STATE OF WISCONSIN
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

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Madison WI 53707-7931

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CORRESPONDENCE MEMORANDUM

DATE: January 30, 2014

TO: Group Insurance Board

FROM: Sherry Etes, Board Liaison

SUBJECT: Updating Group Insurance Board (GIB) Governance Manual

This memo is for informational purposes only. No Board action is required.

There have been changes to items 3, 6, 8, 13, and the Reference Manual of the Group Insurance Board Governance Manual. Please insert the updated documents into your copy of the *Group Insurance Board Governance Manual*. All updates have been made to the on-line version.

Staff will be at the Board meeting to answer any questions.

Attachment A: Organization and Responsibilities of Boards
Attachment B: GIB Membership Roster
Attachment C: Functional Organization Chart
Attachment D: Chapter 40
Attachment E: Reference Manual Table of Contents
Attachment F: Reference Manual Section 1: Compliance Guide and Statutes
Attachment G: Reference Manual Section 2: Compliance Outline and Statutes

Reviewed and approved by Robert J. Marchant, Deputy Secretary.

Electronically Signed: 02/06/2014

Board	Mtg Date	Item #
GIB	2.19.14	7J

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ORGANIZATION AND RESPONSIBILITIES OF BOARDS

There are five Boards of Trustees associated with the Wisconsin Department of Employee Trust Funds. The Boards set policy and review the overall administration of the benefit programs provided for state and local government employees.

The five Boards are:

- Employee Trust Funds Board
- Teachers Retirement Board
- Wisconsin Retirement Board
- Group Insurance Board
- Deferred Compensation Board

Employee Trust Funds Board

The thirteen-member Employee Trust Funds (ETF) Board has oversight responsibility for the Department. The ETF Board meets quarterly in Madison. Board members represent state and local government employers and employees, retired participants, and the public. Membership is set by state law and includes:

- Four representatives of the Teachers Retirement (TR) Board, elected by the TR Board
- Four representatives of the Wisconsin Retirement (WR) Board, elected by the WR Board
- Two representatives appointed by the Governor
- One elected annuitant representative
- One elected educational support personnel representative
- The director of the State Office of Employment Relations (appointed by the Governor)

Each member is a trustee of the trust funds.

The duties of the members of the ETF Board are found in Ch. 40.03, Wis. Stats., and include the following:

1. Authorize and terminate benefit payments
2. Ensure the Wisconsin Retirement System (WRS) complies with Internal Revenue Service (IRS) Code
3. Approve actuarial tables used to compute benefits
4. Appoint the ETF Secretary
5. Select necessary legal, medical, or other independent contractors
6. Select and retain an actuary or actuarial firm

7. Approve employer and employee contribution rates and actuarial assumptions as determined by the actuary
8. Compel witnesses to attend meetings and testify on any matter concerning the fund
9. Determine the length of prior service from information available
10. Accept gifts, grants, or bequests of property to the fund
11. Contract for insurance plans for death and disability benefits through the Group Insurance Board
12. Accept and hear timely appeals of determinations of the Department
13. Require employers to distribute materials necessary for the administration of the fund
14. Delegate powers as desirable or necessary
15. Approve or reject administrative rules proposed by the Department Secretary
16. Allow separate retirement plans to send funds to the Department for investment in the Core or Variable Retirement Trust Funds
17. Transfer funds to provide group insurance

Advisory Boards (Teachers Retirement Board and Wisconsin Retirement Board)

Two Boards advise the ETF Board on retirement system matters specific to the groups they represent, including reviewing administrative rules and hearing legal appeals regarding retirement disability determinations: the Teachers Retirement (TR) Board and the Wisconsin Retirement (WR) Board.

Responsibilities of the TR and WR Boards are:

1. Appoint four members to the ETF Board
2. Study and recommend alternate administrative policies and rules that will enhance achievement of objectives of the benefit plans
3. Appoint one member to the State of Wisconsin Investment Board
4. Approve or reject all administrative rules that relate to teachers (TR Board) or non-teacher members (WR Board) of the WRS
5. Authorize and terminate disability benefits to teachers (TR Board) or non-teachers (WR Board)
6. Hear appeals of disability determinations made by the Department for teachers (TR Board) or non-teachers (WR Board)

Teachers Retirement Board

The TR Board has 13 members including:

- Six public school teachers
- One teacher from the vocational, technical, and adult education system
- One public school administrator
- Two university teachers
- One school board member
- One teacher annuitant
- One teacher from the Milwaukee Public School District

Retirement merger legislation of 1981 created the TR Board. This Board replaced the previous and separate State Teachers Retirement Board and the Milwaukee Teachers Retirement Board. The legislation required four of the TR Board positions to be appointed by the Governor, while the nine remaining positions must be filled by election.

Wisconsin Retirement Board

The WR Board has nine members, eight of whom are appointed by the Governor. Membership includes representatives from Wisconsin municipalities including the following:

- City executive
- Finance officer
- City employee
- Member of a town or county government
- County clerk
- County employee

The Governor also appoints a state employee and a public member to the WR Board. The Commissioner of Insurance or his or her designee occupies the ninth position.

Group Insurance Board

The Group Insurance Board (GIB) has eleven members. Six members are appointed by the Governor. The remaining positions are ex-officio members occupied by the following officials or their designees: Governor, Attorney General, Secretary of the Department of Administration, Director of the Office of State Employment Relations, and the Commissioner of Insurance.

This Board sets policy and oversees administration of the group health, life insurance, and income continuation insurance plans for state employees and retirees and the group health and life insurance plans for local employers who choose to offer them. The Board also can provide other insurance plans, if employees pay the entire premium.

Group Insurance Board – Strategic Planning Workgroup

The Group Insurance Board – Strategic Planning Workgroup (GIB-SPW) consists of members from the Group Insurance Board. The GIB-SPW does not have a set number of members. It is a non-voting workgroup that serves as an advisory to the Group Insurance Board.

The GIB-SPW was created to engage in discussion and in-depth analysis on potential plan changes and present recommendations to the Group Insurance Board.

Deferred Compensation Board

The Deferred Compensation (DC) Board consists of five members who serve staggered four-year terms. Each member is appointed by the Governor and confirmed by the Senate. The statutes do not specify criteria for the five appointments.

The DC Board was created by 1989 Wisconsin Act 31 and carries out the following duties:

1. Select and contract with deferred compensation plan providers for investment and record keeping
2. Develop deferred compensation plan policies, procedures, and rules that govern provider participation in the program
3. Hear participant appeals of program determinations

Deferred Compensation Investment Committee

The Deferred Compensation Investment Committee (DCIC) consists of two Board members selected by the Deferred Compensation Board.

The DCIC is advisory only and was created in 1990 to provide investment expertise in the evaluation of investment options offered by the Board.

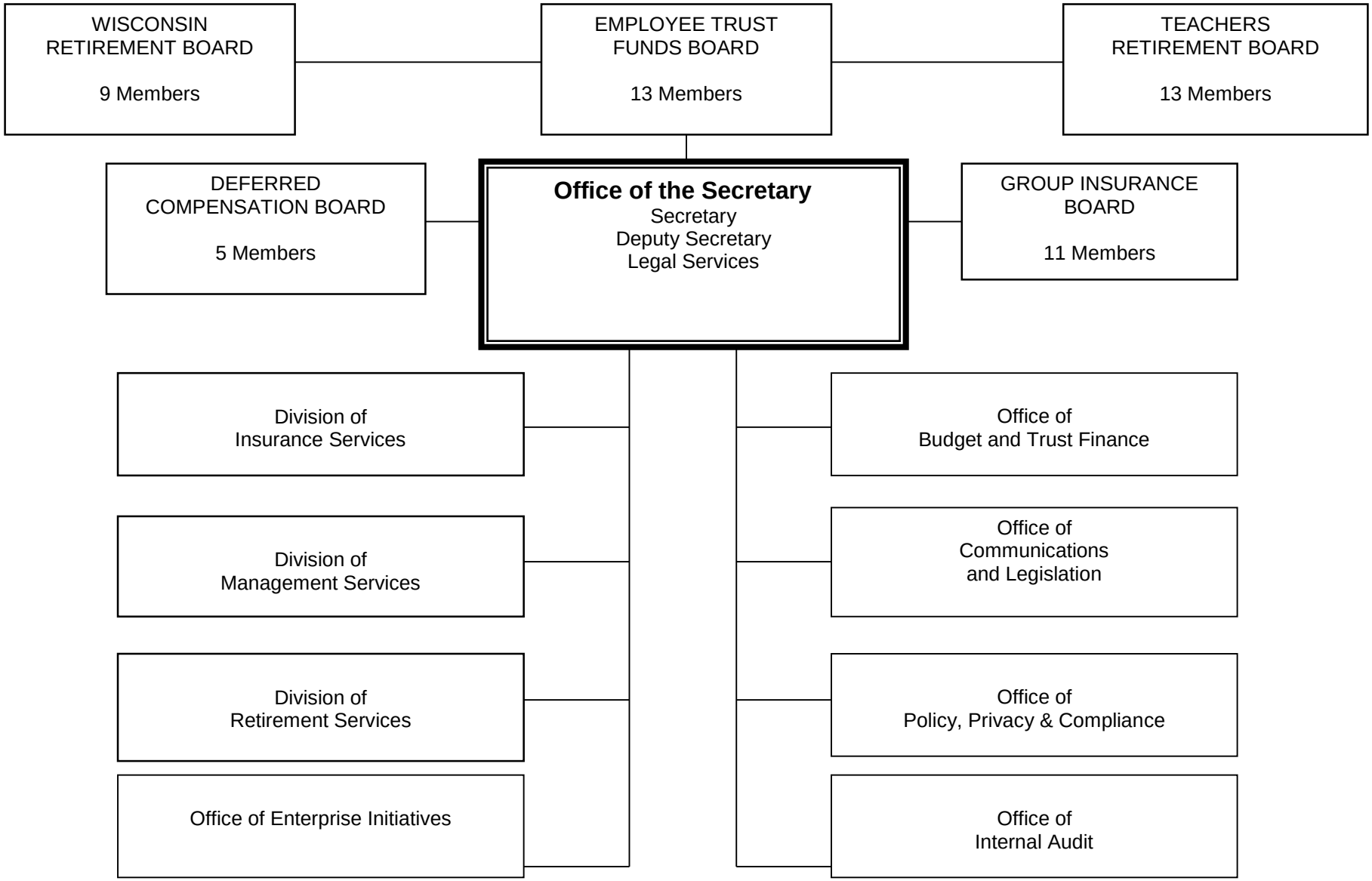
(Revised: January 2014)

2013
GROUP INSURANCE BOARD
MEMBERSHIP ROSTER (11 Members)

MEMBER NAME	BOARD MEMBER SINCE	CURRENT TERM EXPIRES	MEMBERSHIP REQUIREMENTS
Litscher* Jon (Chair)	5/2011	Ex Officio	**§ 15.165 (2) (intro.)** Ex Officio Governor or his/her designee.
Cyganek* Bonnie (Vice Chair)	3/2012	Ex Officio	**§ 15.165 (2)** Ex Officio Attorney General or his/her designee.
O'Donnell* Jessica (Secretary)	4/2011	Ex Officio	**§ 15.165 (2) (intro.)** Ex Officio Director of the Office of State Employment Relations or his/her designee.
Carlson Terri	5/2013	5/01/15	**§ 15.165 (2)** 2-year term Appointed by Governor. Insured participant in WRS who is not a teacher.
Day Herschel	5/2013	5/01/15	**§ 15.165 (2)** 2-year term Appointed by Governor. Insured participant in WRS who is a teacher.
Farrell Michael	03/2012	5/01/15	**§ 15.165 (2)** 2-year term Appointed by Governor. No membership requirement.
Grapentine Charles	3/2012	5/01/15	**§ 15.165 (2)** 2-year term Appointed by Governor. Insured participant in WRS who is a retired employee.
Hitt* Andrew	10/2013	Ex Officio	**§ 15.165 (2)** Ex Officio Secretary of Dept. of Administration or his/her designee.
Schwartzer* Daniel	3/2011	Ex Officio	**§ 15.165 (2)** Ex Officio Commissioner of Insurance or his/her designee.
Thompson Nancy	2/2012	5/01/13	**§ 15.165 (2)** 2-year term Appointed by Governor. Chief executive or member of the governing body of a local unit of government that is a participating employer in the WRS.
Yerges Brian	3/2012	5/01/13	**§ 15.165 (2)** 2-year term Appointed by Governor. Insured participant who is an employee of a local unit of government.

*****Designee appointed.

DEPARTMENT OF EMPLOYEE TRUST FUNDS
FUNCTIONAL ORGANIZATIONAL CHART
December 2013



DEPARTMENT OF EMPLOYEE TRUST FUNDS
FUNCTIONAL ORGANIZATIONAL CHART

Office of the Secretary

Bob Conlin, Secretary
Rob Marchant, Deputy Secretary

DIVISION OF RETIREMENT SERVICES

DIVISION OF INSURANCE SERVICES

LEGAL SERVICES
David Nispel, General Counsel
(5.0 FTE, 5 Employees)

- Legal services for Secretary's Office, ETF staff and the boards
- Provide legal opinions and analysis
- Respond to WRS inquiries from members, attorneys and others
- Represent ETF in administrative appeals
- Draft legislation and administrative rules
- Ombudsperson services

OFFICE OF POLICY, PRIVACY & COMPLIANCE
Steve Hurley, Director
(4.0 FTE, 4 Employees)

- Policy review and development
- Federal regulation & compliance
- HIPAA Compliance

OFFICE OF COMMUNICATIONS AND LEGISLATION
Mark Lamkins, Director
(7.0 FTE, 7 Employees)

- Legislative analysis and affairs
- Overall Department communication
- Forms management
- Outreach
- Video library/Mediasite

OFFICE OF BUDGET AND TRUST FINANCE
Robert Willett, Director
(23 FTE, 23 Employees)

- Departmental Accounting
- Financial/Statistical Reporting
- Actuarial Reporting & Analysis
- LAB Liaison
- Biennial Budget
- Operating Budget
- Procurement

DIVISION OF MANAGEMENT SERVICES

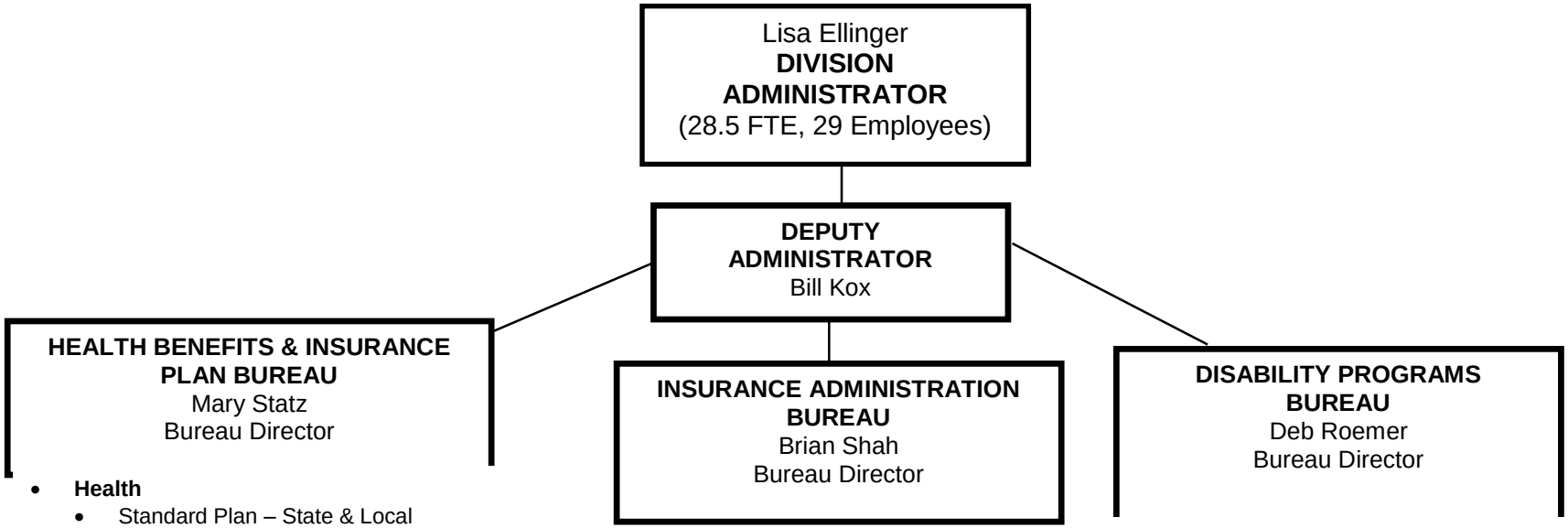
OFFICE OF INTERNAL AUDIT
John Vincent, Director
(4.0 FTE, 4.0 Employees)

- Staff to Audit Committee of ETF Board
- Prepare and carryout biennial audit plan
- Coordinate responsibilities with external auditors engaged by ETF
- Review internal controls of ETF & make recommendations to Secretary's Office on risk areas

OFFICE OF ENTERPRISE INITIATIVES
Robert Martin, Director
(6.0 FTE, 6 Employees)

- Transformation, Integration and Modernization (TIM)
- Portfolio and Project Management
- Business Analysis (Standards and Templates)

DEPARTMENT OF EMPLOYEE TRUST FUNDS
DIVISION OF INSURANCE SERVICES



- **Health**
  - Standard Plan – State & Local
  - Retire Plan – Local
  - HMO Guidelines – State & Local
  - Contract Administration
- **Life Insurance**
  - State Group Life Insurance
  - Local Government Group Life Insurance
  - Spouse & Dependent Life Insurance
  - Milwaukee Teacher Death Benefit
  - Contract Administration
- **Long-Term Care Insurance**
- **Accumulated Sick Leave Program (ASLCC)**
- **Employee Reimbursement Accounts (ERA)**
  - Reimbursement Accounts
    - Dependent Care
    - Medical Expenses
    - Commuter Benefits
  - Oversight
    - Contract Administration
    - Claim Determination Appeals Staff to ETF Board
- **Primary Staff to Group Insurance Board (for above programs)**
- **Staff to ETF Board (for ASLCC and ERA)**

- New Employer Processing: Health Insurance, Life Insurance, ICI
- myETF Benefits System Administration (business side)
- Employer and Member Training and Outreach
- Employer Error Issues: Life Insurance, ICI
- COBRA Processing
- Health Insurance Auditing
- Health Insurance Applications and Eligibility Issues
- Pharmacy Benefits: Overpayments, Validation
- Insurance Departmental Determinations
- Full File Comparison
- *It's Your Choice* Coordination

- **Disability**
  - § 40.63 Disability Retirement Program
  - § 40.65 Duty Disability Program
  - Benefit administration for the above programs
  - Policy Review and Development
- **Income Continuation Insurance (ICI) (short- and long-term)**
  - State Plan
  - UW Faculty Plan
  - Local Plan
  - Contract Administration
  - Departmental Determinations
  - Policy Review and Development
- **Long-Term Disability Insurance (LTDI)**
  - Contract Administration
  - Departmental Determinations
  - Policy Review and Development
- **Primary Staff to Group Insurance Board** (for ICI and LTDI programs)
- **Primary Staff to Teachers Retirement, Wisconsin Retirement and Employee Trust Funds Boards** (for §40.63 Disability Retirement and §40.65 Duty Disability programs)

(Updated 12/13)

DEPARTMENT OF EMPLOYEE TRUST FUNDS

DIVISION OF MANAGEMENT SERVICES

Pam Henning
DIVISION ADMINISTRATOR
(58.10 FTE, 59 Employees)
COOP/Pandemic Planning

Staff Services Section
Sharon Walk, Supervisor
(3.0 FTE, 3 Employees)

- Appeals Coordination
- Board Liaisons
- Conference Room Scheduling
- Word Processing Services
- Procedures Coordination
- Executive Staff Support

FACILITY/TELECOMMUNICATIONS & CONTINUITY OF OPERATIONS

- Telecommunications
- Building Oversight
- Health & Safety
- Parking
- Continuity of Operations (COOP) Plan/Pandemic Plan

HUMAN RESOURCES TEAM
Stacie Meyer
Human Resources Manager

- Employee Assistance Program
- Recruitment
- Affirmative Action/Equal Employment Opportunity
- Disability Accommodations
- Classification and Compensation

OFFICE SERVICES BUREAU
Diane Vultaggio
Bureau Director

RECORDS MANAGEMENT SECTION

SUPPLY & MAIL SERVICES SECTION

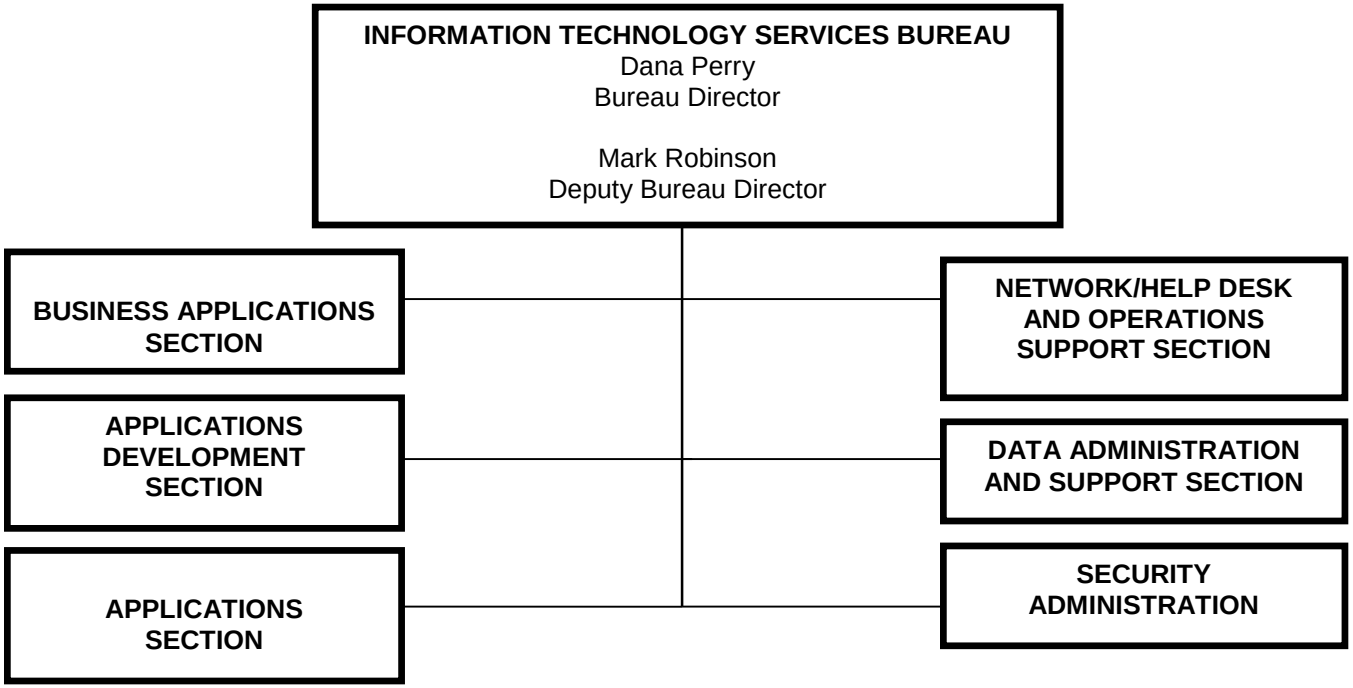
LIBRARIAN

- Records & Imaging Management
- State Records Center Services
- Records Officer/Liaison to Public Records Board
- Copy and FAX Machine Services
- Mail Services and Distribution
- Postal Budgeting, Controlling and Monitoring
- Supply and Forms Inventory
- Fleet Car Management

INFORMATION TECHNOLOGY SERVICES BUREAU
(SEE NEXT PAGE)

(Updated 12/13)

DEPARTMENT OF EMPLOYEE TRUST FUNDS
DIVISION OF MANAGEMENT SERVICES (continued)

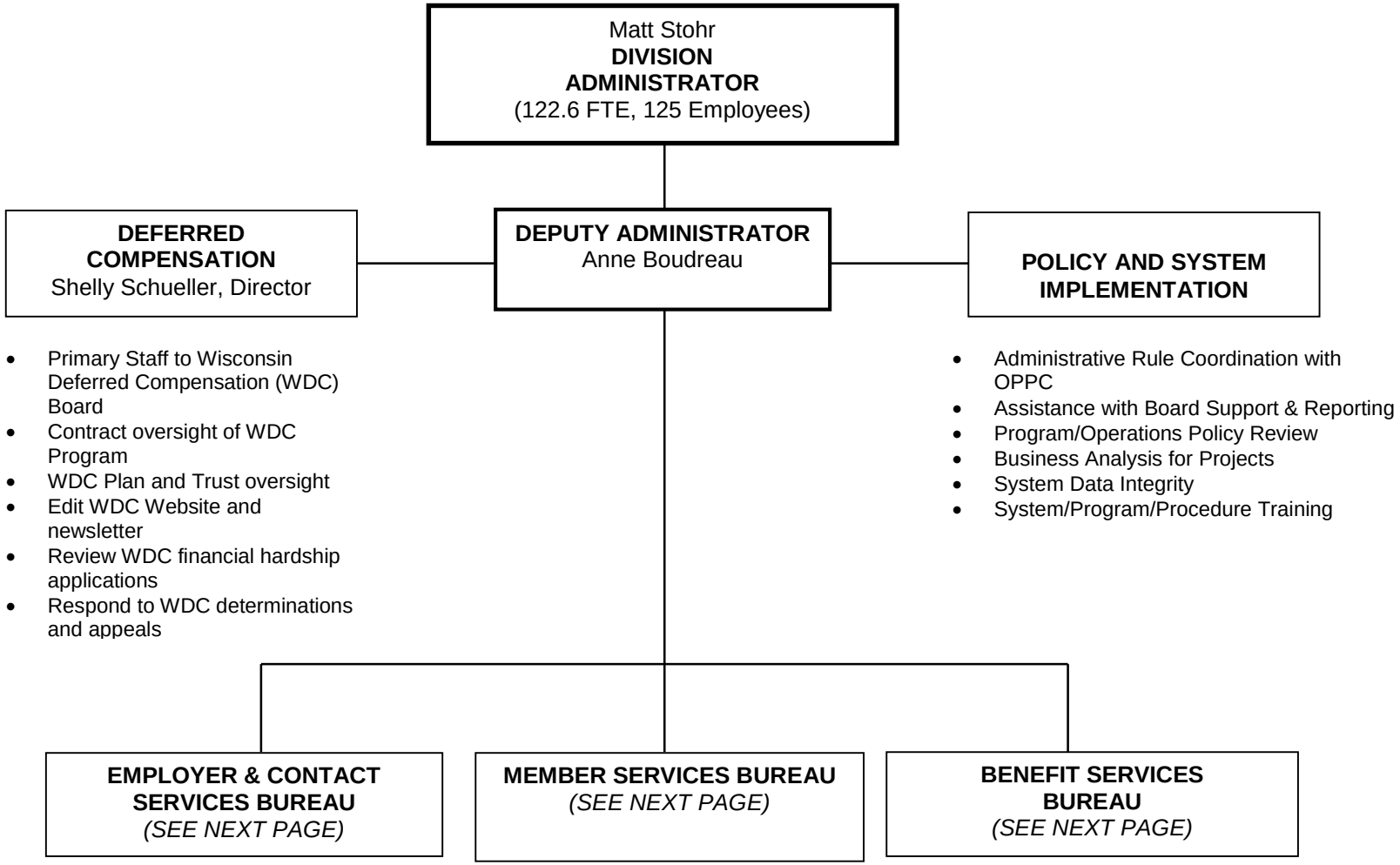


- Computer Applications Development and Support
- Feasibility Studies and Design Analysis
- Existing Systems Maintenance
- Re-engineering Projects, Support and Solutions
- IT Plan Implementations
- Document Imaging Projects & Workflow Design
- Technical Architectural Support (for imaging and workflow, Web, telephony, data systems)
- Change Control (project requests)
- Product Evaluation

- LAN, WAN and Internet Infrastructure Support/Installation
- Client Server System Administration
- "Help Desk" Support for All Department Applications
- IT Disaster Recovery Planning/COOP/ Pandemic Planning
- Data Back-up and Recovery
- IT Property/Asset Management
- Database Management
- Data Administration and Consultation
- Database Design
- Data/Information Architecture
- Production Support (data control, data entry and job control services)
- Security Administration, Consultation and Policy Development

(Updated 12/13)

DEPARTMENT OF EMPLOYEE TRUST FUNDS
DIVISION OF RETIREMENT SERVICES



(Updated 12/13)

DEPARTMENT OF EMPLOYEE TRUST FUNDS
DIVISION OF RETIREMENT SERVICES (continued)

EMPLOYER & CONTACT SERVICES BUREAU
Jaymee Meier
Bureau Director

EMPLOYER SERVICES SECTION

RESEARCH & COORDINATION

- Employer Inquiries
- Employer Communication Center
- Employer Administration Manuals & Forms
- WRS Annual Earnings Reconciliation
- WRS Employer Participation
- WRS Employer Reporting of Member Data
- Grievances/Settlements Impacting WRS
- Public Employee Social Security Coverage
- Public Entity Status Determinations
- Member Beneficiary Designations
- Member Military Service Crediting
- Calculation of Retirement Estimates

CONTACT MANAGEMENT SECTION

- Explanation of WRS benefits
- Provision of account-specific information
- Assistance with benefit application process
- Responses to calls, letters, and e-mail inquiries
- Appointment booking

MEMBER SERVICES BUREAU
Roger Fletcher
Bureau Director

OUTREACH & EDUCATION SECTION

- Calculation of Retirement Estimates
- Presentation of Group Retirement Sessions
- Public & Private Outreach Presentations
- Employer Training

RETIREMENT PLANNING SECTIONS

- One on one member meetings
- Detailed explanation of WRS benefits
- Provision of account-specific information
- Calculation of benefit complex estimates (retirement, disability, death, service purchase)
- Assistance with benefit application process
- Responses to calls, letters, and e-mail inquiries

PROGRAM ADMINISTRATION

- Maintenance of content for forms/brochures
- DRS staff training development and delivery
- WEBS system maintenance, daily reconciliation & CFM
- Reception desk staffing

BENEFIT SERVICES BUREAU
Chris Lindeman
Bureau Director

RETIREE SERVICES SECTION

- Maintenance of annuity accounts & sick leave conversion credit accounts
- Monthly annuity & weekly lump sum payroll processing
- Tax reporting & filing
- Annuitant & continuant health insurance administration

BENEFIT INITIATION SECTION

- Final retirement calculations & annuity corrections
- Disability retirement calculations
- Non-annuitant death benefit annuities
- Special active death lump sum benefit computations
- Retirement, death, separation eligibility determinations
- Initiating annuities on payroll
- Lump sum retirement, death, separation benefit computations
- Required distributions

(Updated 12/13)

CHAPTER 40

PUBLIC EMPLOYEE TRUST FUND

SUBCHAPTER I

TRUST PURPOSES AND ADMINISTRATION

40.01 Creation and purpose. (1) CREATION. A "public employee trust fund" is created to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale, by providing for the orderly and humane departure from service of employees no longer able to perform their duties effectively, by establishing equitable benefit standards throughout public employment, by achieving administrative expense savings and by facilitating transfer of personnel between public employers.

(2) PURPOSE. The public employee trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515 (1) (um) or (ut) or 40.04 (2), and shall not be used for the purposes of any other benefit plan. Each member of the employee trust funds board shall be a trustee of the fund and the fund shall be administered by the department of employee trust funds. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section.

(3) COMPATIBILITY OF TRUSTEE RESPONSIBILITIES. Membership on the employee trust funds board, group insurance board, deferred compensation board, Wisconsin retirement board and the teachers retirement board shall not be incompatible with any other public office. The board members and the employees of the department shall not be deemed to have a conflict of interest in carrying out their responsibilities and duties in administering this chapter, or taking other appropriate actions necessary to achieve the purposes of this chapter, solely by reason of their being eligible for benefits under the benefit plans provided under this chapter. However, any board member or employee of the department is expressly prohibited from participating in decisions directly related to a specific benefit, credit, claim or application of the person and from participating in negotiations or decisions on the selection of actuarial, medical, legal, insurance or other independent contractors if the board member or employee of the department has a direct or indirect financial interest in or is an officer or employee or is otherwise associated with the independent contractor.

History: 1981 c. 96; 1989 a. 31; 1991 a. 269.

Monies appropriated to the Public Employee Trust Fund are not "state funds"; therefore the legislature may not restrict the use of those funds by a statute governing the use of "state or local funds." OAG 1−95.

40.015 Compliance with federal tax laws. (1) The Wisconsin retirement system is established as a governmental plan and as a qualified plan for federal income tax purposes under the Internal Revenue Code and shall be so maintained and administered.

(2) No benefit plan authorized under this chapter may be administered in a manner which violates an Internal Revenue

Code provision that authorizes or regulates that benefit plan or which would cause an otherwise tax exempt benefit to become taxable under the Internal Revenue Code.

(3) For the purposes of compliance with the Internal Revenue Code, the plan year is January 1 through December 31.

History: 1995 a. 302; 2013 a. 20.

40.02 Definitions. In this chapter, unless the context requires otherwise:

(1) "Accumulation" means the total employee required contributions or employer required contributions or additional contributions as increased or decreased by application of investment earnings.

(2) "Additional contribution" means any contribution made by or on behalf of a participant to the retirement system other than employee and employer required contributions.

(2m) "Alternate payee" means a former spouse or domestic partner of a participant who is named in a qualified domestic relations order as having a right to receive a portion of the benefits of the participant.

(3) "Annual earnings period" means the calendar year except as follows:

(a) For a teacher, it means the period beginning on the first day of a school year and ending on the day prior to the beginning of the next school year, as determined by the employer in accordance with rules of the department.

(b) For a supreme court justice, court of appeals judge or circuit judge who terminates all creditable service on or after May 1, 1992, it means the period beginning on July 1 and ending on the following June 30. This paragraph applies to periods beginning after June 30, 1988.

(c) For an educational support personnel employee who terminates participating employment on or after July 1, 1997, it means the period beginning on July 1 and ending on the following June 30. This paragraph applies to periods beginning after June 30, 1997.

(d) For a technical college educational support personnel employee who terminates participating employment on or after July 1, 1998, it means the period beginning on July 1 and ending on the following June 30. This paragraph applies to periods beginning after June 30, 1998.

(e) For a cooperative educational service agency support personnel employee who terminates participating employment on or after July 1, 1998, it means the period beginning on July 1 and ending on the following June 30. This paragraph applies to periods beginning after June 30, 1998.

(4) "Annuitant" means a person receiving a retirement annuity, beneficiary annuity or a disability annuity from the Wisconsin retirement system, including a person whose disability annuity has been suspended. For group life insurance purposes, "annuitant" also means annuitants of retirement systems other than the Wisconsin retirement system as determined by the group insurance board for any employer.

(5) "Annuity" means a series of monthly payments payable during the life of the annuitant or during a specific period. The first installment of each annuity from the Wisconsin retirement system shall be payable on the first day of the calendar month following the annuity effective date as specified in this chapter and shall be the full monthly amount or, if less, the full monthly amount multiplied by a percentage equal to 3.6% times the number of days from the effective date of the annuity to the end of the month in which the annuity is effective, counting both the effective date and the last day of the month. Succeeding installments shall be payable as of the first day of each succeeding calendar month. The last payment shall be the payment payable in the calendar month in which the annuitant dies, except as otherwise specifically provided in this chapter. In the case of the death of an annuitant prior to the expiration of any guaranteed number of payments, if the first installment was less than the full monthly amount, an additional payment shall be paid to the beneficiary, in the month after the end of the guarantee period, equal to the then monthly amount payable times the difference between 100% and the percent applied in determining the first monthly installment.

(6) "Assumed benefit rate" means a rate of 5%. The assumed benefit rate shall be used for calculating reserve transfers at the time of retirement, making actuarial valuations of annuities in force, determining the amount of lump−sum death benefits payable from the portion of an annuity based on additional deposits and crediting interest to employee required contribution accumulations under s. 40.04 (4) (a) 2.

(7) "Assumed rate" means the probable average effective rate expected to be earned for the core annuity division on a long−term basis. The assumed rate shall be a rate of 8 percent and the actuarial assumption for across−the−board salary increases for the purpose of valuing the liabilities of the Wisconsin Retirement System shall be 3.4 percent less than the assumed rate unless due to changed economic circumstances the actuary recommends and the board approves a different rate. The assumed rate for a calendar year shall be used for all calculations of required contributions and reserves for participants, except as provided in s. 40.04 (4) (a) 2., 2g., and 2m., and the amount of any lump sum benefit paid instead of an annuity, except it shall not be used for any purpose for which the assumed benefit rate is to be used under sub. (6).

(8) (a) "Beneficiary" means:

1. The person, or a trust in which the person has a beneficial interest, so designated by a participant or insured employee or annuitant in the last written designation of beneficiary on file with, and in the form approved by, the department at the time of death, except as provided in s. 40.23 (4) (c). A written designation of beneficiary for a specified benefit plan applies only for determining beneficiaries under that specified benefit plan.

2. In the absence of a written designation of beneficiary, or if all designated beneficiaries who survive the decedent die before filing with the department a beneficiary designation applicable to that death benefit or an application for any death benefit payable, the person determined in the following sequence: group 1, surviving spouse or surviving domestic partner; group 2, children of the deceased participant, employee or annuitant, in equal shares, with the share of any deceased child payable to the issue of the child or, if there is no surviving issue of a deceased child, to the other eligible children in this group or, if deceased, their issue; group 3, parent, in equal shares if both survive; group 4, brother and sister in equal shares and the issue of any deceased brother or sister. The shares payable to the issue of a person shall be determined per stirpes. No payment may be made to a person included in any group if there is a living person in any preceding group, and s. 854.04 (6) shall not apply to a determination under this subsection.

3. The estate of the participant, employee or annuitant, if there is no written designation of beneficiary and no beneficiary determined under subd. 2. or par. (b) or if so specified in the last written designation of beneficiary filed prior to time of death.

(b) "Beneficiary" does not include any of the following:

1. A person who dies before filing with the department either a beneficiary designation applicable to that death benefit or an application for any death benefit payable to the person except as otherwise provided under group 2, under par. (a) 2. If a person dies after filing a beneficiary application but before the date on which the benefit check, share draft or other draft is issued or funds are otherwise transferred, any benefit payable shall be paid in accord with the written designation of beneficiary, if any, filed with the department in connection with the application or, if none, in accord with the last designation previously filed by the person, or otherwise to the person's estate.

2. For purposes of a group life insurance benefit plan under this chapter, and at the discretion of the department, an individual who is notified by the department or insurer that a benefit is payable to the individual because of the death of an insured person,

who is provided with any necessary application form, and who does not then apply for the benefit within 12 months of the date of notification by the department that the benefit is payable to the individual.

(9) "Beneficiary annuity" means any death benefit which is paid as an annuity.

(10) "Benefit plan" includes the Wisconsin retirement system, employee−funded reimbursement account plan, deferred compensation plan, OASDHI, group health insurance, group income continuation insurance, group life insurance or any other insurance plan established under this chapter, regardless of whether each type of insurance is provided through one or multiple contracts or provides different levels of benefits to different employees.

(11) "Board" means the employee trust funds board.

(12) "Child" means natural children and legally adopted children.

(12m) "Cooperative educational service agency support personnel employee" means a person who is a cooperative educational service agency employee, but who is not a teacher.

(12r) " Core annuity" means any annuity other than a variable annuity.

(13) "Coverage group" has the meaning given that term by federal regulations.

(13m) "Craft employee" means a state employee who is a skilled journeyman craftsman, including the skilled journeyman craftsman's apprentices and helpers, but does not include employees who are not in direct line of progression in the craft. Craft employees may be either nonrepresented or in a collective bargaining unit for which a representative is recognized or certified under ch. 111.

(14) "Creditable current service" means the creditable service granted for service performed for a participating employer and for which a participating employee receives earnings after the effective date of participation for that employer.

(15) (a) "Creditable military service" means active service in the U.S. armed forces, based on the total period of service in the U.S. armed forces, provided:

1. The participant enlisted or was ordered or inducted into active service in the U.S. armed forces;

2. The participant left the employment of a participating employer to enter the U.S. armed forces;

3. The participant returns to the employment of the employer whose employment the participant left to enter the U.S. armed forces within 180 days of release or discharge from the armed forces, or within 180 days of release from hospitalization because of injury or sickness resulting from service in the armed forces;

4. The period of service in the U.S. armed forces is not more than 4 years, unless involuntarily extended for a longer period;

5. The participant was discharged from the U.S. armed forces under conditions other than dishonorable;

6. The participant upon return from service in the U.S. armed forces furnishes evidence required to establish the participant's rights under this chapter; and

7. The service in the U.S. maritime service, including the merchant marine, was aboard an oceangoing vessel during the period beginning on December 7, 1941, and ending on August 15, 1945, and the participant submits to the department a copy of a release or discharge certificate or honorable service certificate issued by the U.S. department of defense that verifies the applicant's creditable maritime service.

(b) The creditable military service under par. (a) shall be in the same employment category, as set forth in s. 40.23 (2m) (e), in which the participant was employed immediately prior to entry into the U.S. armed forces.

(c) Notwithstanding sub. (17) (intro.) and any other law, any person who is credited with 5, 10, 15 or 20 or more years of creditable service, not counting any previously granted creditable military service, may receive creditable military service at the time of retirement for not more than 1, 2, 3 or 4 years, respectively, of active service which meets the standards under par. (a) 5., provided:

1. This paragraph applies only to active military service served prior to January 1, 1974.

2. Any creditable military service otherwise granted shall be included in determining the maximum years to be granted under this paragraph.

3. Creditable military service under this paragraph shall be allocated at the time of retirement in proportion to the amount of the participant's creditable service for each of the employment categories as set forth in s. 40.23 (2m) (e), unless a higher benefit would result from the prorated allocation of creditable military service based on the amount of the participant's creditable service for each of the types of creditable service on the date the participant attains the greater of 5, 10, 15 or 20 years of creditable service.

4. This paragraph does not apply to any active service used for the purpose of establishing entitlement to, or the amount of, any benefit, other than a disability benefit, to be paid by any federal retirement program except OASDHI and the retired pay for nonregular military service program under 10 USC 1331 to 1337 or, if the participant makes an election under s. 40.30 (2), by any retirement system specified in s. 40.30 (2) other than the Wisconsin retirement system.

5. The participant's creditable service terminates on or after January 1, 1982.

(d) Contributions, benefits, and service credit with respect to qualified military service, as defined in 38 USC 43, taken on or after December 12, 1994, are governed by section 414 (u) of the Internal Revenue Code and the federal Uniformed Services Employment and Reemployment Rights Act of 1994.

(e) 1. Effective with deaths occurring on or after January 1, 2007, while a participant is performing qualified military service, as defined in 38 USC 43, death benefits shall be calculated as though the participant was a participating employee subject to par. (d) during the period or periods of military service between the date that the participant left participating employment to enter active military service and the date of death.

2. Effective with disabilities occurring on or after January 1, 2007, if a participant becomes disabled while performing qualified military service, as defined in 38 USC 43, to the extent permitted by section 414 (u) (8) of the Internal Revenue Code, and is unable to return to participating employment due to the disability incurred while performing such military service, for benefit calculation purposes the participant shall be treated as though the participant was a participating employee subject to par. (d) during the period or periods of military service between the date that the participant left participating employment to enter active military service and the date of discharge from military service.

3. Beginning January 1, 2009, an individual receiving differential wage payments while the individual is performing qualified military service, as defined in 38 USC 43, from an employer shall be treated as employed by that employer, and the differential wage payment shall be treated as compensation for purposes of applying the limits on annual additions under section 415 (c) of the Internal Revenue Code. This provision shall be applied to all similarly situated individuals in a reasonably equivalent manner.

(16) "Creditable prior service" means all previous service for a participating employer of a person who became a participating employee on the effective date of participation for that employer if the service or employment conformed to the requirements for granting creditable current service, but no credit shall be granted for any period of service which was previously covered by a retirement system.

(17) "Creditable service" means the creditable current and prior service, expressed in years and fractions of a year to the nearest one−hundredth, for which a participating employee receives or

is considered to receive earnings under sub. (22) (e), (ef), or (em) and for which contributions have been made as required by s. 40.05 (1) and (2) and creditable military service, service credited under s. 40.285 (2) (b) and service credited under s. 40.29, expressed in years and fractions of years to the nearest one−hundredth. How much service in any annual earnings period is the full−time equivalent of one year of creditable service shall be determined by rule by the department and the rules may provide for differing equivalents for different types of employment. Except as provided under s. 40.285 (2) (e) and (f), the amount of creditable service for periods prior to January 1, 1982, shall be the amount for which the participant was eligible under the applicable laws and rules in effect prior to January 1, 1982. No more than one year of creditable service shall be granted for any annual earnings period. Creditable service is determined in the following manner for the following persons:

(a) Each person holding the offices of governor, lieutenant governor, secretary of state, state treasurer, representative to the assembly, senator, chief clerk and sergeant at arms of the assembly and chief clerk and sergeant at arms of the senate shall receive creditable service on a full−time basis for the period during which the office is held.

(d) 1. Notwithstanding s. 40.19 (3), upon application to the department each participant who has been a protective occupation participant after July 1, 1969, if the participant has been employed as a protective occupation participant for the 12 months immediately preceding retirement, shall be granted creditable service as a protective occupation participant for all service prior to July 1, 1969, which was performed in a position designated under sub. (48) as a position in which an individual would be a protective occupation participant.

2. Any benefits authorized under subd. 1. for any person who terminated as a participating employee prior to April 27, 1982, which are in excess of the amounts otherwise payable to the person under other provisions of this chapter, shall be paid from the appropriation under s. 20.515 (1) (a).

(f) Notwithstanding any other law or rule, any participating employee whose service includes Wisconsin teaching service performed before July 1, 1966, for which required contributions were made under the applicable statutes and rules of the former state teachers retirement system and for which the number of days of teaching service in a fiscal year was fewer than 120, shall receive creditable service for that service in an amount equal to the total number of teaching days credited during the fiscal year divided by 165 days.

(gm) Any assistant district attorney in a county having a population of 500,000 or more who did not have vested benefit rights under the retirement system established under chapter 201, laws of 1937, who became a participating employee on January 1, 1990, and who is a participating employee on October 29, 1999, shall receive creditable service for the total period of his or her service under the retirement system established under chapter 201, laws of 1937.

(h) Notwithstanding par. (d), each participant who is a state motor vehicle inspector hired before January 1, 1968, shall be granted creditable service as a protective occupation participant for all covered service as a state motor vehicle inspector that was earned before, on or after May 1, 1990. Notwithstanding par. (d), each participant who is a state motor vehicle inspector hired on or after January 1, 1968, shall be granted creditable service as a protective occupation participant for all covered service as a state motor vehicle inspector that was earned on or after May 1, 1990, but may not be granted creditable service as a protective occupation participant for any covered service as a state motor vehicle inspector that was earned before May 1, 1990.

(m) Notwithstanding par. (d), each participant who is a state probation and parole officer on or after January 1, 1999, shall be granted creditable service as a protective occupation participant for all covered service as a state probation and parole officer that was earned on or after January 1, 1999, but may not be granted creditable service as a protective occupation participant for any covered service as a state probation and parole officer that was earned before January 1, 1999, unless that service was earned while the participant was classified under sub. (48) (a) and s. 40.06 (1) (d) as a protective occupation participant.

(18) "Death benefit" means any amount payable to a beneficiary under s. 40.73.

(18f) "Decree date" means the first day of the month in which a participant's marriage is terminated by a court under a final judgment, decree or order.

(18g) "Deferred compensation plan" means a plan which is in accordance with section 457 of the Internal Revenue Code, under which an employer executes an agreement by which an employee voluntarily agrees to defer a part of gross compensation for payment at a later date. Deferred compensation plan does not include annuity plans specified under section 403 (b) of the Internal Revenue Code.

(18s) "Deferred compensation plan provider" means a person who provides administrative or investment services related to deferred compensation plans.

(19) "Department" means the department of employee trust funds.

(20) "Dependent" means the spouse, domestic partner, minor child, including stepchildren of the current marriage or domestic partnership dependent on the employee for support and maintenance, or child of any age, including stepchildren of the current marriage or domestic partnership, if handicapped to an extent requiring continued dependence. For group insurance purposes only, the department may promulgate rules with a different definition of "dependent" than the one otherwise provided in this subsection for each group insurance plan.

(20m) "Differential wage payment" means any payment, including specifically a payment under s. 230.315, that satisfies all of the following:

(a) The payment is made by an employer to a participating employee with respect to any period during which the participating employee is performing service in the uniformed services, as defined in 38 USC 4303, while on active duty for a period of more than 30 days.

(b) The payment represents all or part of the earnings the participating employee would have received from the employer if the participating employee were performing services for the employer.

(21) "Disability annuity" means any annuity payable under s. 66.191, 1981 stats., or s. 40.63.

(21c) "Domestic partner" means an individual in a domestic partnership.

(21d) "Domestic partnership" means a relationship between 2 individuals that satisfies all of the following:

(a) Each individual is at least 18 years old and otherwise competent to enter into a contract.

(b) Neither individual is married to, or in a domestic partnership with, another individual.

(c) The 2 individuals are not related by blood in any way that would prohibit marriage under s. 765.03.

(d) The 2 individuals consider themselves to be members of each other's immediate family.

(e) The 2 individuals agree to be responsible for each other's basic living expenses.

(f) The 2 individuals share a common residence. Two individuals may share a common residence even if any of the following applies:

1. Only one of the individuals has legal ownership of the residence.

2. One or both of the individuals have one or more additional residences not shared with the other individual.

3. One of the individuals leaves the common residence with the intent to return.

(22) "Earnings":

(a) Except as provided in pars. (b) to (f) and s. 40.63 (1) (c), means the gross amount paid to an employee by a participating employer as salary or wages, including amounts provided through deferred compensation or tax shelter agreements, for personal services rendered to or for an employer, or which would have been available for payment to the employee except for the employee's election that part or all of the amount be used for other purposes; any amount considered earnings under sub. (15) (d) and (e); and the money value, as determined by the employer, of any board, lodging, fuel, laundry and other allowances provided for the employee in lieu of money. For purposes of this paragraph, the gross amount shall be determined prior to deductions for taxes, insurance premiums, retirement contributions or deposits, charitable contributions or similar amounts and shall be considered received as of the date when the earnings would normally be payable by the employer. For reporting and computation purposes, fractions of a dollar shall be disregarded in determining annual earnings.

(b) Does not mean payments made for reasons other than for personal services rendered to or for an employer, including, but not limited to:

1. Uniforms purchased directly by the employer.

2. Employer contributions for insurance and retirement.

3. Unemployment insurance benefits.

4. Payments contingent on the employee providing the employer with or assisting the employer in acquiring tangible or intangible property of the employee.

5. Payments contingent on the employee having attained an age which, if increased by 5 years, is greater than what the employee's age would be on the employee's normal retirement date.

6. Lump sum payments at termination for accumulated vacation, sick leave or compensatory time, except that for disability purposes any lump sum payments shall be treated as a continuation of the employee's earnings and service at the employee's then current rate of pay. This subdivision does not exclude payments which are broadly applicable to the employees of the employer regardless of age, length of service or likelihood of employment termination.

7. Payments contingent on the employee having terminated covered employment or having died.

8. Payments contingent on the employee terminating employment at a specified time in the future including payments to secure voluntary release of an unexpired contract of employment.

9. Payments for damages, attorney fees, interest or penalties paid under court judgment or by compromise settlement to satisfy a grievance or wage claim even though the amount of damages or penalties might be based on previous salary levels. However, the department may by rule provide that a payment of additional wages to a continuously participating employee, or the payment of salary to a participant for any period of improper termination of participating employment, is earnings, if the payment is treated by the employer and employee as taxable income and is consistent with previous payment for hours of service rendered by the employee.

10. Payments made in the last 5 years of employment which are the result of a change in the method of computing the base compensation of an employee, unless the change in method for computing the base compensation is a permanent change and is broadly applicable to the employees of that employer or unless the change is the result of a significant change in the nature of the duties and activities expected of the employee.

11. Payment in lieu of fringe benefits normally paid for or provided by the employer but which can be paid to the employee at the employee's option.

12. For any employer, earnings paid to an employee directly by any other unit of government except county supplements to judges under s. 20.923 (3m), 1977 stats., s. 753.016, 1977 stats., s. 753.071, 1977 stats., and s. 753.075, 1977 stats., are earnings if the supplemental payments were subject to subch. I of ch. 41, 1977 stats.

14. Any other type of payment determined by the department by rule to be a distortion of the normal progression patterns on which an individual's benefits should be based.

(c) For OASDHI purposes, has the meaning specified for wages under federal regulations.

(d) 1. For Wisconsin retirement system purposes only, for a state elected official who is prohibited by law from receiving an increase in compensation during the official's term of office, means the compensation which would have been payable to the participant if the participant had not been prohibited by law from receiving an increase in compensation during his or her term of office.

2. For Wisconsin retirement system purposes only, for a state senator, means the compensation which would have been payable to the participant if the participant had not been prohibited by law from receiving an increase in compensation during part of his or her term of office.

(e) For purposes of the Wisconsin retirement system, but not for OASDHI purposes, means compensation determined as required under 38 USC 4318 (b) (3) and regulations adopted thereunder with respect to a person who has actually returned to employment under section 414 (u) (9) (A) of the Internal Revenue Code, 38 USC 4312, or any predecessor veteran's reemployment rights provision under federal law, provided contributions and premiums on the compensation are paid as required under s. 40.05. If the participant does not pay any portion of the employee contributions that the participant would have paid if the participant had not left employment to enter military service, the value of the benefits payable from the participant's account shall be reduced by the value of the unpaid contributions plus interest as provided by rule.

(ec) Includes contributions made by a reduction in salary as provided in s. 40.05 (1) (b).

(ef) For Wisconsin retirement system purposes only, for a state employee, means compensation that would have been payable to the participant, at the participant's rate of pay immediately prior to the beginning of any mandatory temporary reduction of work hours or days during the period from July 1, 2009, to June 30, 2011, for service that would have been rendered by the participant during that period if the mandatory temporary reduction of work hours or days had not been in effect. Contributions and premiums on earnings considered to be received under this paragraph shall be paid as required under s. 40.05.

(em) For Wisconsin retirement system purposes only, for a member of the faculty, as defined in s. 36.05 (8), of a university who is on sabbatical leave under s. 36.11 (17), means the compensation that would have been payable to the participant, at the participant's rate of pay immediately prior to beginning the sabbatical leave, for service that would have been rendered at the university during the period of the sabbatical leave if the participant had continued to render services for the participant's employer during that period. Contributions and premiums on earnings considered to be received under this paragraph shall be paid as required under s. 40.05.

(f) Does not mean credits for payment of health insurance premiums converted from accumulated unused sick leave for a participating employee who qualifies for a disability benefit under s. 40.63 or 40.65, and who qualifies for the conversion of accumulated unused sick leave under s. 40.05 (4) (b), (bc) or (bf) or as provided by a participating employer's compensation plan or contract.

(g) Does not include credits for the payment of health insurance premiums provided under s. 40.05 (4) (bw) or subch. IX or any sabbatical or vacation leave converted into such credits.

(22m) "Educational support personnel employee" means a person who is a school district employee, but who is not a teacher.

(23) "Effective rate" means:

(a) For the core annuity division, the rate, disregarding fractions of less than one−tenth of one percent, determined by dividing the remaining core annuity division investment earnings for the calendar year or part of the calendar year, after making provision for any necessary reserves and after deducting prorated interest and the administrative costs of the core annuity division for the year, by the core annuity division balance at the beginning of the calendar year as adjusted for benefit payments and refunds paid during the year excluding prorated interest.

(b) For the variable annuity division, the rate, disregarding fractions less than one percent, which will distribute the net gain or loss of the variable annuity division to the respective variable annuity balances and reserves using the same procedure as provided in par. (a) for the core annuity division.

(24) "Elected official", except as otherwise provided in sub. (48), means a participating employee who is:

(a) A supreme court justice, court of appeals judge, circuit judge or state, county or municipal official elected by vote of the people.

(b) Appointed as provided by statute to fill a vacancy in a position specified in par. (a).

(c) The chief clerk and sergeant at arms of the senate and assembly.

(25) "Eligible employee" means:

(a) For the purpose of any group insurance:

1. Any participating state employee who has been participating under the Wisconsin retirement system for a period of at least 6 months prior to attainment of age 70 not including any period of leave of absence without pay.

2. Any state employee who is a member or employee of the legislature, a state constitutional officer, a district attorney who did not elect under s. 978.12 (6) to continue insurance coverage with a county, or who did elect such coverage but has terminated that election under s. 978.12 (6), a justice of the supreme court, a court of appeals judge, a circuit judge or the chief clerk or sergeant at arms of the senate or assembly.

3. The blind employees of the Wisconsin workshop for the blind authorized under s. 47.03 (1) (b), 1989 stats., or of the nonprofit corporation with which the department of workforce development contracts under s. 47.03 (1m) (a), 1989 stats., as of the beginning of the calendar month following completion of 1,000 hours of service. Persons employed by an employer who are blind when hired shall not be eligible for life insurance premium waiver because of any disability that is directly or indirectly attributed to blindness and may convert life insurance coverage only once under the contract.

4. Only a person who has not attained age 70 at the time of becoming initially eligible for the group insurance coverage provided under this chapter; but this subdivision does not exclude any participant from participation in the group health insurance plan nor does it exclude from participation in the group life insurance plan any employee who is initially eligible on the employer's effective date of participation.

5. Any state employee who has been participating under the Wisconsin retirement system for a period of at least 6 months prior to attaining age 70 not including any period of leave of absence without pay and who is on union service leave except the cost for premium payments shall be entirely the responsibility of the state employee on union service leave.

6. Any state employee of the office of district attorney, other than the district attorney, in a county having a population of 500,000 or more who did not elect under s. 978.12 (6) to continue insurance coverage with that county, or who did elect such coverage but has terminated that election under s. 978.12 (6), and who has participated under the retirement system established under chapter 201, laws of 1937, and under the Wisconsin retirement system for a combined and consecutive period, of at least 6 months prior to attainment of age 70, not including any period of leave of absence without pay.

(b) For the purpose of group health insurance coverage:

1. Any teacher who is employed by the university for an expected duration of not less than 6 months on at least a one−third full−time employment basis and who is not described in subd. 1m.

1m. Any teacher who is a participating employee and who is employed by the university for an expected duration of not less than 6 months on at least a one−third full−time employment basis.

2. Any person employed as a teaching assistant or graduate assistant and other employees−in−training as are designated by the board of regents of the university, who are employed on at least a one−third full−time basis.

2c. A state employee described in s. 49.825 (4) or (5) or 49.826 (4).

2g. Any person employed as a graduate assistant and other employees−in−training as are designated by the board of directors of the University of Wisconsin Hospitals and Clinics Authority, who are employed on at least a one−third full−time basis with an expected duration of employment of at least 6 months.

3. The surviving spouse or domestic partner of an employee, or of a retired employee, who is currently covered by health insurance at the time of death of the employee or retired employee. The spouse or domestic partner shall have the same right to health insurance coverage as the deceased employee or retired employee, but without state contribution, under rules promulgated by the secretary.

4. Any insured employee who is retired on an immediate or disability annuity, or who receives a lump sum payment under s. 40.25 (1) that would have been an immediate annuity if paid as an annuity, if the employee meets all of the requirements for an immediate annuity including filing of application whether or not final administrative action has been taken.

5. Any participating state employee under the Wisconsin retirement system, notwithstanding par. (a) 1.

6. A participating state employee who terminates creditable service:

a. After attaining 20 years of creditable service; and

b. Who is eligible for an immediate annuity but defers application.

6e. A state employee who terminates creditable service after attaining 20 years of creditable service, remains a participant, and is not eligible for an immediate annuity.

6g. Any state constitutional officer, member or officer of the legislature, head of a state department or state agency who is appointed by the governor with senate confirmation, or head of a legislative service agency, as defined in s. 13.90 (1m) (a), who terminates all creditable service on or after January 1, 1992, who is eligible for and has applied for a retirement annuity or a lump sum payment under s. 40.25 (1), who, if eligible, is receiving medicare coverage under both part A and part B of Title XVIII of the federal social security act, 42 USC 1395 to 1395zz, and who has acted under s. 40.51 (10m) to elect group health insurance coverage.

6m. Beginning on the date specified by the department, but not earlier than March 20, 1992, and not later than July 1, 1992, any of the following persons who, if eligible, is receiving medicare coverage under both part A and part B of Title XVIII of the federal social security act, 42 USC 1395 to 1395zz, and who has acted under s. 40.51 (16) to elect group health insurance coverage:

a. A retired employee of the state who is receiving a retirement annuity or has received a lump sum payment under s. 40.25 (1).

b. An employee of the state who terminates creditable service after attaining 20 years of creditable service, remains a participant and is not eligible for an immediate annuity.

6r. Any insured employee of the state who terminates creditable service on or after April 23, 1992, after attaining at least 20 years of creditable service, remains a participant and is not eligible for an immediate annuity or is not receiving a retirement or disability annuity, and who, if eligible, is receiving medicare coverage under both part A and part B of Title XVIII of the federal social security act, 42 USC 1395 to 1395zz.

7. Any employee whose health insurance premiums are being paid under s. 40.05 (4) (bm).

8. Any other state employee for whom coverage is authorized under a collective bargaining agreement pursuant to subch. V of ch. 111 or under s. 230.12 or 233.10.

9. Except as provided under s. 40.51 (7), any other employee of any employer, other than the state, that has acted under s. 40.51 to make such coverage available to its employees.

10. Any participating employee who is an employee of this state and who qualifies for a disability benefit under s. 40.63 or 40.65.

11. Beginning on July 1, 1988, any retired public employee, other than a retired employee of the state, who is receiving an annuity under the Wisconsin retirement system, or any dependent of such an employee, as provided in the health insurance contract, who is receiving a continuation of the employee's annuity, and, if eligible, is receiving medicare coverage under both part A and part B of Title XVIII of the federal social security act, 42 USC 1395 to 1395zz, and who has acted under s. 40.51 (10) to elect group health insurance coverage.

(bm) For the purpose of long−term care insurance, in addition to any state annuitant under s. 40.02 (54m), any employee of the state who received a salary or wages in the previous calendar year, and any participant who was at one time employed by the state who receives a lump sum payment under s. 40.25 (1) which would have been an immediate annuity if paid as an annuity, if the employee is a resident of this state and meets all of the requirements for an immediate annuity including filing of an application, whether or not final administrative action has been taken.

(c) For the purpose of group life insurance coverage, for participating employees and employees subject to s. 40.19 (4) of any employer, other than the state, which has acted under s. 40.70 (1) (a) to make group life insurance available to its employees the same as provided under par. (a) 1. and 3.

(d) For the purpose of income continuation insurance coverage, and except as provided under s. 40.61 (3), for participating employees of any employer under sub. (28), other than the state, which has acted under s. 40.61 to make such coverage available to its employees.

(25g) "Eligible retired public safety officer" has the meaning given in section 402 (l) (4) (B) of the Internal Revenue Code.

(26) "Employee" means any person who receives earnings as payment for personal services rendered for the benefit of any employer including officers of the employer. An employee is deemed to have separated from the service of an employer at the end of the day on which the employee last performed services for the employer, or, if later, the day on which the employee−employer relationship is terminated because of the expiration or termination of leave without pay, sick leave, vacation or other leave of absence. Except as provided in s. 40.82 (4), a participant receiving a differential wage payment or earnings, contributions, or service credit under sub. (15) (e) is considered an employee of the employer making the payment. A person shall not be considered an employee if a person:

(a) Is employed under a contract involving the furnishing of more than personal services.

(b) Is customarily engaged in an independently established trade, business or profession providing the same type of services to private individuals and organizations as is provided to the employer and whose services to a participating employer are not compensated for on a payroll of that employer, except that persons holding offices provided for by statute shall be considered employees.

(c) Is a patient or inmate of a hospital, home or institution and performs services in the hospital, home or institution.

(26g) "Employee−funded reimbursement account plan" means any of the following:

(a) A plan in accordance with section 125 of the Internal Revenue Code under which an employee may direct an employer to place part of the employee's gross compensation in an account to pay for certain future expenses of the employee under section 125 of the Internal Revenue Code.

(b) A plan in accordance with section 132 of the Internal Revenue Code under which an employee may direct an employer to place part of the employee's gross compensation in an account to pay for certain future expenses of the employee under section 132 of the Internal Revenue Code.

(26r) "Employee−funded reimbursement account plan provider" means a person who provides administrative services related to employee−funded reimbursement account plans.

(27) "Employee required contribution" means the contribution made by an employee under s. 40.05 (1) (a) 1. to 4.

(28) "Employer" means the state, including each state agency, any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state, any federated public library system established under s. 43.19 whose territory lies within a single county with a population of 500,000 or more, a local exposition district created under subch. II of ch. 229, and a long−term care district created under s. 46.2895, except as provided under ss. 40.51 (7) and 40.61 (3). "Employer" does not include a local cultural arts district created under subch. V of ch. 229. Each employer shall be a separate legal jurisdiction for OASDHI purposes.

(29) "Employer required contribution" means the contribution made by an employer under s. 40.05 (2) (a) to (f).

(30) "Executive participating employee" means a participating employee in a position designated under s. 19.42 (10) (L) or 20.923 (4), (4g), (7), (8), or (9) or authorized under s. 230.08 (2) (e) during the time of employment. All service credited prior to May 17, 1988, as executive service as defined under s. 40.02 (31), 1985 stats., shall continue to be treated as executive service as defined under s. 40.02 (31), 1985 stats., but no other service rendered prior to May 17, 1988, may be changed to executive service as defined under s. 40.02 (31), 1985 stats.

NOTE: Sub. (30) is amended eff. 7−1−15 by 2011 Wis. Act 32, as affected by 2013 Wis. Act 20, ss. 2365m and 9448, to read:

(30) "Executive participating employee" means a participating employee in a position designated under s. 19.42 (10) (L) or 20.923 (4), (7), (8), or (9) or authorized under s. 230.08 (2) (e) during the time of employment, and also includes the president and vice presidents of the University of Wisconsin System and the chancellors and vice chancellors who are serving as deputies of all University of Wisconsin institutions, the University of Wisconsin Colleges, and the University of Wisconsin−Extension. All service credited prior to May 17, 1988, as executive service as defined under s. 40.02 (31), 1985 stats., shall continue to be treated as executive service as defined under s. 40.02 (31), 1985 stats., but no other service rendered prior to May 17, 1988, may be changed to executive service as defined under s. 40.02 (31), 1985 stats.

(31) "Federal annual compensation limits" means any annual compensation limit under section 401 (a) (17) of the Internal Revenue Code, as adjusted for any cost of living increases under section 401 (a) (17) (B) of the Internal Revenue Code, but only with respect to plan years beginning after December 31, 1995, and only with respect to individuals who first became participating employees in plan years beginning after December 31, 1995. This subsection shall be applied in compliance with section 401 (a) (31) of the Internal Revenue Code pursuant to any applicable fed-

eral regulations or guidance adopted under the Internal Revenue Code.

(32) "Federal regulations" means the provisions of section 218 of Title II of the federal social security act and applicable regulations adopted under the federal social security act.

(33) "Final average earnings" means:

(a) The monthly rate of earnings, ignoring any fractions of a dollar, obtained by dividing:

1. The participant's total earnings received or considered to be received under sub. (22) (e), (ef), or (em) and for which contributions are made under s. 40.05 (1) and (2) during the 3 annual earnings periods (excluding any period more than 3 years prior to the effective date for any participating employer) in which the earnings were the highest, subject to federal annual compensation limits; by

2. Twelve times the total amount of creditable service for the 3 periods.

(b) 1. For a state elected official who is prohibited by law from receiving an increase in compensation during the official's term of office and who so elects, one−twelfth of the annual salary, subject to federal annual compensation limits, which would have been payable to the participant during the last completed month in which the participant was a participating employee in such a position if the participant had not been prohibited by law from receiving an increase in salary during his or her term of office, but only with respect to service as a state elected official.

2. For a state senator who so elects, one−twelfth of the annual salary which would have been payable to the participant during the last completed month in which the participant was a participating employee in such a position if the participant had not been prohibited by law from receiving an increase in salary during part of his or her term of office, but only with respect to service as a state senator.

(c) For a participant who makes an election under s. 40.30 (2), the monthly rate of earnings applicable under par. (a) or (b), increased as provided under s. 40.30 (4) (b) but subject to federal annual compensation limits.

(35) "Fund" means the public employee trust fund.

(36) "Governing body" means the legislature or the head of each state agency with respect to employees of that agency for the state, the common council in cities, the village board in villages, the town board in towns, the county board in counties, the school board in school districts, or the board, commission or other governing body having the final authority for any other unit of government, for any agency or instrumentality of 2 or more units of government, for any federated public library system established under s. 43.19 whose territory lies within a single county with a population of 500,000 or more, for a local exposition district created under subch. II of ch. 229 or for a long−term care district created under s. 46.2895, but does not include a local cultural arts district created under subch. V of ch. 229.

(37) "Health insurance" means contractual arrangements which may include, but are not limited to, indemnity or service benefits, or prepaid comprehensive health care plans, which will provide full or partial payment of the financial expense incurred by employees and dependents as the result of injury, illness or preventive medical procedures. The plans may include hospitalization, surgical and medical care, as well as ancillary items or services as determined by the group insurance board. The plans may include the type of coverage normally referred to as "major medical" insurance.

(37m) "Health savings account" means a health savings account described in 26 USC 223.

(37r) "High−deductible health plan" has the meaning given in 26 USC 223 (c) (2).

(38) "Immediate annuity" means an annuity, not including an annuity from additional contributions, which begins to accrue not later than 30 days after termination of employment.

(39) "Insured employee" means, for purposes of each insurance benefit plan, any eligible employee who is properly enrolled in the benefit plan.

(39m) "Internal Revenue Code" means the federal Internal Revenue Code of 1986, under Title 26, USC, as amended.

(39r) "Joint and survivor annuity" means an optional annuity form, described under s. 40.24 (1) (d) or a rule promulgated under s. 40.24 (1) (g), that is payable for the life of the participant and, after the death of the participant, a continuing percentage of which is payable in monthly installments to the named survivor.

(40) "Leave of absence" means any period during which an employee has ceased to render services for a participating employer and receive earnings and there has been no formal termination of the employer−employee relationship. For purposes of the fund every leave of absence, except a military leave or union service leave, shall terminate 3 years after it begins or, if earlier, upon the date specified by the employer in a notification to the department that the employer−employee relationship has terminated. A leave of absence is not deemed ended or interrupted by reason of resumption of active duty until the employee has resumed active performance of duty for 30 consecutive calendar days for at least 50% of what is considered that employee's normal work time with that employer. For the purpose of group health insurance coverage, every leave of absence due to employee layoff which has not been terminated before 3 years have elapsed shall continue for affected insured employees until an additional 2 years elapse or until sick leave credits used to pay health insurance premiums are exhausted, whichever occurs first.

(40m) "Long−term care insurance" means insurance that primarily provides coverage for care that is provided in institutional and community−based settings and that is convalescent or custodial care or care for a chronic condition or terminal illness. The term does not include a medicare supplement policy, as defined in s. 600.03 (28r), a medicare replacement policy, as defined in s. 600.03 (28p), or a continuing care contract, as defined in s. 647.01 (2).

(41) "Milwaukee teacher" means any teacher employed by the board of school directors of the city of Milwaukee.

(41m) "Monthly salary" means the gross amount paid to a participant making a claim under s. 40.65, at the time he or she becomes disabled within the meaning of s. 40.65 (4), by the employer in whose employ the injury occurred or the disease was contracted. Overtime pay may not be considered part of an employee's monthly salary unless the employee received it on a regular and dependable basis.

(41n) "Municipal employer" has the meaning given in s. 111.70 (1) (j).

(41r) "Named survivor" means the natural person designated by a participant on an application for a joint and survivor annuity or pursuant to a request under s. 40.24 (4) to receive, after the death of the participant, a continuing percentage of the annuity payable in monthly installments. A participant may not designate more than one natural person as the named survivor for a joint and survivor annuity. A participant's designation of a named survivor on an application for a joint and survivor annuity is irrevocable after the deadline specified under s. 40.24 (4). Pursuant to rules promulgated by the department, a named survivor may designate one or more beneficiaries to receive any remaining guaranteed monthly installments that are unpaid at the time of the named survivor's death.

(42) "Normal retirement date" means:

(a) The date on which a participant attains the age of 55 years for a protective occupation participant who terminates covered employment before July 1, 1990, or, for a protective occupation participant who terminates covered employment on or after July 1, 1990, the date on which the participant attains the age of 54 years if the participant has accumulated less than 25 years of creditable service or the age of 53 years if the participant has accumu-

lated at least 25 years of creditable service, except as provided in par. (g).

(b) The date on which a participant attains the age of 62 years for an elected official or an executive participating employee, except as provided in par. (g).

(d) The date on which a participant attains the age of 65 years for any participant not subject to par. (a) or (b), except as provided in par. (g).

(g) The date applicable to the participant under pars. (a) to (d) at the earlier of either the date it is necessary to make any determination or to take any action relative to the participant for purposes of the retirement system or the date of termination of employment of the participant, notwithstanding the fact that a participant may have been in one or more different employment categories at any previous time except for the purpose of calculating an annuity. For the purpose of calculating an annuity, the normal retirement date for each category provided by pars. (a) to (d) applies to service which is subject to that category. For the purpose of calculating a retirement benefit for an executive participating employee qualifying only under s. 40.02 (30) (b), 1985 stats., a normal retirement date of the date the executive participating employee attains the age of 62 years shall be applied to creditable service of the executive participating employee for which par. (d) would otherwise apply except the number of creditable service years to which that normal retirement date shall be applied under this paragraph may not exceed the number of executive service years of the executive participating employee.

(43) "OASDHI" means federal old−age, survivors, disability and health insurance under Titles II and XVIII of the federal social security act.

(44) "OASDHI benefit" means the primary or disability insurance monthly benefit amount for which a person is eligible, or for which a participant will be eligible upon attaining the lowest age at which old−age benefits are payable under the OASDHI program.

(45) "Participant" means any person included within the provisions of the Wisconsin retirement system by virtue of being or having been a participating employee whose account has not been closed under s. 40.25 (1) or (2).

(46) "Participating employee" means an employee who is currently in the service of, or an employee who is on a leave of absence from, a participating employer under the Wisconsin retirement system and who has met the requirements for inclusion within the provisions of the Wisconsin retirement system under s. 40.22.

(47) "Participating employer" means, for purposes of each of the respective benefit plans, any employer subject to the provisions of that plan under this chapter.

(48) (a) "Protective occupation participant" means any participant whose principal duties are determined by the participating employer, or, subject to s. 40.06 (1) (dm), by the department head in the case of a state employee, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

(am) "Protective occupation participant" includes any participant whose name is certified to the fund as provided in s. 40.06 (1) (d) and (dm) and who is any of the following:

1. A conservation warden.
2. A conservation patrol boat captain.
3. A conservation patrol boat engineer.
4. A conservation pilot.
5. A conservation patrol officer.
6. A forest fire control assistant.
7. A member of the state traffic patrol.
8. A state motor vehicle inspector.
9. A police officer.
10. A fire fighter.
11. A sheriff.
12. An undersheriff.
13. A deputy sheriff.
14. A state probation and parole officer.
15. A county traffic police officer.
16. A state forest ranger.
17. A fire watcher employed at Wisconsin veterans facilities.
18. A state correctional−psychiatric officer.
19. An excise tax investigator employed by the department of revenue.
20. A special criminal investigation agent in the department of justice.
21. An assistant or deputy fire marshal.
22. A person employed under s. 60.553 (1), 61.66 (1), or 62.13 (2e) (a).

(b) Each determination of the status of a participant under this subsection shall include consideration, where applicable, of the following factors:

1. A "police officer" is any officer, including the chief, or employee of a police department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Police officer includes any person regularly employed and qualifying as a patrol officer or a person of equal or higher rank, even if temporarily assigned to other duties.

2. A "fire fighter" is any officer, including the chief, or employee of a fire department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active fire suppression or prevention even though such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active fire suppression or prevention. Fire fighter includes any person regularly employed and qualifying as a fire fighter, hose handler or a person of equal or higher rank, even if temporarily assigned to other duties.

3. A "deputy sheriff" or a "county traffic police officer" is any officer or employee of a sheriff's office or county traffic department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Deputy sheriff or county traffic police officer includes any person regularly employed and qualifying as a deputy sheriff or county traffic police officer, even if temporarily assigned to other duties.

4. A "member of the state traffic patrol" includes one division administrator in the department of transportation who is counted under s. 230.08 (2) (e) 12. and whose duties include supervising the state traffic patrol, if the division administrator is certified by the law enforcement standards board under s. 165.85 (4) (b) 1. as being qualified to be a law enforcement officer.

(bm) "Protective occupation participant" includes any participant who is an emergency medical technician if the participant's employer classifies the participant as a protective occupation participant and the department receives notification of the participant's name as provided in s. 40.06 (1) (d) and (dm). Notwithstanding par. (a), an employer may classify a participant who is an emergency medical technician as a protective occupation participant without making a determination that the principal duties of the participant involve active law enforcement or active fire suppression or prevention. A determination under this paragraph may not be appealed under s. 40.06 (1) (e) or (em), but a determination under this paragraph regarding the classification of a

state employee is subject to review under s. 40.06 (1) (dm). Notwithstanding sub. (17) (d), each participant who is classified as a protective occupation participant under this paragraph on or after January 1, 1991, shall be granted creditable service as a protective occupation participant for all covered service as an emergency medical technician that was earned on or after the date on which the department receives notification of the participant's name as provided in s. 40.06 (1) (d) and (dm), but may not be granted creditable service as a protective occupation participant for any covered service as an emergency medical technician that was earned before that date.

(c) In s. 40.65, "protective occupation participant" means a participating employee who is a police officer, fire fighter, an individual determined by a participating employer under par. (a) or (bm) to be a protective occupation participant, county undersheriff, deputy sheriff, state probation and parole officer, county traffic police officer, conservation warden, state forest ranger, field conservation employee of the department of natural resources who is subject to call for forest fire control or warden duty, member of the state traffic patrol, state motor vehicle inspector, University of Wisconsin System full−time police officer, guard or any other employee whose principal duties are supervision and discipline of inmates at a state penal institution, excise tax investigator employed by the department of revenue, person employed under s. 60.553 (1), 61.66 (1), or 62.13 (2e) (a), or special criminal investigation agent employed by the department of justice.

(48m) "Qualified domestic relations order" means a judgment, decree or order issued by a court pursuant to a domestic relations law of any state or territory of the United States, that meets all of the following criteria:

(a) The name, date of birth, social security number and last−known mailing address of the participant and the alternate payee are specified.

(b) The Wisconsin retirement system is specified by name.

(c) The decree date is specified as the date to be used for valuing and dividing the participant's account.

(d) The alternate payee share is specified as a single percentage, not to exceed 50% of the value of the participant's account on the decree date, to be applied to all parts of the participant's account.

(e) The determination of the alternate payee share does not require that benefits be paid to the alternate payee if those benefits are also required to be paid to another alternate payee or to the internal revenue service under a lien placed on the participant's account under section 64 of the Internal Revenue Code.

(f) The judgment, decree or order requires the participant to certify, in a form prescribed by the department, all of the participant's active military service, as described in sub. (15) (a).

(g) The judgment, decree or order does not require payment of benefits exceeding in value those benefits to which the participant is entitled on the decree date.

(h) The judgment, decree or order does not assign any form of joint ownership of a participant's account or benefits payable from the account.

(i) The judgment, decree or order does not require a division of the participant's account in a manner contrary to s. 40.08 (1m).

(j) The judgment, decree or order requires the participant's employer to submit to the department a report of all earnings, service and contributions of the participant as provided in s. 40.06 (7).

(k) The judgment, decree or order does not require the department to enforce or otherwise monitor the benefits assigned to the alternate payee under s. 40.08 (1m).

(48r) "Required beginning date" means the later of April 1 of the calendar year following the calendar year in which a participant attains the age of 70.5 years or April 1 of the calendar year following the calendar year in which a participating employee retires.

(49) "Retired employee" means a former insured employee who is not a participating employee and who is retired on an immediate or disability annuity or who receives a lump sum payment under s. 40.25 (1) which would have been an immediate annuity if paid as an annuity or who is an eligible employee under sub. (25) (b) 6., 6e., or 6g.

(50) "Retirement annuity" means any annuity payable under s. 40.23, including the continuation of retirement annuities after the death of the participant.

(51) "Retirement system" means a pension, annuity, retirement or similar fund or system established by this state or by a political subdivision of this state.

(52) "Salary index" means the percentage increase in the average of the total wages, as determined under 42 USC 415 (b) (3) (A), between the year before the preceding year and the preceding year.

(53) "Secretary" means the secretary of the department.

(54) "State agency" means any office, department or independent agency in the executive, legislative and judicial branches of state government and includes the following:

(b) The Wisconsin Housing and Economic Development Authority.

(c) The Wisconsin Health and Educational Facilities Authority.

(e) The community development finance authority created under ch. 233, 1985 stats., before July 1, 1988.

(f) The nonprofit corporation with which the department of workforce development contracts under s. 47.03 (1m) (a), 1989 stats.

(h) The University of Wisconsin Hospitals and Clinics Authority.

(i) The Fox River Navigational System Authority.

(j) The Wisconsin Aerospace Authority.

(L) The Health Insurance Risk−Sharing Plan Authority.

NOTE: Par. (L) is repealed eff. 1−1−15 by 2013 Wis. Act 20.

(m) The Wisconsin Economic Development Corporation.

(54m) "State annuitant" means a person receiving a retirement annuity, beneficiary annuity or a disability annuity from this state's retirement system who at one time received a salary or wages from this state and who is a resident of this state.

(54t) "State employee" means an employee of a state agency.

(55) "Teacher" means any employee engaged in the exercise of any educational function for compensation in the public schools, including charter schools as defined in s. 115.001 (1) that are instrumentalities of a school district, or the university in instructing or controlling pupils or students, or in administering, directing, organizing or supervising any educational activity, but does not include any employee determined to be an auxiliary instructional employee under s. 115.29 (3). "Teacher" includes the following:

(a) Any person employed as a librarian by any school board in a library in any school under its jurisdiction, including a charter school as defined in s. 115.001 (1) that is an instrumentality of a school district, whose qualifications as a librarian are at least equal to the minimum librarian qualifications prescribed by the state superintendent of public instruction.

(b) Any person employed as a full−time social center, community house, adult education or recreation director, instructor or other employee employed by the board of school directors of the city of Milwaukee, who possesses the qualifications required for employment as a teacher.

(55g) "Technical college educational support personnel employee" means a person who is a technical college district employee, but who is not a teacher.

(55m) "Timely appeal" means a written request for the review of a determination that is filed within 90 days after the determination is mailed to the person aggrieved by the determination.

(56) "Union service leave" means that period of absence from employment commencing on the date an employee commences a leave of absence for the purpose of serving in a position with a labor organization representing employees of the employee's employer, and terminating on the date that leave of absence terminates or the date that service with that labor organization terminates, whichever first occurs.

(57) "University" means the University of Wisconsin System under ch. 36.

(57m) "U.S. armed forces" means any of the following:

(a) The U.S. army, including the WACS.

(b) The U.S. navy, including the WAVES.

(c) The U.S. air force, including the WAFS.

(d) The U.S. marine corps, including the WMS.

(e) The U.S. coast guard, including the SPARS.

(f) The U.S. maritime service, including the merchant marine.

(58) "Variable annuity" means any annuity provided by the accumulations in the variable annuity division established under s. 40.04 (7) providing for the dollar amount of benefits or other contractual payments or values to vary so as to reflect differences which may arise between the total value of the annuity reserve for variable annuities and the reserve that would be required if the annuities were core annuities.

History: 1981 c. 96, 187, 250, 274, 386; 1983 a. 9, 27; 1983 a. 81 s. 11; 1983 a. 83 s. 20; 1983 a. 106, 140; 1983 a. 141 ss. 1 to 3, 20; 1983 a. 191 ss. 1, 6; 1983 a. 192 s. 304; 1983 a. 255 s. 6; 1983 a. 275, 290, 368; 1983 a. 435 s. 7; 1985 a. 29, 225; 1985 a. 332 ss. 52, 251 (1); 1987 a. 27, 62, 83, 107, 309, 340, 356, 363, 372, 399; 1987 a. 403 ss. 43 to 45, 256; 1989 a. 13, 14, 31; 1989 a. 56 s. 259; 1989 a. 166, 182, 189, 218, 230, 240, 323, 327, 336, 355, 357, 359; 1991 a. 32, 39, 113, 152, 229, 269, 315; 1993 a. 16, 263, 383, 490, 491; 1995 a. 27, ss. 1946 to 1953, 9130 (4); 1995 a. 81, 88, 89, 216, 240, 302, 381, 417; 1997 a. 3, 27, 39, 69, 110, 162, 237, 238; 1999 a. 9, 11, 42, 63, 65, 83; 2001 a. 16, 38, 103, 104, 109; 2003 a. 33; 2005 a. 153, 335; 2007 a. 20, 131, 226; 2009 a. 15, 28; 2011 a. 7, 10, 32, 116, 229; 2013 a. 20; s. 35.17 correction in (22) (a).

A union request that the county make pension contributions for jailers equal in amount to those for its "protective occupation participants" under sub. (48) did not require reclassification of the jailers as "POPS," is allowed under s. 40.05 (2) (g) 1., and is a mandatory subject of bargaining under s. 111.70 (1) (a). County of LaCrosse v. WERC, 180 Wis. 2d 100, 508 N.W.2d 9 (1993).

"Active military service" and "active service" as used in sub. (15) (c) do not include "active duty for training." Morris v. Employee Trust Funds Board, 203 Wis. 2d 172, 554 N.W.2d 205 (Ct. App. 1996), 94−0857.

It was reasonable to determine jailers' status based on their duties performed as sheriff's department employees regardless of their appointment as deputy sheriff. Being a deputy sheriff is a necessary qualification to being a protective occupation participant under sub. (48) (am), but is not a sufficient one. The employee's name must also be certified to the fund as provided in s. 40.06 (1) (d). Mattila v. Employee Trust Funds Board, 2001 WI App 79, 243 Wis. 2d 90, 626 N.W.2d 33, 00−0759.

Under sub. (48) (a), a "protective occupation participant" is an employee "whose principal duties are determined by the participating employer . . . to involve active law enforcement . . .. Jailers classified as protective occupation participants under sub. (48) (a), thus, have been determined to have principal duties that involve active law enforcement. Sub. (48) (b) 3. does not impose an additional substantial requirement for purposes of determining which employees are deputy sheriffs. The requirements of s. 59.26 do not apply to the definition of deputy sheriff within the meaning of sub. (48) (am) 13. and (b) 3. Local 441A, WPPA v. WERC, 2013 WI App 104, ___ Wis. 2d ___, ___ N.W.2d ___, 12−2721.

40.03 Powers and duties. (1) EMPLOYEE TRUST FUNDS BOARD. The board:

(a) Shall authorize and terminate the payment of all annuities and death benefits, except disability annuities, in accordance with this chapter and may adjust the computation of the amount, as provided by this chapter, as necessary to prevent any inequity which might otherwise exist if a participant has a combination of full−time and part−time service, a change in annual earnings period during the high years of earnings or has previously received an annuity which was terminated.

(am) Shall ensure that the Wisconsin retirement system complies with the Internal Revenue Code as a qualified plan for income tax purposes and shall ensure that each benefit plan is administered in a manner consistent with all Internal Revenue Code provisions that authorize and regulate the benefit plan.

(b) Shall approve the tables to be used for computing benefits under the Wisconsin retirement system after certification of the tables in writing by the actuary.

(c) Shall appoint the secretary of the department and may employ or select any medical, legal and other independent contractors as are required for the administration of the fund.

(d) Shall select and retain an actuary or an actuarial firm, under one or more contractual agreements which shall run to the department for the purpose of performing all actuarial services which are necessary for the operation and control of each of the insurance and benefit programs under this chapter. Under this paragraph, the board shall:

1. Determine the requirements for and qualifications of the actuary or the actuarial firms so retained.

2. Determine the terms and conditions of each contractual agreement, and the time any contractual agreement shall be in force.

3. Determine the procedure for the selection of an actuary or an actuarial firm.

4. Direct the secretary to sign on behalf of the department any contractual agreement approved by the board.

(e) Shall approve the contribution rates and actuarial assumptions determined by the actuary under sub. (5) (b) and (c).

(f) May compel witnesses to attend meetings and to testify upon any necessary matter concerning the fund and authorize fees not in excess of the statutory provisions for witnesses.

(g) May determine the length of creditable prior service from information available. Any determination shall be conclusive as to any period of service unless, within the time limits specified in s. 40.08 (10), the board reconsiders any case and changes the determination.

(h) May accept any gift, grant, or bequest of any money or property of any kind, for the purposes designated by the grantor if the purpose is specified as providing cash benefits to some or all of the participants, insured employees, or annuitants of this fund or for reducing employer or employee costs; or, if no purposes are designated, then for the purpose of distribution to the several accounts and reserves of the Wisconsin Retirement System at the end of the year as if the money or property were investment earnings of the core annuity division.

(i) May determine that some or all of the disability annuities and death benefits provided from the Wisconsin retirement system shall instead be provided through group insurance plans to be established by the group insurance board either as separate plans or as integral parts of the group life and income continuation insurance plans established under this chapter.

(j) Shall accept timely appeals from determinations made by the department, other than appeals of determinations made by the department regarding disability annuities. The board shall review the relevant facts and may hold a hearing. Upon completion of its review and hearing, if any, the board shall make a determination which it shall certify to the participating employer or the appropriate state agency and to the appropriate employee, if any. The board's determination of an employee's status under s. 40.06 (1) (e) shall remain in effect until receipt by the department of notification indicating a different classification. A participant may appeal that determination as provided by s. 40.06 (1) (e).

(k) May require any employer to distribute to its employees any materials which are determined to be necessary for the efficient administration of the fund.

(L) May delegate powers and duties as deemed necessary or desirable.

(m) Shall approve or reject all administrative rules proposed by the secretary under sub. (2) (i).

(n) May allow any separate retirement system for employees of one or more employers to deliver or send funds representing assets of that system to the department. If the department accepts delivery or transmission, the department shall purchase shares of the core retirement investment trust or variable retirement investment trust or both with those funds, subject to rules under sub. (2)

(q). Each retirement system shall pay as provided in s. 40.04 (2) for the costs of investing and administering any of its funds sent or delivered to the department.

(p) May, upon the recommendation of the actuary, transfer in whole or in part the assets and reserves held in any account described in s. 40.04 (9) to a different account described in s. 40.04 (9), for the purpose of providing any group insurance benefit offered by the group insurance board.

(2) SECRETARY. The secretary:

(a) Shall be in charge of the administration of the department and exercise, as head of the department, all powers and duties specified in ss. 15.04 and 15.05.

(b) Shall employ and select administrative, clerical or other employees as required for the administration of this chapter and establish the internal organization of the department.

(c) Shall process all applications for annuities and benefits and may initiate payment based on estimated amounts, when the applicant is determined to be eligible, subject to correction upon final determination of the amount of the annuity or benefit.

(d) May suspend an annuity pending final action by the board, or a disability annuity pending final action by the Wisconsin retirement board or the teachers retirement board, when, in the secretary's judgment, the annuitant is not eligible to receive the annuity.

(e) Shall submit to each employer and, upon request, to each individual participating in any of the benefit plans administered by the department the report required under s. 15.04 (1) (d) or a summary of the report. The report shall be in lieu of any reports required by ss. 15.07 (6) and 15.09 (7) or any other law and shall include financial and actuarial balance sheets which reflect changes in the asset, liability and reserve accounts and additional statistics which the secretary determines to be necessary or desirable for a full understanding of the status of the fund and the benefit plans.

(f) May delegate to other departmental employees any power or duty of the secretary.

(g) Shall submit once each year to each participant currently making contributions, and to any other participant upon request or as in the secretary's judgment is desirable, a statement of the participant's account together with appropriate explanatory material.

(h) May request any information from any participating employee or from any participating employer as is necessary for the proper operation of the fund.

(i) Shall promulgate, with the approval of the board, all rules, except rules promulgated under par. (ig) or (ir), that are required for the efficient administration of the fund or of any of the benefit plans established by this chapter. In addition to being approved by the board, rules promulgated under this paragraph relating to teachers must be approved by the teachers retirement board and rules promulgated under this paragraph relating to participants other than teachers must be approved by the Wisconsin retirement board, except rules promulgated under s. 40.30.

(ig) Shall promulgate, with the approval of the group insurance board, all rules required for the administration of the group health, long−term care, income continuation or life insurance plans established under subchs. IV to VI and health savings accounts under subch. IV.

(ir) Shall promulgate, with the approval of the deferred compensation board, all rules required for the administration of deferred compensation plans established under subch. VII.

(j) May authorize any governing body in a written designation filed by the governing body with the department to have an agent or agents to act for the governing body in all matters pertaining to the fund.

(k) May determine an amount, and the procedure for establishing the amount, of OASDHI benefits for any person using any information the department has available in its records and any assumptions as to data not in the department's records as deemed appropriate for estimating the benefits unless the person establishes, through a certification of the person's social security earnings record or actual benefit amount, a different amount payable. In the case of any participant whose earnings are not subject to Titles II and XVIII of the federal social security act by reason of eligibility for a choice provided by statute, it is conclusively assumed in making the estimate, regardless of the person's actual federal social security earnings record, that 50% of those earnings are and were subject to Titles II and XVIII of the federal social security act. The secretary may require the person to provide the department with a certification of the person's social security earnings record or benefit amount as a condition for receiving benefits under this chapter. If a participant does not receive the OASDHI benefit for which the person is or will be eligible by reason of failure to apply for the benefit or by virtue of the suspension of the benefit the participant will nevertheless be deemed to have received the OASDHI benefit amount for purposes of any benefit computation under this chapter.

(L) Shall determine each calendar year's effective rate.

(m) Shall have all other powers necessary to carry out the purposes and provisions of this chapter, except as otherwise specifically provided by this chapter.

(n) Shall have any additional powers and duties as are delegated by the board.

(p) Shall establish procedures for and conduct the elections of board members required under ss. 15.16 (1) (d) and 15.165 (3) (a) 1., 2., 6. and 7. The procedures shall include the establishment of a nominating process and shall provide for the distribution of ballots to all participating employees and annuitants eligible to vote in the election.

(q) Shall promulgate rules governing the times when separate retirement systems may send or deliver funds under sub. (1) (n) or withdraw those funds, the amounts of money that may be sent, delivered or withdrawn, the valuation of money that has been sent, delivered or withdrawn, and the distribution of investment income among the retirement systems. These rules may modify the accounting and valuation bases and the investment earnings distribution procedures of the Wisconsin retirement system to the extent necessary to achieve equity among the various retirement systems.

(r) Shall promulgate rules governing the times for making lump sum payments that are authorized under this chapter to be made to or from the Wisconsin retirement system and governing the valuation of money that has been sent, delivered or withdrawn, and the distribution of investment income to be credited on those amounts. The rules may modify the accounting and valuation bases and the investment earnings distribution procedures of the Wisconsin retirement system to the extent necessary to achieve equity among the various types of payments and contributions to, and payments from, the Wisconsin retirement system.

(s) Shall reimburse the legislative audit bureau for the cost of audits required to be performed under s. 13.94 (1) (dc) and (dd).

(t) Shall ensure that the Wisconsin retirement system complies with the Internal Revenue Code as a qualified plan for income tax purposes and shall ensure that each benefit plan is administered in a manner consistent with all Internal Revenue Code provisions that authorize and regulate the benefit plan.

(u) Shall ensure that the department include on all publications that are printed beginning on October 14, 1997, and that are intended for distribution to participants the toll−free telephone number of the department, if the department has such a telephone number.

(v) May settle any dispute in an appeal of a determination made by the department that is subject to review under sub. (1) (j), (6) (i), (7) (f), or (8) (f), or s. 40.80 (2g), but only with the approval of the board having the authority to accept the appeal. In deciding whether to settle such a dispute, the secretary shall consider the cost of litigation, the likelihood of success on the merits, the cost

of delay in resolving the dispute, the actuarial impact on the trust fund, and any other relevant factor the secretary considers appropriate. Any moneys paid by the department to settle a dispute under this paragraph shall be paid from the appropriation account under s. 20.515 (1) (r).

(vm) Annually, before July 1, shall submit a report to the secretary of administration and the joint committee on finance on the department's progress in modernizing its business processes and integrating its information technology systems.

(w) If the secretary determines that an otherwise eligible participant has unintentionally forfeited or otherwise involuntarily ceased to be eligible for any benefit provided under this chapter principally because of an error in administration by the department, may order the correction of the error to prevent inequity. A decision under this paragraph is not subject to review. The secretary shall submit a quarterly report to the employee trust funds board on decisions made under this paragraph.

(3) DEPARTMENT OF JUSTICE. The department of justice shall furnish legal counsel and shall prosecute or defend all actions brought by or against the board, department, group insurance board or any employee of the department as a result of the performance of the department employee's duties.

(4) STATE TREASURER. The state treasurer shall be the treasurer of the fund.

(5) ACTUARY. The actuary or actuarial firm retained under sub. (1) (d):

(a) Shall be the technical adviser of the board, the secretary and the group insurance board on any matters of an actuarial nature affecting the soundness of the fund or requiring any changes for more satisfactory operation.

(b) Shall make a general investigation at least once every 3 years of the experience of the Wisconsin retirement system relating to mortality, disability, retirement, separation, interest, employee earnings rates and of any other factors deemed pertinent and to certify, as a result of each investigation, the actuarial assumptions to be used for computing employer contribution rates, the assumed rate and the tables to be used for computing annuities and benefits, provided the tables shall not provide different benefits on the basis of sex for participants or beneficiaries similarly situated. If the assumed rate changes, the actuary shall at the same time adjust the assumptions for future changes in employee earnings rates to be consistent with the new assumed rate. The recommended actuarial assumptions shall be based on the system's own experience as identified in the general investigations unless lack of adequate information or unusual circumstances are specifically identified and fully described which require use of other groups' experience and such other experience is not inconsistent with the system's own experience. When considering or implementing new or changed benefit provisions and areas of risk, the assumptions may be based solely on the experience of other groups until 5 years of the system's own experience is available for use as long as such other experience is not inconsistent with the system's own experience.

(c) Shall determine the proper rates of premiums and contributions required, or advise as to the appropriateness of premium rates proposed by independent insurers, for each of the benefit plans provided for by this chapter.

(d) Shall make an annual valuation of the liabilities and reserves required to pay both present and prospective benefits.

(e) Shall certify the actuarial figures on the annual financial statements required under sub. (2) (e).

(6) GROUP INSURANCE BOARD. The group insurance board:

(a) 1. Shall, on behalf of the state, enter into a contract or contracts with one or more insurers authorized to transact insurance business in this state for the purpose of providing the group insurance plans provided for by this chapter; or

2. May, wholly or partially in lieu of subd. 1., on behalf of the state, provide any group insurance plan on a self−insured basis in which case the group insurance board shall approve a written description setting forth the terms and conditions of the plan, and may contract directly with providers of hospital, medical or ancillary services to provide insured employees with the benefits provided under this chapter.

(b) May provide other group insurance plans for employees and their dependents and for annuitants and their dependents in addition to the group insurance plans specifically provided under this chapter. The terms of the group insurance under this paragraph shall be determined by contract, and shall provide that the employer is not liable for any obligations accruing from the operation of any group insurance plan under this paragraph except as agreed to by the employer.

(c) Shall not enter into any agreement to modify or expand benefits under any group insurance plan, unless the modification or expansion is required by law or would maintain or reduce premium costs for the state or its employees in the current or any future year. A reduction in premium costs in future years includes a reduction in any increase in premium costs that would have otherwise occurred without the modification or expansion. This paragraph shall not be construed to prohibit the group insurance board from encouraging participation in wellness or disease management programs or providing optional coverages if the premium costs for those coverages are paid by the employees.

(d) May take any action as trustees which is deemed advisable and not specifically prohibited or delegated to some other governmental agency, to carry out the purpose and intent of the group insurance plans provided under this chapter, including, but not limited to, provisions in the appropriate contracts relating to:

1. Eligibility of active and retired employees to participate, or providing the employee the opportunity to decline participation or to withdraw.

2. The payments by employees for group insurance.

3. Enrollment periods and the time group insurance coverage shall be effective.

4. The time that changes in coverage and premium payments shall take effect.

5. The terms and conditions of the insurance contract or contracts, including the amount of premium.

6. The date group insurance contracts shall be effective.

7. Establishment of reserves.

(e) Shall apportion all excess moneys becoming available to it through operation of the group insurance plans to reduce premium payments in following contract years or to establish reserves to stabilize costs in subsequent years. If it is determined that the excess became available due to favorable experience of specific groups of employers or specific employee groups, the apportionment may be made in a manner designated to benefit the specific employers or employee groups only, or to a greater extent than other employers and employee groups.

(f) Shall take prompt action to liquidate any actuarial or cash deficit which occurs in the accounts and reserves maintained in the fund for any group insurance benefit plan.

(g) Shall determine the amount of insurance and extent of coverage provided and amount of premiums required during a union service leave. The amount of insurance and extent of coverage shall be not less than that in effect immediately preceding the commencement of the union service leave.

(h) Shall, on behalf of the state, offer as provided in s. 40.55 long−term care insurance policies. For purposes of this section, the offering by the state of long−term health insurance policies shall constitute a group insurance plan under par. (a) 1.

(i) Shall accept timely appeals of determinations made by the department affecting any right or benefit under any group insurance plan provided for under this chapter.

(j) May contract with the department of health services and may contract with other public or private entities for data collec-

tion and analysis services related to health maintenance organizations and insurance companies that provide health insurance to state employees.

(k) Shall establish health savings accounts for state employees who select a high−deductible health plan under s. 40.515 for their health care coverage plan.

(7) TEACHERS RETIREMENT BOARD. The teachers retirement board:

(a) Shall appoint 4 members of the employee trust funds board as provided under s. 15.16 (1).

(b) Shall study and recommend to the secretary and the employee trust funds board alternative administrative policies and rules which will enhance the achievement of the objectives of the benefit programs for teacher participants.

(c) Shall appoint one member of the investment board as provided under s. 15.76 (3).

(d) Shall approve or reject all administrative rules proposed by the secretary under sub. (2) (i) that relate to teachers, except rules promulgated under s. 40.30.

(e) Shall authorize and terminate the payment of disability annuity payments to teacher participants in accordance with this chapter.

(f) Shall accept timely appeals of determinations made by the department regarding disability annuities for teacher participants in accordance with s. 40.63 (5) and (9) (d).

(g) May amend any rule of the department, the Milwaukee teachers retirement board, the state teachers retirement board and the Wisconsin retirement fund board, which are in effect on January 1, 1982, in such a manner as to make it no longer applicable to teacher participants.

(8) WISCONSIN RETIREMENT BOARD. The Wisconsin retirement board:

(a) Shall appoint 4 members of the employee trust funds board as provided under s. 15.16 (1).

(b) Shall study and recommend to the secretary and the employee trust funds board alternative administrative policies and rules which will enhance the achievement of the objectives of the benefit programs for participants other than teachers.

(c) Shall appoint one member of the investment board as provided under s. 15.76 (3).

(d) Shall approve or reject all administrative rules proposed by the secretary under sub. (2) (i) that relate to participants other than teachers, except rules promulgated under s. 40.30.

(e) Shall authorize and terminate the payment of disability annuity payments to participants other than teachers in accordance with this chapter.

(f) Shall accept timely appeals of determinations made by the department regarding disability annuities for participants other than teachers in accordance with s. 40.63 (5) and (9) (d).

(g) May amend any rule of the department, the Milwaukee teachers retirement board, the state teachers retirement board and the Wisconsin retirement fund board, which are in effect on January 1, 1982, in such a manner as to make it no longer applicable to participants other than teachers.

(9) DEFERRED COMPENSATION BOARD. The deferred compensation board shall have the powers and duties provided under s. 40.80 (2) and (2m).

History: 1981 c. 96 ss. 24, 32; 1981 c. 386; 1983 a. 247; 1985 a. 29; 1985 a. 332 ss. 53, 251 (1); 1987 a. 356; 1989 a. 31, 166, 323; 1991 a. 116, 141, 152, 269; 1993 a. 16; 1995 a. 302, 414; 1997 a. 27; 1999 a. 9; 2001 a. 16; 2003 a. 33; 2005 a. 25, 153; 2007 a. 20 s. 9121 (6) (a); 2007 a. 131; 2011 a. 10, 32, 258; 2013 a. 20.

Cross−reference: See also ETF, Wis. adm. code.

The insurance subrogation law permitting a subrogated insurer to be reimbursed only if the insured has been made whole applies to the state employee health plan. Leonard v. Dusek, 184 Wis. 2d 267, 516 N.W.2d 463 (Ct. App. 1994).

An appeal to the board was an inadequate remedy under the facts of the case because the board does not have the statutory authority to award interest on delayed benefit payments based either on a claim of unjust enrichment or a takings claim under Art. I, s. 13. The doctrine of exhaustion of administrative remedies did not require an appeal of the department's dismissal of the claim to the board before filing a court action. Fazio v. Department of Employee Trust Funds, 2002 WI App 127, 255 Wis. 2d 801, 645 N.W.2d 618, 01−2595.

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40.04 Accounts and reserves. (1) The separate accounts and reserves under subs. (2) to (10) and any additional accounts and reserves determined by the department to be useful in achieving the fund's purposes, or necessary to protect the interests of the participants or the future solvency of the fund, shall be maintained within the fund. The accounts and reserves maintained for each benefit plan shall fairly reflect the operations of that benefit plan. Any deficit occurring within the accounts of a benefit plan shall be eliminated as soon as feasible by increasing the premiums, contributions or other charges applicable to that benefit plan. Until eliminated, any deficit shall be charged with interest at the rate the funds would have earned if there had been no deficit.

(2) (a) An administrative account shall be maintained within the fund from which administrative costs of the department shall be paid, except charges for services performed by the investment board, costs of medical and vocational evaluations used in determinations of eligibility for benefits under ss. 40.61, 40.63 and 40.65 and costs of contracting for insurance data collection and analysis services under s. 40.03 (6) (j).

(b) Except as otherwise provided in this section, investment income of this fund and moneys received for services performed or to be performed by the department shall be credited to this account.

(c) The secretary shall estimate the administrative costs to be incurred by the department in each fiscal year and shall also estimate the investment income which will be credited to this account in the fiscal year. The estimated administrative costs less the estimated investment income shall be equitably allocated by the secretary, with due consideration being given to the derivation and amount of the investment income, to the several benefit plans administered by the department. In determining the amount of the allocation, adjustments shall be made for any difference in prior years between the actual administrative costs and investment income from that originally estimated under this paragraph. An amount equal to the adjusted allocated costs shall be transferred to this account from the investment earnings credited to the respective benefit plan accounts and from payments by the respective insurers or employee−funded reimbursement plan providers for administrative services.

(d) The costs of investing the assets of the benefit plans and retirement systems, including all costs due to s. 40.03 (1) (n), shall be paid from the appropriation under s. 20.515 (1) (r) and charged directly against the appropriate investment income or reserve accounts of the benefit plan or retirement system receiving the services.

(e) The costs of contracting for insurance data collection and analysis services under s. 40.03 (6) (j) shall be paid from the appropriation under s. 20.515 (1) (ut).

(3) A core retirement investment trust and a variable retirement investment trust shall be maintained within the fund under the jurisdiction and management of the investment board for the purpose of managing the investments of the retirement reserve accounts and of any other accounts of the fund as determined by the board, including the accounts of separate retirement systems.

Within the core retirement investment trust there shall be maintained a transaction amortization account and a market recognition account, and any other accounts as are established by the board or the investment board. A current income account shall be maintained in the variable retirement investment trust. All costs of owning, operating, protecting, and acquiring property in which either trust has an interest shall be charged to the current income or market recognition account of the trust having the interest in the property.

(a) The net gain or loss of the variable retirement investment trust shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the respective trust bears to the total average daily balance of all participating accounts in the trust. The amount to be distributed shall be the excess of the increase within the period in the value of the assets of the trust resulting from income from the investments of the trust and from the sale or appreciation in value of any investment of the trust, over the decrease within the period in the value of the assets resulting from the sale or the depreciation in value of any investments of the trust.

(ab) Beginning on December 31, 2000, the balance of the transaction amortization account shall be determined and 20 percent of the balance established on December 31, 2000, shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the core retirement investment trust bears to the total average daily balance of all participating accounts in the trust until the balance of the transaction amortization account is entirely distributed. Notwithstanding sub. (3) (intro.), after the entire balance of the transaction amortization account has been distributed, the department shall close the account.

(am) 1. Beginning on January 1, 2000, there shall be maintained within the core retirement investment trust a market recognition account. The department shall establish and administer the market recognition account as recommended by the actuary or actuarial firm retained under s. 40.03 (1) (d) and as approved by the board.

2. Annually, the total market value investment return earned by the core retirement investment trust during the year shall be credited to the market recognition account.

3. Annually, on December 31, the sum of all of the following shall be distributed from the market recognition account to each participating account in the core retirement investment trust in the same ratio as each account's average daily balance bears to the total average daily balance of all participating accounts in the trust:

a. The expected amount of investment return in the core retirement investment trust during the year based on the assumed rate.

b. An amount equal to 20 percent of the difference between the total market value investment return earned by the core retirement investment trust and the expected amount of investment return of the core retirement investment trust during the year ending on December 31 based on the assumed rate.

c. An amount equal to 20 percent of the sum of the differences between the total market value investment return earned by the core retirement investment trust and the expected amount of investment return of the core retirement investment trust at the end of the 4 preceding years. For the purpose of making this calculation, the amount in the market recognition account at the end of each year that occurs before the year 2000 shall be assumed to be zero.

(b) The assets of the core retirement investment trust shall be commingled and the assets of the variable retirement investment trust shall be commingled. No particular contributing benefit plan shall have any right in any specific item of cash, investment, or other property in either trust other than an undivided interest in the whole as provided in this paragraph. The department of administration shall maintain any records as may be required to account for each contributing account's share in the corresponding trust except that the employee accumulation reserve, the employer accumulation reserve and the annuity reserve shall be treated as a single account, except as provided in sub. (7).

(c) The department shall advise the investment board and the secretary of administration as to the limitations on the amounts of cash to be invested from investment trusts under this subsection in order to maintain the cash balances deemed advisable to meet current annuity, benefit and expense requirements.

(d) Notwithstanding par. (a), assets of the core retirement investment trust which are authorized to be invested in common or preferred stock may, if authorized by rule, be invested as a part of the variable retirement investment trust with that portion of the annual distributions of net gains or losses to the core retirement investment trust from the variable retirement investment trust being credited to the market recognition account.

(4) (a) An employee accumulation reserve, within which a separate account shall be maintained for each participant, shall be maintained within the fund and:

1. Credited with all employee contributions made under s. 40.05 (1), all employer additional contributions made under s. 40.05 (2) (g) 1., all additional contributions under s. 40.05 (2) (g) 2. and all contribution accumulations reestablished under s. 40.63 (10).

2. Credited as of each December 31 with interest on the prior year's closing balance at the effective rate on all employee required contribution accumulations in the variable annuity division, on all employee required contributions in the core annuity division on December 31, 1984, on all employee required contributions in the core annuity division of participants who are not participating employees after December 31, 1984, and on all employee and employer additional contribution accumulations and with interest on the prior year's closing balance at the assumed benefit rate on all employee required contribution accumulations in the core annuity division for participants who are participating employees after December 31, 1984, but who terminated covered employment before December 30, 1999.

2g. Credited as of each December 31, with interest on the prior year's closing balance at the effective rate on all employee required contribution accumulations in the core annuity division for participants who are participating employees on or after December 30, 1999.

2m. Debited, if a participant terminates covered employment on or after January 1, 1990, but before December 30, 1999, and applies for a benefit under s. 40.25 (2), with an amount equal to the amount by which the core annuity division interest credited on or after January 1, 1990, but before December 30, 1999, to employee required contributions, exceeds the interest crediting at an annual rate of 3 percent on each prior year's closing balance.

3. Debited by the amount available in any participant's account for funding a benefit elected by the participant or the participant's beneficiary. When the amount available has been applied to funding the benefit, no further right to the amounts, or to corresponding creditable service and employer contribution accumulations, shall exist other than the right to the annuity or benefit so granted except as provided in s. 40.63 (10).

(b) Whenever a payment under s. 40.25 (4), an annuity or a death benefit is computed, the prior year's closing balance of all employee contribution accumulations and any accounts maintained for individual participants shall be credited with interest for each full month elapsing between the first day of the calendar year and the annuity effective date or the month in which the payment of a benefit under s. 40.25 (4) is approved at one−twelfth of the assumed benefit rate. The interest so credited shall be charged to the interest earnings for the current year and shall be paid out or transferred with the amount to which it was so credited.

(bm) Whenever a payment under s. 40.25 (1) is computed under s. 40.23 (3), the prior year's closing balance of all employee and employer contribution accumulations and any accounts main-

tained for individual participants shall be credited with interest for each full month elapsing between the first day of the calendar year and the month in which the payment under s. 40.25 (1) is approved at one−twelfth of the assumed benefit rate. The interest so credited shall be charged to the interest earnings for the current year and shall be paid out or transferred with the amount to which it was so credited.

(c) Whenever a participant's account is reestablished under s. 40.63 (10), in lieu of interest credits as provided in par. (a), any balances remaining in the account at the end of the calendar year in which reestablished shall be credited with interest at one−twelfth the assumed benefit rate for the year for each full month between the date the account was reestablished and the end of the calendar year.

(5) An employer accumulation reserve shall be maintained within the fund to which, without regard to the identity of the individual employer, shall be:

(a) Credited all employer required contributions.

(b) Credited, as of each December 31, all core annuity division interest not credited to other accounts and reserves under this section.

(c) Debited the aggregate excess of the amount of each single sum benefit or in the case of an annuity the present value of the annuity over the amount equal to the accumulated credits of the participant in the employee accumulation reserve applied to provide for the benefit or annuity.

(d) Credited as of the date of termination of any annuity under s. 40.63 (9) (c) with the excess of the then present value of the terminated annuity over the aggregate amount of credits reestablished in the accounts of the participant.

(e) Credited all amounts waived, released or forfeited under any provision of this chapter.

(6) An annuity reserve shall be maintained within the fund to which shall be transferred amounts equal to the present value as of the date of commencement of annuities granted under this chapter. The reserve shall be increased by investment earnings at the effective rate and shall be reduced by the aggregate amount of annuity payments and death benefits paid with respect to the annuities and by the present value at the date of termination of annuities terminated in accordance with s. 40.08 (3) or 40.63 (9) (c).

(7) The reserves established under subs. (4), (5), and (6) shall be divided both individually and for the purposes of sub. (3) between a core annuity division and a variable annuity division. All required and additional contributions shall be credited to the core annuity division except:

(a) As otherwise elected by a participant prior to April 30, 1980, or on or after January 1, 2001. Any participant who was a participant prior to April 30, 1980, and whose accounts on January 1, 1982, include credits segregated for a variable annuity shall have his or her required and additional contributions made on or after January 1, 1982, credited to the variable annuity division in a manner consistent with the participant's election prior to April 30, 1980, unless prior to January 1, 1982, the participant terminated such election under s. 40.85, 1979 stats. Any participant who elects or has elected to have any of his or her credits segregated for a variable annuity on or after January 1, 2001, shall have 50 percent of his or her required and additional contributions made on or after the date of election credited to the variable annuity division. The department shall by rule provide that any participant who elects or has elected variable participation prior to April 30, 1980, or on or after January 1, 2001, may elect to cancel that variable participation as to future contributions. The department's rules shall permit a participant who elects or has elected to cancel variable participation as to future contributions, or an annuitant, to elect to transfer previous variable contribution accumulations to the core annuity division. A transfer of variable contribution accumulations under this paragraph shall result in the participant receiving the accrued gain or loss from the participant's variable participation. A participant may specify that election to cancel participation in the variable annuity division is conditional. If the participant so specifies the election is effective on the first date on which it may take effect on which the participant:

1. Is an annuitant and the amount of the annuity the participant or member will receive if the election is made effective is greater than or equal to the amount of the annuity the participant or member would have received if the participant or member had not elected variable participation; or

2. Is not an annuitant and the accumulated amount which is to be transferred to the core annuity division is equal to or greater than the amount which would have accumulated if the segregated contributions had been originally credited to the core annuity division.

(b) An election under par. (a) is irrevocable and continuing except a participant or member may make a conditional election unconditional by filing written notice with the department.

(c) Any participant whose required contributions are segregated in any portion to provide for a variable annuity may direct that any part or all of subsequent additional contributions credited to the participant's account be segregated to provide for a variable annuity and may at any time by filing a form prescribed by the department change the portion being segregated for any future additional contributions.

(8) A social security account shall be maintained within the fund to which shall be credited all moneys received from employee and employer OASDHI contributions including any penalties for late transmission of moneys or reports. All disbursements under subch. III shall be charged to this account.

(9) Separate group health, income continuation and life insurance accounts, and additional accounts for any other type of insurance provided under this chapter shall be maintained within the fund, to which shall be credited moneys received from operations of the respective group insurance plans for insurance premiums, as dividend or premium credits arising from the operation of the respective insurance plans and from investment income on any reserves established in the fund for the respective insurance plans. Premium payments to insurers, any insurance benefit to be paid directly by the fund and reimbursements of 3rd parties for benefits paid on behalf of an insurance plan shall be charged to the corresponding account established for that benefit plan. This subsection shall not be construed to prohibit the direct payment of premiums to insurers when appropriate administrative procedures have been established for direct payments.

(9m) The department shall do all of the following:

(a) Maintain a separate account in the fund for each employee−funded reimbursement account plan authorized under subch. VIII.

(b) Credit to the appropriate accounts established under par. (a) money received from employees in connection with each employee−funded reimbursement account plan and income from investment of the reserves in the account.

(c) Charge to the appropriate accounts established under par. (a) payments made to reimburse employee−funded reimbursement account plan providers for payments made to employees under each employee−funded reimbursement account plan under subch. VIII.

(10) An accumulated sick leave conversion account shall be maintained within the fund, to which shall be credited all money received under s. 40.05 (4) (b), (bc), (bf), (bm), (br), and (bw) for health insurance premiums, as dividends or premium credits arising from the operation of health insurance plans and from investment income on any reserves established in the fund for health insurance purposes for retired employees and their surviving dependents, and for the payment of any employer share of OASDHI contributions for sick leave credits used to pay health insurance premiums for dependents who are not tax dependents under the Internal Revenue Code. Premium payments to health insurers authorized in s. 40.05 (4) (b), (bc), (bf), (bm), and (bw) shall be charged to this account. This subsection does not prohibit the direct payment of premiums to insurers when appropriate

administrative procedures have been established for direct payments.

(11) A health insurance premium credit account shall be maintained within the fund, to which shall be credited all moneys received under s. 40.05 (4) (by) for the payment of health insurance premiums, as dividends or premium credits arising from the operation of health insurance plans and from investment income on any reserves established in the fund for health insurance purposes for retired employees and their surviving dependents, and for the payment of any employer share of OASDHI contributions for health insurance premium credits used to pay health insurance premiums for dependents who are not tax dependents under the Internal Revenue Code. Premium payments to health insurers authorized in subch. IX may only be charged to this account after all other health insurance premium credits under s. 40.05 (4) (b), (bc), (bf), (bm) and (bw) are exhausted. This subsection does not prohibit the direct payment of premiums to insurers when appropriate administrative procedures have been established for direct payments.

(12) The department shall establish and maintain a separate account in the fund to which shall be credited all moneys received from employees and employers in connection with health savings accounts established under s. 40.515.

History: 1981 c. 96, 386; 1983 a. 27, 141, 247, 504; 1987 a. 27, 83; 1989 a. 13, 14, 31, 355; 1991 a. 39, 141, 152, 269; 1995 a. 88, 89, 225, 240; 1997 a. 26, 69; 1999 a. 11; 2001 a. 16; 2003 a. 33; 2005 a. 153; 2013 a. 20.

An employee sick leave account cannot be considered an asset of a marital estate subject to division in a divorce action. Preiss v. Preiss, 2000 WI App 185, 238 Wis. 2d 368, 617 N.W.2d 514, 99−3261.

40.05 Contributions and premiums. (1) EMPLOYEE RETIREMENT CONTRIBUTIONS. For Wisconsin retirement system purposes employee contributions on earnings for service credited as creditable service shall be subject to federal annual compensation limits and shall be made as follows:

(a) Subject to par. (b):

1. For each participating employee not otherwise specified, a percentage of each payment of earnings equal to one−half of the total actuarially required contribution rate, as approved by the board under s. 40.03 (1) (e).

2. For each participating employee whose formula rate is determined under s. 40.23 (2m) (e) 2., a percentage of each payment of earnings equal to one−half of the total actuarially required contribution rate, as approved by the board under s. 40.03 (1) (e).

3. For each participating employee whose formula rate is determined under s. 40.23 (2m) (e) 3., the percentage of earnings paid by a participating employee under subd. 1.

4. For each participating employee whose formula rate is determined under s. 40.23 (2m) (e) 4., the percentage of earnings paid by a participating employee under subd. 1.

5. Additional contributions may be made by any participant by deduction from earnings or otherwise or may be provided on behalf of any participant in any calendar year in which the participant has earnings, subject to any limitations imposed on contributions by the Internal Revenue Code, applicable regulations adopted under the Internal Revenue Code and rules of the department.

6. Under the rules promulgated under s. 40.03 (2) (r), additional contributions that are attributable to a death benefit paid under s. 40.73 may be made to the core annuity division by any participant by rollover contribution of a payment or distribution from a pension or annuity qualified under section 401 of the Internal Revenue Code, subject to any limitations imposed on contributions by the Internal Revenue Code, applicable regulations adopted under the Internal Revenue Code, and rules of the department.

(b) 1. Except as otherwise provided in a collective bargaining agreement entered into under subch. IV or V of ch. 111 and except as provided in subd. 2., an employer may not pay, on behalf of a participating employee, any of the contributions required by par. (a). The contributions required by par. (a) shall be made by a reduction in salary and, for tax purposes, shall be considered employer contributions under section 414 (h) (2) of the Internal Revenue Code. A participating employee may not elect to have contributions required by par. (a) paid directly to the employee or make a cash or deferred election with respect to the contributions.

2. a. A municipal employer shall pay, on behalf of a nonrepresented law enforcement or fire fighting managerial employee or a nonrepresented managerial employee described in s. 111.70 (1) (mm) 2., who was initially employed by the municipal employer before July 1, 2011, the same contributions required by par. (a) that are paid by the municipal employer for represented law enforcement or fire fighting personnel or personnel described in s. 111.70 (1) (mm) 2. who were initially employed by the municipal employer before July 1, 2011.

b. An employer shall pay, on behalf of a nonrepresented managerial employee in a position described under s. 40.02 (48) (am) 7. or 8., who was initially employed by the state before July 1, 2011, in a position described under s. 40.02 (48) (am) 7. or 8. the same contributions required by par. (a) that are paid by the employer for represented employees in positions described under s. 40.02 (48) (am) 7. or 8. who were initially employed by the state before July 1, 2011.

c. A municipal employer shall pay, on behalf of a represented law enforcement or fire fighting employee or employee described in s. 111.70 (1) (mm) 2., who was initially employed by the municipal employer before July 1, 2011, and who on or after July 1, 2011, became employed in a nonrepresented law enforcement or fire fighting managerial position or nonrepresented managerial position described in s. 111.70 (1) (mm) 2. with the same municipal employer, or a successor municipal employer in the event of a combined department that is created on or after July 1, 2011, the same contributions required by par. (a) that are paid by the employer for represented law enforcement or fire fighting personnel or personnel described in s. 111.70 (1) (mm) 2. who were initially employed by a municipal employer before July 1, 2011.

(2) EMPLOYER RETIREMENT CONTRIBUTIONS. For Wisconsin retirement system purposes and subject to federal annual compensation limits:

(a) Each participating employer shall make contributions for current service determined as a percentage of the earnings of each participating employee, determined as though all employees of all participating employers were employees of a single employer, but with a separate percentage rate determined for the employee occupational categories specified under s. 40.23 (2m). A separate percentage shall also be determined for subcategories within each category determined by the department to be necessary for equity among employers.

(am) The percentage of earnings under par. (a) shall be determined on the basis of the information available at the time the determinations are made and on the assumptions the actuary recommends and the board approves by dividing the amount determined by subtracting from the then present value of all future benefits to be paid or purchased from the employer accumulation reserve on behalf of the then participants the amount then credited to the reserve for the benefit of the members and the present value of future unfunded prior service liability contributions of the employers under par. (b) by the present value of the prospective future compensation of all participants.

(ar) Participating employers of employees subject to s. 40.65 shall contribute an additional percentage or percentages of those employees' earnings based on the experience rates determined to be appropriate by the board with the advice of the actuary.

(b) Contributions shall be made by each participating employer for unfunded prior service liability in a percentage of the earnings of each participating employee. A separate percentage rate shall be determined for the employee occupational categories under s. 40.23 (2m) as of the employer's effective date of participation. The rates shall be sufficient to amortize as a level percent of payroll over a period of 30 years from the later of that date or

January 1, 1986, the unfunded prior service liability for the categories of employees of each employer determined under s. 40.05 (2) (b), 1981 stats., increased to reflect any creditable prior service granted on or after January 1, 1986, increased to reflect the effect of 1983 Wisconsin Act 141, increased at the end of each calendar year after January 1, 1986, by interest at the assumed rate on the unpaid balance at the end of the year and adjusted under pars. (bu), (bv) and (bw).

(bg) Contributions of amounts under par. (b) may be made in advance to reduce an employer's existing unfunded prior service liability.

(bm) Contributions under par. (b) for each category of employee shall be made until full payment of that employer's unfunded prior service liability for all categories is made.

(br) The contribution under par. (b) by an employer in any calendar year before full payment of the unfunded prior service liability determined under par. (bm) may not be less than the dollar amount determined to be necessary in the first calendar year of the amortization schedule established by par. (b).

(bt) The department may reallocate prior service liability from one employer to another and adjust as necessary the contribution rates established under par. (b) to reflect transfers of responsibilities and employees among different employers.

(bu) The employer contribution rate determined under par. (b) for each employer shall be adjusted, if necessary, to reflect the added prior service liability of paying additional joint and survivor death benefits to beneficiaries of participating employees as a result of 1997 Wisconsin Act 58 and that rate shall be sufficient to amortize the unfunded prior service liability of the employers over the remainder of the 40−year amortization period under s. 40.05 (2) (b), 2005 stats.

(bv) The employer contribution rate determined under par. (b) for participating employees who served in the U.S. maritime service shall be adjusted to reflect the cost of granting creditable service under s. 40.02 (15) (a) 7. and that rate shall be sufficient to amortize the unfunded prior service liability of the employers over the remainder of the 40−year amortization period under s. 40.05 (2) (b), 2005 stats.

(bw) The employer contribution rate determined under par. (b) for the University of Wisconsin System shall be adjusted to reflect the cost of granting creditable service under s. 40.285 (2) (e) and that rate shall be sufficient to amortize the unfunded prior service liability of the employers over the remainder of the 40−year amortization period under s. 40.05 (2) (b), 2005 stats.

(bz) The employer contribution rate determined under par. (b) for the department of administration shall be adjusted to reflect the cost of granting creditable service under s. 40.02 (17) (gm) and that rate shall be sufficient to amortize the unfunded prior service liability of the department of administration over the remainder of the 40−year amortization period under s. 40.05 (2) (b), 2005 stats.

(c) The percentage rates determined under this subsection shall become effective as of the beginning of the calendar year to which they are applicable and shall remain in effect during the calendar year, except that the secretary, upon the written certification of the actuary, may change any percentage determined under par. (b) during any calendar year for the purpose of reflecting any reduced obligation which results from any payment of advance contributions.

(cm) The department may adjust the unfunded prior service liability balance of the Wisconsin retirement system under par. (b) and of each employer that makes contributions under par. (b) to reflect any changes in the assumed rate and the assumption for across−the−board salary increases specified in s. 40.02 (7) and any other factor specified by the actuary if the actuary recommends and the board approves the changes or if otherwise provided by law.

(d) The amount of each employer's monthly contribution shall be the sum of the amounts determined by applying the proper percentage rates as determined in accordance with pars. (a) and (b) to the total of all earnings paid to participating employees on each payday.

(f) Whenever the existence of any participating employer is terminated because of consolidation or for any other reason, the employer who thereafter has responsibility for the governmental functions of the previous employer shall be liable for all contributions payable by the previous employer in the following manner:

1. If the territory of the previous employer is attached to 2 or more employers, the total liability of the previous employer shall be allocated to the new employers in proportion to the equalized valuation of each area so attached.

2. Whenever the existence of any participating employer, who was an instrumentality of 2 or more employers, is terminated for any reason and there is no territory to be divided, the liability for contributions of the previous employer shall be divided between the sponsoring employers in the same proportion as the net assets of the terminating employer are divided.

3. If the department determines that it is not feasible to allocate the liability as provided in subd. 1. or 2., then the liability shall be allocated in proportion to the equalized valuation of the remaining employers.

4. The amount of the allocations to the respective employers shall be certified by the department to each employer.

5. If the employer to whom such an allocation is made is or becomes a participating employer the allocations so certified shall be added to the liability otherwise determined for the employer and the amortization schedule provided for under par. (b) adjusted so that the required annual amount shall approximate the sum of the annual amounts otherwise required.

6. If the employer who becomes responsible for any part of the liability of the previous employer is not a participating employer the contributions required to liquidate the allocated liability shall be made by the successor employer in equal quarterly payments sufficient to liquidate the allocated liability over the remainder of the amortization period.

7. If an allocation based on equalized valuation is required by this paragraph, the equalized valuations used shall be the valuation determined for the calendar year immediately preceding the calendar year in which the allocation is required to be made by this paragraph.

8. If it is not possible to apply the procedures under this paragraph, the terminating employer and any successor employer shall immediately pay the full outstanding prior service liability balance unless an agreement for a different procedure is approved by the department.

(g) 1. A participating employer may make contributions as provided in its compensation agreements for any participating employee in addition to the employer contributions required by this subsection. The additional employer contributions made under this paragraph shall be available for all benefit purposes and shall be administered and invested on the same basis as employee additional contributions made under sub. (1) (a) 5., except that ss. 40.24 (1) (f), 40.25 (4), and 40.285 (2) (a) 1. c. do not apply to additional employer contributions made under this paragraph.

2. Under the rules promulgated under s. 40.03 (2) (r), a participant may, as a payout option for the deferred compensation plan established under subch. VII, elect to have the entire balance in the participant's account under subch. VII treated as an additional contribution to the core annuity division, subject to any limitations imposed on contributions by the Internal Revenue Code, applicable regulations adopted under the Internal Revenue Code, and rules of the department. Additional contributions under this subdivision shall be available for all benefit purposes and shall be administered and invested on the same basis as employee additional contributions, except that ss. 40.24 (1) (f) and 40.25 (4) do not apply to additional contributions under this subdivision and s.

40.26 does not apply to an annuity received from additional contributions under this subdivision.

(i) If an annuity is calculated under s. 40.02 (42) (f), 1987 stats., the employer shall pay to the department the difference, as determined by the department, between the actuarial cost of the annuity which would have been paid if the employer had not elected under s. 42.245 (2) (bm), 1979 stats., or s. 42.78 (2) (bm), 1979 stats., or s. 40.02 (42) (f) 2., 1987 stats., and the actual cost of the annuity payable. The amount payable shall be paid to the department in 3 equal annual payments, plus interest at the effective rate unless the employer pays the full amount due. Each annual payment is due and shall be included with the first payment made under s. 40.06 (1) in each fiscal year after the annuity effective date. The amount so paid shall be credited as employer required contributions.

(2r) ANNUAL CONTRIBUTIONS LIMITATIONS; DISQUALIFICATION PROCEDURE. (a) Contributions made under this section are subject to the limitations under s. 40.32 and the Internal Revenue Code.

(b) If a participant in the Wisconsin retirement system also participates in a different retirement plan offered by an employer that is subject to section 401 of the Internal Revenue Code and the internal revenue service seeks to disqualify one or more of the plans because the aggregate contributions to the plans exceed the contribution limits under section 415 of the Internal Revenue Code, the internal revenue service, if it permits state law to determine the order of disqualification of such retirement plans, shall disqualify the retirement plans in the following order:

1. Retirement plans offered and administered by the employer.

2. Retirement plans offered by the employer, but administered by the department.

3. The Wisconsin retirement system.

(3) SOCIAL SECURITY CONTRIBUTIONS. Each employer included under an agreement made under subch. III shall make the contributions required under federal regulations and shall also withhold from the wages of each of its employees who are covered by the state−federal agreement provided for by subch. III the amount required to be withheld under federal regulations. The state shall be liable for all remittances due from employers in conformity with agreements under subch. III and shall make payment of all sums which are due under this subsection and become delinquent.

(4) HEALTH INSURANCE PREMIUMS. (a) 1. For health insurance, each insured employee and insured retired employee shall contribute the balance of the required premium amounts after applying required employer contributions, if any.

2. For an insured employee who is an eligible employee under s. 40.02 (25) (a) 2. or (b) 1m. or 2c., the employer shall pay required employer contributions toward the health insurance premium of the insured employee beginning on the date on which the employee becomes insured. For an insured state employee who is currently employed, but who is not a limited term appointment under s. 230.26 or an eligible employee under s. 40.02 (25) (a) 2. or (b) 1m. or 2c., the employer shall pay required employer contributions toward the health insurance premium of the insured employee beginning on the first day of the 3rd month beginning after the date on which the employee begins employment with the state, not including any leave of absence. For an insured employee who has a limited term appointment under s. 230.26, the employer shall pay required employer contributions toward the health insurance premium of the insured employee beginning on the first day of the 7th month beginning after the date on which the employee first becomes a participating employee.

3. The employer shall continue to pay required employer contributions toward the health insurance premium of an insured employee while the insured employee is on a leave of absence, as follows:

a. Only for the first 3 months of the leave of absence, except as provided in subd. 3. b.

b. Unless otherwise provided in the compensation plan under s. 230.12, for the entire leave of absence if the insured employee is receiving temporary disability compensation under s. 102.43.

(ad) For health insurance, each insured retired employee who elects coverage under s. 40.51 (10), (10m) or (16) shall pay the entire amount of the required premiums, except as provided in par. (bc).

(ag) Except as otherwise provided in a collective bargaining agreement under subch. V of ch. 111, the employer shall pay for its currently employed insured employees:

1. For insured part−time employees other than employees specified in s. 40.02 (25) (b) 2., including those in project positions as defined in s. 230.27 (1), who are appointed to work less than 1,044 hours per year, an amount determined annually by the director of the office of state employment relations under par. (ah).

2. For eligible employees not specified in subd. 1. and s. 40.02 (25) (b) 2., an amount not more than 88 percent of the average premium cost of plans offered in each tier under s. 40.51 (6), as determined annually by the director of the office of state employment relations under par. (ah).

(ah) 1. Annually, the director of the office of state employment relations shall establish the amount that employees are required to pay for health insurance premiums in accordance with the maximum employer payments under par. (ag).

2. For purposes of establishing the amount that employees are required to pay for health insurance premiums, if a tier under s. 40.51 (6) contains no health insurance plans, but that tier is used to establish the premium amounts for employees who work and reside outside of the state, the amount these employees are required to pay shall be based on the premium contribution amount for that tier in the prior year, adjusted by the average percentage change of the premium contribution amount of the other tiers from the prior year.

3. A craft employee shall pay 100 percent of health insurance premiums, unless otherwise determined by the director.

4. Annually, the director shall determine the amount of contributions, if any, that the state must contribute into an employee's health savings account under s. 40.515 and the amount that employees are required to pay for health insurance premiums for a high−deductible health plan under s. 40.515.

(at) An employer shall pay, on behalf of a nonrepresented managerial employee in a position described under s. 40.02 (48) (am) 7. or 8., who was initially employed by the state before July 1, 2011, the same premium contribution rates required by par. (ag) that are paid by the employer for represented employees in positions described under s. 40.02 (48) (am) 7. or 8. who were initially employed by the state before July 1, 2011.

(b) Except as provided under pars. (bc) and (bp), accumulated unused sick leave under ss. 13.121 (4), 36.30, 230.35 (2), 233.10, 238.04 (8), and 757.02 (5) and subch. V of ch. 111 of any eligible employee shall, at the time of death, upon qualifying for an immediate annuity or for a lump sum payment under s. 40.25 (1) or upon termination of creditable service and qualifying as an eligible employee under s. 40.02 (25) (b) 6. or 10., be converted, at the employee's highest basic pay rate he or she received while employed by the state, to credits for payment of health insurance premiums on behalf of the employee or the employee's surviving insured dependents. Any supplemental compensation that is paid to a state employee who is classified under the state classified civil service as a teacher, teacher supervisor, or education director for the employee's completion of educational courses that have been approved by the employee's employer is considered as part of the employee's basic pay for purposes of this paragraph. The full premium for any eligible employee who is insured at the time of retirement, or for the surviving insured dependents of an eligible employee who is deceased, shall be deducted from the credits until the credits are exhausted and paid from the account under s. 40.04 (10), and then deducted from annuity payments, if the annuity is sufficient. The department shall provide for the direct payment of

premiums by the insured to the insurer if the premium to be withheld exceeds the annuity payment. Upon conversion of an employee's unused sick leave to credits under this paragraph or par. (bf), the employee or, if the employee is deceased, the employee's surviving insured dependents may initiate deductions from those credits or may elect to delay initiation of deductions from those credits, but only if the employee or surviving insured dependents are covered by a comparable health insurance plan or policy during the period beginning on the date of the conversion and ending on the date on which the employee or surviving insured dependents later elect to initiate deductions from those credits. If an employee or an employee's surviving insured dependents elect to delay initiation of deductions from those credits, an employee or the employee's surviving insured dependents may only later elect to initiate deductions from those credits during the annual enrollment period under par. (be). A health insurance plan or policy is considered comparable if it provides hospital and medical benefits that are substantially equivalent to the standard health insurance plan established under s. 40.52 (1).

NOTE: Par. (b) is shown as affected by 2011 Wis. Acts 10 and 32 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(bc) The accumulated unused sick leave of an eligible employee under s. 40.02 (25) (b) 6e. or 6g. shall be converted to credits for the payment of health insurance premiums on behalf of the employee on the date on which the department receives the employee's application for a retirement annuity or for lump sum payment under s. 40.25 (1). The employee's unused sick leave shall be converted at the eligible employee's highest basic pay rate he or she received while employed by the state. The full premium for the employee, or for the surviving insured dependents of the employee if the employee later becomes deceased, shall be deducted from the credits until the credits are exhausted and paid from the account under s. 40.04 (10), and then deducted from annuity payments, if the annuity is sufficient. The department shall provide for the direct payment of premiums by the insured to the insurer if the premium to be withheld exceeds the annuity payment.

(be) The department shall establish an annual enrollment period during which an employee or, if the employee is deceased, an employee's surviving insured dependents may elect to initiate or delay continuation of deductions from the employee's sick leave credits under par. (b). An employee or surviving insured dependent may elect to continue or delay continuation of such deductions any number of times. If an employee or surviving insured dependent has initiated the deductions but later elects to delay continuation of the deductions, the employee or surviving insured dependent must be covered by a comparable health insurance plan or policy during the period beginning on the date on which the employee or surviving insured dependent delays continuation of the deductions and ending on the date on which the employee or surviving insured dependent later elects to continue the deductions. A health insurance plan or policy is considered comparable if it provides hospital and medical benefits that are substantially equivalent to the standard health insurance plan established under s. 40.52 (1).

(bf) Any eligible employee who was granted credit under s. 230.35 (1) (gm) for service as a national guard technician, who, on December 31, 1965, had accumulated unused sick leave that was based on service performed in this state as a national guard technician before January 1, 1966, and who is a participating employee or terminated all creditable service after June 30, 1972, or, if the eligible employee is deceased, the surviving insured dependents of the eligible employee, may have that accumulated unused sick leave converted to credits for the payment of health insurance premiums on behalf of the eligible employee or the surviving insured dependents if, not later than November 30, 1996, the eligible employee or the surviving insured dependents submit to the department, on a form provided by the department, an application for the conversion. The application shall include evidence satisfactory to the department to establish the applicant's rights under this paragraph and the amount of the accumulated unused sick leave that is eligible for the conversion. The accumulated unused sick leave shall be converted under this paragraph, at the eligible employee's highest basic pay rate he or she received while employed by the state, on the date of conversion specified in par. (b) or on the last day of the 2nd month beginning after the date on which the department receives the application under this paragraph, whichever is later. Deductions from those credits, elections to delay initiation of those deductions and premium payments shall be made as provided in par. (b).

(bm) Except as provided under par. (bp), accumulated unused sick leave under ss. 36.30 and 230.35 (2), 233.10, or 238.04 (8) of any eligible employee shall, upon request of the employee at the time the employee is subject to layoff under s. 40.02 (40), be converted at the employee's highest basic pay rate he or she received while employed by the state to credits for payment of health insurance premiums on behalf of the employee. Any supplemental compensation that is paid to a state employee who is classified under the state classified civil service as a teacher, teacher supervisor or education director for the employee's completion of educational courses that have been approved by the employee's employer is considered as part of the employee's basic pay for purposes of this paragraph. The full amount of the required employee contribution for any eligible employee who is insured at the time of the layoff shall be deducted from the credits until the credits are exhausted, the employee is reemployed, or 5 years have elapsed from the date of layoff, whichever occurs first.

(bp) 1. Except as provided in subds. 2. and 3., for sick leave which accumulates beginning on August 1, 1987, conversion under par. (b) or (bm) of accumulated unused sick leave under s. 36.30 to credits for payment of health insurance premiums shall be limited to the annual amounts of sick leave specified in this subdivision. For faculty and academic staff personnel who are appointed to work 52 weeks per year, conversion is limited to 8.5 days of sick leave per year. For faculty and academic staff personnel who are appointed to work 39 weeks per year, conversion is limited to 6.4 days of sick leave per year. For faculty and academic staff personnel not otherwise specified, conversion is limited to a number of days of sick leave per year to be determined by the secretary by rule, in proportion to the number of weeks per year appointed to work.

2. The limits on conversion of accumulated unused sick leave which are specified under subd. 1. may be waived for nonteaching faculty who are appointed to work 52 weeks per year and nonteaching academic staff personnel if the secretary of administration determines that a sick leave accounting system comparable to the system used by the state for employees in the classified service is in effect at the institution, as defined in s. 36.05 (9), and if the institution regularly reports on the operation of its sick leave accounting system to the board of regents of the University of Wisconsin System.

3. The limits on conversion of accumulated unused sick leave which are specified under subd. 1. may be waived for teaching faculty or teaching academic staff at any institution, as defined in s. 36.05 (9), if the secretary of administration determines all of the following:

a. That administrative procedures for the crediting and use of earned sick leave for teaching faculty and teaching academic staff on a standard comparable to a scheduled 40−hour work week are in operation at the institution.

b. That a sick leave accounting system for teaching faculty and teaching academic staff comparable to the system used by state employees in the classified service is in effect at the institution.

c. That the institution regularly reports on the operation of its sick leave accounting system to the board of regents of the University of Wisconsin System.

(br) 1. Employers shall pay contributions that shall be sufficient to pay for the present value of the present and future benefits

authorized under pars. (b), (bc) and (bw). Subject to subd. 2., the board shall annually determine the contribution rate upon certification by the actuary of the department. The contribution rates determined under this paragraph shall become effective on January 1 of the calendar year in which they are applicable and shall remain in effect during that year.

2. Beginning in 1985, the initial contribution rate determined under subd. 1. may not exceed the employer's costs under pars. (b) and (bc) for the previous calendar year by more than 0.2% of covered payroll. Each subsequent contribution rate determined under subd. 1. may not exceed the employer's costs under this paragraph for the previous calendar year by more than 0.2% of covered payroll.

(bw) On converting accumulated unused sick leave to credits for the payment of health insurance premiums under par. (b), the department shall add additional credits, calculated in the same manner as are credits under par. (b), that are based on a state employee's accumulated sabbatical leave or earned vacation leave from the state employee's last year of service prior to retirement, or both. The department shall apply the credits awarded under this paragraph for the payment of health insurance premiums only after the credits awarded under par. (b) are exhausted. This paragraph applies only to state employees who are eligible for accumulated unused sick leave conversion under par. (b) and who are entitled to the benefits under this paragraph pursuant to a collective bargaining agreement under subch. V of ch. 111.

(by) 1. Employers shall pay contributions that are sufficient to pay for the present value of the present and future benefits authorized under subch. IX for all employees eligible to receive the benefits under that subchapter, other than state employees who are eligible to receive the benefits as a result of layoff. Except as provided in subd. 2., the board shall annually determine the contribution rate upon certification by the actuary of the department. The contribution rates determined under this paragraph shall become effective on January 1 of the calendar year in which they are applicable and shall remain in effect during that year.

2. Beginning on November 25, 1995, and ending on June 30, 1997, each employer shall pay contributions equal to the dollar value of the credits awarded to its retired employees under subch. IX, as determined and directed by the department. The board, upon certification by the actuary, shall determine the contribution rate to be paid by employers for the period beginning on July 1, 1997, and ending on December 31, 1997. In determining the contribution rate for this period, the board shall consider any remaining unfunded present and future liability for any benefits arising under subch. IX before July 1, 1997.

(c) The employer shall contribute toward the payment of premiums for the plan established under s. 40.52 (3) the amount established under s. 40.52 (3).

(d) For insurance premium withholding purposes, an insured employee on more than one payroll shall have a premium withheld only under the department or agency paying the greater portion of the employee's earnings.

(4g) PAYMENT OF HEALTH INSURANCE PREMIUMS FOR STATE EMPLOYEES ACTIVATED FOR MILITARY DUTY IN THE U.S. ARMED FORCES. (a) In this subsection, "eligible employee" means a state employee to whom all of the following apply:

1. On or after April 15, 1999, is activated to serve on military duty in the U.S. armed forces, other than for training purposes.

2. On the date on which he or she is activated to serve on active duty in the U.S. armed forces, is insured and is receiving employer contributions for health insurance premiums under sub. (4).

3. On the date on which he or she is activated, is either a member of a national guard or a member of a reserve component of the U.S. armed forces or is recalled to active military duty from inactive reserve status.

4. Has received a military leave of absence under s. 230.32 (3) (a) or 230.35 (3), under a collective bargaining agreement under subch. V of ch. 111 or under rules promulgated by the director of the office of state employment relations or is eligible for reemployment with the state under s. 321.64 after completion of his or her service in the U.S. armed forces.

(b) 1. Notwithstanding sub. (4) and s. 40.51 (2), an eligible employee who is not insured after the date on which he or she is activated to serve on active duty in the U.S. armed forces may have his or her health insurance reinstated during the period in which he or she is serving on active duty in the U.S. armed forces without furnishing evidence of insurability satisfactory to the insurer and may receive employer contributions under par. (c) if the eligible employee or the eligible employee's designated representative makes a written election to have his or her health insurance reinstated and to receive employer contributions under par. (c) and pays any employee contributions that are required to be paid under sub. (4) toward the premium payments.

2. Notwithstanding sub. (4), an eligible employee who is insured after the date on which he or she is activated to serve on active duty in the U.S. armed forces may receive employer contributions under par. (c) during the period in which he or she is serving on active duty in the U.S. armed forces if the eligible employee or the eligible employee's designated representative makes a written election to receive employer contributions under par. (c) and pays any employee contributions that are required to be paid under sub. (4) toward the premium payments.

3. An eligible employee or his or her designated representative shall make an election under subd. 1. or 2. on a form provided by his or her employer not later than 60 days after the date on which the eligible employee begins to serve on active duty for the U.S. armed forces.

4. The group insurance board shall include the period under subd. 3. in any applicable enrollment period under the state health insurance plan for eligible employees who are not insured.

(c) Notwithstanding sub. (4) and s. 40.51 (2), the employer of an eligible employee who makes or whose designated representative makes an election under par. (b) shall pay employer contributions toward the premium payments of the eligible employee during the period in which the eligible employee is serving on active duty for the U.S. armed forces as follows:

1. The amount of the employer contributions paid toward each premium payment shall be equal to the amount of the employer contributions under sub. (4) that would have been paid toward the premium payment if the eligible employee had continued employment with the employer instead of serving on active duty for the U.S. armed forces.

2. If the eligible employee has been insured during the period beginning on the date on which the eligible employee left employment with the employer to serve on active duty for the U.S. armed forces and ending on the date on which the eligible employee or the eligible employee's designated representative makes the election under par. (b) but the eligible employee did not receive employer contributions under sub. (4) toward any of the premium payments during that period, the employer shall pay to the eligible employee in a lump sum an amount equal to the employer contributions that would have been paid toward those premium payments under sub. (4) if the eligible employee had continued employment with the employer during that period instead of serving on active duty for the U.S. armed forces.

(4m) LONG−TERM CARE INSURANCE PREMIUMS. For any long−term care insurance policies provided under s. 40.55, the entire premium shall be paid as a deduction under s. 40.06 (1) (a) from an employee's earnings or a state annuitant's annuity, except that if an eligible employee is not on a state payroll or receives earnings that are insufficient to cover premium payments or a state annuitant receives an annuity that is not sufficient to cover premium payments, the eligible employee or state annuitant shall make premium payments directly to the insurer. There shall be no employer contributions.

(4r) PAYMENT OF CERTAIN INSURANCE PREMIUMS. If an annuitant is an eligible retired public safety officer and receives health care coverage or long−term care coverage under a plan other than one offered under subch. IV, and if the annuitant so elects by providing written notice to the department, the premium shall be paid as a deduction under s. 40.06 (1) (a) from the annuitant's annuity. If the annuitant receives an annuity that is not sufficient to cover premium payments, the annuitant shall make premium payments directly to the insurer. The department shall establish procedures to permit an annuitant who is an eligible retired public safety officer to elect to have his or her premium paid as a deduction under s. 40.06 (1) (a) from his or her annuity. The annuitant shall provide the department with all necessary information to permit the department to make the payment in a timely manner.

(5) INCOME CONTINUATION INSURANCE PREMIUMS. For the income continuation insurance provided under subch. V the employee shall pay the amount remaining after the employer has contributed the following or, if different, the amount determined under a collective bargaining agreement under subch. V of ch. 111 or s. 230.12 or 233.10:

(a) For teachers in the unclassified service of the state employed by the board of regents of the university, no contribution if the teacher has less than one year of state creditable service and an amount equal to the gross premium for coverage subject to a 130−day waiting period if the teacher has one year or more of state creditable service.

(b) Except as provided in par. (a), for all insured employees:

1. Sixty−seven percent of the gross premium for any insured employee who accumulates 10 days of sick leave or more each year, 77% of the gross premium for any insured employee who has accumulated at least 65 days of sick leave, 85% of the gross premium if an insured employee has accumulated at least 91 days of sick leave and 100% of the gross premium if an insured employee has accumulated over 130 days of sick leave.

3. Any insured employee for whom an employer contribution of 77% or more of the premium was paid under subd. 1. shall continue to be eligible for an employer contribution of that same percentage of the premiums until the employee is eligible for a higher level even if, as a result of disability or illness, the accumulation is subsequently reduced.

4. The accrual and crediting of sick leave shall be determined in accordance with ss. 13.121 (4), 36.30, 230.35 (2), 233.10, 238.04 (8), and 757.02 (5) and subch. V of ch. 111.

NOTE: Subd. 4. is shown as affected by 2011 Wis. Acts 10 and 32 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(6) LIFE INSURANCE PREMIUMS. For the life insurance coverage provided under subch. VI:

(a) Except as otherwise provided in accordance with a collective bargaining agreement under subch. V of ch. 111 or s. 230.12 or 233.10, each insured employee under the age of 70 and annuitant under the age of 65 shall pay for group life insurance coverage a sum, approved by the group insurance board, which shall not exceed 60 cents monthly for each $1,000 of group life insurance, based upon the last amount of insurance in force during the month for which earnings are paid. The equivalent premium may be fixed by the group insurance board if the annual compensation is paid in other than 12 monthly installments.

(b) Beginning with the month in which an insured employee attains age 70 or an annuitant attains the age of 65, no withholdings from the employee's earnings or annuity may be made under this subsection.

(c) Beginning with the month in which an insured employee is retired on a disability annuity, and continuing as long as the annuity is not terminated, no further premium shall be required under this subsection for the retired insured employee. No premium is required under this subsection for an insured employee during a period of disability during which premiums are waived under the insurance contract.

(d) Except as provided under par. (c), the premium payment for any insured employee whose eligibility for continued coverage is based on s. 40.72 (4) shall be deducted from the appropriate annuity payroll as authorized by s. 40.08 (2), if the annuity is sufficient, or the employee may make direct payments to continue insurance coverage or the employee's employer may pay, on behalf of the employee, the premium payment according to procedures established by the department.

(e) Each employer shall contribute toward the payment of premiums under this section an amount which, together with the employee's contribution, will equal the gross monthly premium determined by the group insurance board for the employee's insurance and any employer may pay for all employees any part or all of the premium required to be paid by employees under par. (a). If an employer elects to pay the entire premium for all of its employees for one or more of the types of insurance coverage established under s. 40.03 (6) (b) or 40.70 (3), a resolution shall be filed with the department. Applications shall be filed and premiums paid for any eligible employees, including those not previously insured under coverage selected by the employer, effective the first day of the month following receipt of the resolution or the effective date of the election, whichever is later, and full payment of premiums for the employees shall be due the department pursuant to the contractual requirements between the group insurance board and the insurer. If an employer elects to pay the entire premium for a portion of its employees, notice is not required and previously filed cancellations are not revoked.

(7) OTHER INSURANCE PLANS PREMIUMS. For any group insurance plans provided under s. 40.03 (6) (b) the entire premium shall be paid by employee contributions and there shall be no employer contributions unless the employer specifically provides otherwise.

(8) EMPLOYEE−FUNDED REIMBURSEMENT ACCOUNT PLAN FEE. For the administration and implementation of employee−funded reimbursement account plans authorized under subch. VIII, each state agency with employees eligible to participate in an employee−funded reimbursement account plan shall contribute the fee charged under s. 40.875 (1) (a).

History: 1981 c. 96, 274, 278, 386; 1983 a. 9 s. 6; 1983 a. 27, 30; 1983 a. 46 ss. 2 to 4, 7; 1983 a. 140; 1983 a. 141 ss. 7 to 12, 20; 1983 a. 290, 504, 538; 1985 a. 29, 119, 135, 225; 1987 a. 27, 83, 107, 309, 356, 363; 1987 a. 403 s. 256; 1989 a. 13, 14, 31, 119, 122, 166, 182, 189, 230, 336, 355, 359; 1991 a. 32, 39, 107, 113, 141, 152, 189, 269; 1995 a. 27, 81, 88, 89, 240, 302; 1997 a. 35, 58, 149; 1999 a. 9, 11, 13, 104; 2001 a. 16; 2003 a. 33 ss. 1004 to 1015, 9160; 2003 a. 69, 117; 2005 a. 22, 153; 2007 a. 20, 131, 200, 226; 2009 a. 15, 28; 2011 a. 10, 32; 2013 a. 20; s. 13.92 (2) (i).

A union request that the county make pension contributions for jailers, equal in amount to those for its "protective occupation participants" under s. 40.02 (48) did not require reclassification of the jailers as "POPS," is allowed under sub. (2) (g) 1., and is a mandatory subject of bargaining under s. 111.70 (1) (a). County of LaCrosse v. WERC, 180 Wis. 2d 100, 508 N.W.2d 9 (1993).

40.06 Reports and payments. (1) (a) Except as otherwise provided by rule or statute, the employee contributions and premium payments specified in s. 40.05 shall be deducted from the earnings of each employee and from the annuity, if sufficient, of each insured retired employee and transmitted to the department, or an agent specified by the department, in the manner and within the time limit fixed by the department together with the required employer contributions and premium payments and reports in the form specified by the department. Notwithstanding any other law, rule or regulation, the payment of earnings less the required deductions shall be a complete discharge of all claims for service rendered during the period covered by the payment.

(b) Each employer shall withhold the amounts specified from any payment of earnings to an employee whose status as a participating or insured employee has not yet been determined under s. 40.22 (1) and shall refund the amount withheld directly to the employee if it is subsequently determined that the employee does not qualify as a participating or insured employee.

(c) For state agencies, contributions paid by employers shall be made from the respective funds from which the salaries are paid to the employee for whom the contributions are being made. The

heads of the respective state agencies shall, at the time that salary deductions in accordance with par. (a) are sent to the department, determine the amount of the corresponding employer contributions, indicate the amount of the contribution on the report submitted to the department and provide for payment to the department, by any method approved by the department, from the appropriate state funds of the amounts payable. If payment is by voucher, the department shall transmit the voucher to the department of administration. The department of administration shall approve vouchers for payment of contributions due under s. 40.05 within 5 working days, s. 16.53 (10) notwithstanding, and the state treasurer shall immediately issue a check, share draft or other draft to the department of employee trust funds for the amount of the voucher.

(d) Each participating employer and, subject to par. (dm), each state agency shall notify the department in the manner and at the time prescribed by the department, of the names of all participating employees classified as protective occupation participants determined in accordance with s. 40.02 (48) or classified as teacher participants in accordance with s. 40.02 (55) or other classification as specified by the department.

(dm) Each determination by a department head regarding the classification of a state employee as a protective occupation participant shall be reviewed by the office of state employment relations. A state employee's name may not be certified to the fund as a protective occupation participant under par. (d) until the office of state employment relations approves the determination.

(e) 1. An employee may appeal a determination under par. (d), including a determination that the employee is not a participating employee, to the board by filing a written appeal with the board. An appeal under this paragraph does not apply to any service rendered more than 7 years prior to the date on which the appeal is received by the board. The board shall consider the appeal and mail a report of its decision to the employee and the participating employer or state agency.

3. A determination of an employee's status under par. (d) made after an appeal is decided under this paragraph shall remain in effect until receipt by the department of a notification indicating a classification for the employee different from the determination. The employee may appeal that subsequent determination by filing an appeal as required under this paragraph.

(em) The department may review any determination by a participating employer to classify an employee who is not a state employee as a protective occupation participant and may appeal the determination to the board by filing a written notice of appeal with the board. The determination by the employer shall remain in effect until the department receives a written notification from the board indicating a classification for the employee that is different from the employer's determination.

(2) (a) If any employer fails to transmit to the department any report required by law or by rule before the end of the calendar month following the date when the report is due, the department shall prepare the report and submit to the employer a statement of the expenses incurred in securing the report, including the value of the personal services rendered in its preparation. The department shall file duplicates of the statement with the department of administration.

(b) Within 30 days after the receipt of the statement under par. (a) by the employer the statement shall be audited as other claims against the employer are audited and shall be paid into the state treasury and credited to the appropriation under s. 20.515 (1) (w).

(c) If the employer defaults on payment of the amount specified in the statement under par. (a), the amount shall become a special charge against the employer and shall be included in the next certification of state taxes and charges and shall be collected, with interest as provided in sub. (3) from the date the statement was submitted to the employer, as other charges are certified and collected, or collected as provided under sub. (4). When the amount and the interest are collected, they shall be credited to the appropriation under s. 20.515 (1) (w).

(3) Interest shall be charged on accounts receivable from any employer if the remittance and any corresponding report are not received by the department in the manner and within the time limit fixed by rule or statute at the rate of 0.04% for each day, from the due date to the date received by the department with a minimum charge of $3, and the interest or minimum charge shall be paid immediately to the department. If the amount is not paid within 30 days after it is payable, the amount shall be collected as provided under sub. (4).

(4) (a) Whenever any employer, other than the state, fails to pay to the department any amount due, the department shall certify the amount or the estimated amount to the department of administration which shall withhold the amount or the estimated amount from the next apportionment of state aids or taxes of any kind payable to the employer or, if so directed by the department, collect the amount as provided in sub. (2) (c) and shall pay the amount so withheld or collected to the department. When the exact amount due is determined and the department receives a sum in excess of the exact amount, the department shall pay the excess amount to the employer from whose aid the excess was withheld.

(b) Whenever any amount is payable by a department or agency of the state, the department shall certify the amount payable with an explanation of the charge, together with a voucher in payment for the amount to the department of administration which shall immediately approve the voucher and within no more than 5 days, notwithstanding s. 16.53 (10), make payment from the appropriation of the department or agency which failed to transmit the payment on time.

(5) Whenever it is determined that contributions and premiums were not paid in the year when due, the amount to be paid shall be determined at the employee and employer contribution or premium rates in effect when the payment should have been made and increased by interest at the effective rate which would have been credited if the amount had been paid and deposited in the accumulation reserves of the core annuity division under s. 40.04 (4) and (5) at the time the contributions or premiums were due. The employer shall collect from the employee the amount which the employee would have paid if the amounts had been paid when due, plus the corresponding interest, and shall transmit the amount collected to the department together with the balance of the amount to be paid, or the employer may elect to pay part or all of the employee amounts.

(6) Notwithstanding ss. 16.52 (2) and 40.02 (22) (a), fiscal year coding adjustments may be made for contributions received after August 1 for earnings paid for services rendered in the previous fiscal year, so that the amount of the contributions received and earnings paid are substantially reflected in the annual earnings period to which they apply.

(7) Within 30 days after receipt of a qualified domestic relations order or of a written request from the department pursuant to a qualified domestic relations order, a participating employer shall submit to the department a report, in the form specified by the department, of the earnings, service and contributions of the participant named in the order. The report shall include all earnings paid to and all service and contributions of the participant through the day before the decree date that have not previously been reported to the department.

History: 1981 c. 96, 386; 1983 a. 290, 368; 1987 a. 309; 1989 a. 13, 31, 166, 218; 1991 a. 152, 315; 1995 a. 27; 1999 a. 83; 2003 a. 33 ss. 1016, 9160; 2005 a. 153.

The statute of limitations under sub. (1) (e) 1. cannot be applied to extinguish pension rights established prior to its enactment without providing the plan participant with fair notice of the change and fair opportunity to preserve the claim. Dicks v. Employee Trust Funds Board, 202 Wis. 2d 703, 551 N.W.2d 845 (Ct. App. 1996), 95−1661.

40.07 Records. (1) Notwithstanding any other statutory provision, individual personal information in the records of the

department is not a public record and shall not be disclosed except as provided in this section.

(1m) Individual personal information, other than medical records, may only be disclosed by the department under any of the following circumstances:

(a) The information is requested by the person whose record contains the information or by the duly authorized representative of the person;

(b) The information is requested by a public employee for use in the discharge of the employee's official duties;

(c) The information is required to be disclosed under a court order duly obtained upon a showing to the court that the information is relevant to a pending court action; or

(d) The information is required to be disclosed for the proper administration of the department or to assist in locating participants or beneficiaries the department is otherwise unable to contact.

(1r) Upon request of the department of revenue, the department may disclose information, including social security numbers, to the department of revenue concerning an annuity only for the following purposes:

(a) To administer the payment of state taxes.

(am) To aid in collecting debts owed to the department of revenue.

(b) To locate participants, or the assets of participants, who have failed to file tax returns, underreported their taxable income, or who are delinquent debtors.

(c) To identify fraudulent tax returns and credit claims.

(d) To provide information for tax−related prosecutions.

(2) Medical records may be disclosed by the department only under any of the following circumstances:

(a) When a disability application or health insurance claim denial is appealed.

(b) Under a court order, or order of a hearing examiner, that is duly obtained upon prior notice to the department and a showing to the court or administrative tribunal that the information is relevant to a pending court or administrative action.

(c) Upon a written authorization that specifically identifies the medical records that may be disclosed, but only to the person who is the subject of the medical records or to the person's designee, except that this paragraph shall not apply to any medical records to which the person's access is otherwise prohibited by law.

(2m) Medical information gathered for any one of the benefit plans established under this chapter may be used by any other benefit plan established under this chapter.

(3) The department shall not furnish lists of participants, annuitants or beneficiaries to any person or organization except as required for the proper administration of the department.

History: 1981 c. 96; 2005 a. 152; 2013 a. 20.

40.08 Benefit assignments and corrections. **(1)** EXEMPTIONS. The benefits payable to, or other rights and interests of, any member, beneficiary or distributee of any estate under any of the benefit plans administered by the department, including insurance payments, shall be exempt from any tax levied by the state or any subdivision of the state and shall not be assignable, either in law or equity, or be subject to execution, levy, attachment, garnishment or other legal process except as specifically provided in this section. The exemption from taxation under this section shall not apply with respect to any tax on income.

(1c) WITHHOLDING OF ANNUITY PAYMENTS. Notwithstanding sub. (1), any monthly annuity paid under s. 40.23, 40.24, 40.25 (1) or (2), or 40.63 is subject to s. 767.75. The board and any member or agent thereof and the department and any employee or agent thereof are immune from civil liability for any act or omission while performing official duties relating to withholding any annuity payment pursuant to s. 767.57.

(1g) WITHHOLDING OF LUMP SUM PAYMENTS. Notwithstanding sub. (1), any lump sum payment made under s. 40.23, 40.24, 40.25 (1) or (2), or 40.63 is subject to s. 49.852. The board and any member or agent thereof and the department and any employee or agent thereof are immune from civil liability for any act or omission while performing official duties relating to withholding any lump sum payment pursuant to s. 49.852.

(1m) DIVISION OF BENEFITS. (a) Notwithstanding sub. (1), a participant's accumulated rights and benefits under the Wisconsin retirement system shall be divided pursuant to a qualified domestic relations order only if the order provides for a division as specified in this subsection.

(b) The creditable service and the value of the participant's account that are subject to division on the decree date shall be equal to one of the following:

1. The creditable service and the dollar amounts credited to all parts of the participant's account through the day before the decree date, if the participant is not an annuitant on the decree date.

2. The present value of the annuity being paid if the participant is an annuitant.

(c) The present value of the annuity specified in par. (b) 2. shall be computed in accordance with the actuarial tables then in effect and shall consider the number of remaining guaranteed payments, if any. If the participant is an annuitant who is not receiving an annuity from all parts of the participant's accounts, then par. (b) 1. applies to those parts of the account from which the annuity is not being received.

(d) The amount computed under par. (b) shall be divided between the participant and the alternate payee in the percentages specified in the qualified domestic relations order. The participant shall have no further right, interest or claim on that portion of the participant's creditable service and account balances or annuity amount allocated to the alternate payee.

(e) The alternate payee share of the amount computed under par. (b) shall be distributed to the alternate payee or, in the case of an individual adjudged mentally incompetent, to a named guardian under sub. (9), as follows:

1. The creditable service and amounts computed under par. (b) 1. shall be transferred to a separate account in the name of the alternate payee.

2. Except as provided in subds. 3. and 4., the control and ownership rights of the alternate payee over his or her share of the account shall be the same as if the alternate payee were a participant who had ceased to be a participating employee but had not applied for a benefit under s. 40.23 or 40.25 on the decree date or the date that the participant terminated covered employment, whichever is earlier.

3. If par. (b) 1. applies and the effective date of the alternate payee's benefit is after the date that the participant would have met the age requirement for a retirement annuity under s. 40.23, the benefits for the alternate payee shall be determined under s. 40.23. The alternate payee's benefits shall be computed using the participant's final average earnings on the first day of the annual earnings period in which the alternate payee's annuity is effective. If the effective date of the alternate payee's benefit is before the date that the participant would have met the age requirement for a retirement annuity under s. 40.23, the alternate payee's benefits shall be determined under s. 40.25 (2).

4. An alternate payee, who elects an annuity option, may only elect among the options under s. 40.24 that provide payments that are calculated only on the basis of the age of the alternate payee.

(f) After division of the participant's account under par. (b), the account and any benefits payable shall be adjusted as follows:

1. Subject to subd. 3., if the participant is not an annuitant on the decree date, an amount equal to the total of the alternate payee share distributed under par. (e), including creditable service, shall be subtracted from the participant's account.

2. Subject to subd. 3., if the participant is an annuitant on the decree date, the annuity shall be recomputed using the total value of the participant's account determined under par. (b) reduced by the total of the alternate payee share transferred under par. (e) 1., in accordance with the actuarial tables in effect and using the participant's age on the decree date. The decree date shall be the effective date of recomputation. If the optional annuity form before division of the participant's account under par. (b) was not a joint and survivor annuity with the alternate payee as the named survivor, the same annuity option with no change in the remaining guarantee period, if any, shall be continued upon recomputation to the participant. The present value of the alternate payee's share of the annuity after division shall be paid to the alternate payee as a straight life annuity based on the age of the alternate payee on the decree date. The alternate payee's annuity shall have the same remaining guarantee period, if any, as the participant's annuity. If the optional annuity form before division of the participant's account under par. (b) was a joint and survivor annuity with the alternate payee as the named survivor, the present value of the annuity after division shall be paid to both the participant and the alternate payee as a straight life annuity based upon their respective ages on the decree date. If the participant's account is reestablished under s. 40.63 (10) after the decree date, the amounts and creditable service reestablished shall be reduced by an amount equal to the percentage of the alternate payee share computed under this subdivision.

3. For any participant whose marriage is terminated by a court during the period that begins on January 1, 1982, and ends on April 27, 1990, and for whom the department receives a qualified domestic relations order after May 2, 1998, the division of benefits may not apply to any benefits paid to the participant before the date on which the department receives the qualified domestic relations order.

(g) If par. (b) 1. applies, eligibility for benefit rights that are available only after attainment of a specified length of service shall be determined based on the service that would have been credited, if the account had not been divided under this subsection, to the participant's account on the effective date of the participant's benefit and on the effective date of the alternate payee's benefit for purposes of determining the participant's and alternate payee's benefit rights, respectively. However, no creditable service may be added to the alternate payee's account under this paragraph, and the participant shall not receive creditable service under this paragraph, for any service that has been transferred to the alternate payee's account. This paragraph applies only if all eligibility requirements, other than length−of−service requirements, for the benefit rights being established have been met.

(h) Notwithstanding pars. (b) to (g), if the participant is both an annuitant and is receiving a benefit under s. 40.65 that is effective on or before the decree date, the adjustments specified in s. 40.65 (5) (b) 4. shall be computed as though the participant's account had not been divided.

(i) The department, its employees, the fund and the board are immune from any liability for any act or omission under this subsection in accordance with a qualified domestic relations order and may not be required to take any action or make any notification as part of the exercise of ownership rights granted under this subsection.

(j) This subsection applies to qualified domestic relations orders issued on or after January 1, 1982, that provide for divisions of the accumulated rights and benefits of participants whose marriages have been terminated by a court on or after January 1, 1982.

(k) 1. Nothing in this subsection authorizes a court to revise or modify a judgment or order with respect to a final division of property under s. 767.61, in contravention of s. 767.59 (1c) (b).

2. Notwithstanding subd. 1., a court may revise or modify a judgment or order specified under subd. 1. for participants whose marriages were terminated by a court on or after January 1, 1982, and before April 28, 1990, but only with respect to providing for payment in accordance with a qualified domestic relations order of benefits under the Wisconsin retirement system that are already divided under the judgment or order.

(1r) DELINQUENT STATE TAX OBLIGATIONS. Notwithstanding sub. (1) and s. 40.01 (2), the department of revenue may attach any lump sum payment or monthly annuity paid under s. 40.23, 40.24, 40.25 (1) or (2), or 40.63 to satisfy delinquent tax obligations. The board and any member or agent thereof and the department and any employee or agent thereof are immune from civil liability for any act or omission while performing official duties relating to withholding any payment under this subsection.

(1u) DEFERRED COMPENSATION PLAN ASSETS. Notwithstanding sub. (1), a participant's accumulated assets held in an account in the deferred compensation plan established under subch. VII may be divided, in the manner provided by the deferred compensation board and under s. 40.80 (2r), pursuant to a domestic relations order, as defined under s. 40.80 (2r) (a).

(2) INSURANCE PREMIUMS. (a) Insurance premiums shall be deducted from annuities for group insurance benefit plans as provided in s. 40.05 and, with the written consent of the annuitant, for premiums for group life and health insurance plans provided by the city of Milwaukee to former Milwaukee teachers if the annuity is sufficient.

(b) If permitted under a deferred compensation plan established under subch. VII, insurance premiums for health or long−term care insurance coverage for an eligible retired public safety officer may be deducted from an amount distributed under a deferred compensation plan and paid directly to an insurer.

(3) WAIVERS. Any participant, beneficiary, or distributee of any estate may waive, absolutely and without right of reconsideration or recovery, the right to or the payment of all or any portion of any benefit payable or to become payable under this chapter. The waiver shall be effective 30 days after it is received by the department or on the date specified in the waiver, if earlier. The waiver may be cancelled by the participant, beneficiary, or distributee in writing before the effective date.

(4) RETENTION OF PAYMENTS. Unless voluntarily repaid and except as limited by sub. (10), the department may retain out of any annuity or benefit an amount as the department in its discretion may determine, for the purpose of reimbursing the appropriate benefit plan accounts for a balance due under s. 40.25 (5) or for any money paid, plus interest at the assumed rate, unless the department sets a different rate by rule, to any person or estate, through misrepresentation, fraud, or error. Upon the request of the department any employer shall withhold from any sum payable by the employer to any person or estate and remit to the department any amount, plus interest at the assumed rate, unless the department sets a different rate by rule, which the department paid to the person or estate through misrepresentation, fraud, or error. Any amount, plus interest at the assumed rate, unless the department sets a different rate by rule, not recovered by the department from the employer may be procured by the department by action brought against the person or estate.

(5) EMPLOYER ERROR. (a) Whenever any sum becomes due to the department from any recipient as the result of incorrect or incomplete reporting by an employer and the sum cannot be recovered from the recipient, then the employer shall be charged with the sum.

(b) Any amount determined to be due under this subsection shall be due with the next payment by the employer under s. 40.06 and shall be subject to the penalties and collection procedures provided in s. 40.06 if not paid when due.

(6) REFUNDS. (a) Notwithstanding s. 20.913, but subject to par. (b), the department may refund any money paid in error to the fund by or on behalf of a person who is not a participant.

(b) The department may not refund any money paid into the fund by an employer, but shall by rule credit the money to the employer.

(c) Except as provided in par. (d), money paid into the fund by an employer on behalf of a participant which exceeds the contribution limits under s. 40.32 may not be refunded to the employer, but the department shall by rule credit the money to the employer and the employer shall pay the participant the amount of the credit as additional wages or salary.

(d) Money paid into the fund by a participant which exceeds the contribution limits under s. 40.32 may be refunded directly to the participant if the department determines that the money was paid on an after−tax basis.

(e) In accordance with rules promulgated by the department, and at the rate of interest established by rule, the department may credit interest on moneys refunded or credited under this subsection.

(7) OVERPAYMENTS AND UNDERPAYMENTS. (a) Any overpayment or underpayment of a lump−sum payment under s. 40.25 or a death benefit which is less than 60% of the amount specified in s. 40.25 (1) (a) rounded to the next highest dollar amount, and any annuity payment error which is less than $2 per month may not be corrected but shall be credited or debited to the employer accumulation reserve or the appropriate insurance account. However, if the amount of unapplied additional contributions would increase an annuity payment by less than $2 but is more than 60% of the amount specified in s. 40.25 (1) (a) rounded to the next highest dollar amount, the unapplied additional contributions shall be paid to the annuitant as a lump sum.

(b) Any overpayment exceeding the limits in par. (a) to a person who cannot be located or which proves to be uncollectible and any underpayment exceeding the limits in par. (a) to a person who cannot be located may be written off 2 years after the underpayment or overpayment is discovered and credited or debited to the employer accumulation reserve or the appropriate insurance account.

(c) If an annuity underpayment exceeding the limits in par. (a) has not been corrected for at least 12 months, the payment to the annuitant to correct the underpayment shall include 0.4% interest on the amount of the underpayment for each full month during the period beginning on the date on which the underpayment occurred and ending on the date on which the underpayment is corrected.

Cross−reference: See also s. ETF 20.30, Wis. adm. code.

(8) ABANDONMENT. (a) Benefits provided under this chapter shall be considered abandoned as follows:

1. Any potential primary beneficiary under s. 40.02 (8), other than an estate, who has not applied for any benefit payable under this chapter as a result of the death of the participant and whom the department cannot locate by reasonable efforts, as determined by the department by rule, within one year after the death of the participant shall be presumed to have predeceased the participant and all other potential beneficiaries. Thereafter, if the department is unable to locate any resulting subsequent beneficiary within 6 months, all beneficiaries under s. 40.02 (8) (a) 1. and 2. shall be presumed to have predeceased the participant and the department shall pay all benefits payable under this chapter as a result of the death of the participant to the participant's estate in a lump sum.

2. If an estate that is determined by the department to be a beneficiary is closed prior to the payment of benefits payable under this chapter as a result of the death of the participant and the estate is not reopened within 6 months after the department notifies the estate that a benefit is payable, the benefit shall be considered irrevocably abandoned and shall be transferred to the employer accumulation reserve, unless the estate was the designated beneficiary under s. 40.02 (8) (a) 1.

2m. If the estate was the designated beneficiary under s. 40.02 (8) (a) 1. and the estate is closed prior to the payment of benefits payable under this chapter as a result of death of the participant and the estate is not reopened within 6 months after the department notifies the estate that a benefit is payable, the department shall pay the benefit to a beneficiary as determined under s. 40.02 (8) (a) 2. If the department is unable to locate any such beneficiary within 6 months, all such beneficiaries shall be presumed to have predeceased the participant and the benefit shall be considered irrevocably abandoned and shall be transferred to the employer accumulation reserve.

3. A participant, other than a participating employee or annuitant, whom the department cannot locate by reasonable efforts, with such efforts beginning by the end of the month in which the participant attains, or would have attained, the age of 65, shall be considered to have abandoned all benefits under the Wisconsin retirement system on the date on which the participant attains, or would have attained, the age of 70. The department shall close the participant's account and shall transfer the moneys in the account to the employer accumulation reserve. The department shall restore the participant's account and shall debit the employer accumulation reserve accordingly if the participant subsequently applies for retirement benefits under this chapter before attaining the age of 80.

4. The former spouse or domestic partner of a participant who is an alternate payee and whom the department cannot locate by reasonable efforts, with such efforts beginning by the end of the month in which the participant attains, or would have attained, the age of 65, shall be considered to have abandoned all benefits under the Wisconsin retirement system on the date on which the participant attains, or would have attained, the age of 70. The department shall close the alternate payee's account and shall transfer the moneys in the account to the employer accumulation reserve. The department shall restore the alternate payee's account and shall debit the employer accumulation reserve accordingly if the alternate payee subsequently applies for retirement benefits under this chapter before the participant attains or would have attained the age of 80.

5. All presumptions under this paragraph are conclusive upon payment of the benefit payable under this chapter as a result of the death of the participant to any qualifying person, estate or entity other than the employer accumulation reserve.

(b) All moneys or credits in an account for a person presumed to have died intestate, without heirs or beneficiary, or to be abandoned by the person under par. (a) shall be applied, at the end of the 5th calendar year in which notice is published under par. (c), to the employer accumulation reserve to reduce future funding requirements.

(c) The department shall publish a class 1 notice, under ch. 985, in the official state paper stating the names of persons presumed to have died intestate, without heirs or beneficiary, or whose accounts are presumed to be abandoned under par. (a), and the fact that a benefit will be paid, if applied for within the time limits under par. (a) and if the participant, alternate payee or other person offers proof satisfactory to the department that the participant, alternate payee or other person is entitled to the benefit. Such proof shall include, but is not limited to, evidence that the participant died and that the person is the beneficiary under s. 40.02 (8).

(d) If any person files a claim within 10 full calendar years after the publication of the notice under par. (c) and furnishes proof of ownership of any amounts in an inactive account the claim shall be paid on the same basis as if no action had been taken under this section. The cost of the benefit shall be charged to the employer account credited under par. (b).

(e) Notwithstanding any other provision of the statutes any account subject to this subsection may, at the discretion of the department, be settled by any heirs of a deceased participant or beneficiary making application, on a form approved by the department, certifying the names of any other persons not known by the applicants to be deceased and known by the applicants to have an equal or superior claim to the account and certifying that the applicants have no knowledge of the whereabouts of any of the persons so named.

(f) Publication under par. (c) is not required if the present value of the benefit to which a person would have been entitled on

attainment of age 70 is less than $100, in the calendar year of 1982 or, in each calendar year commencing after January 1, 1982, the applicable amount under this paragraph for the previous calendar year increased by the salary index for that year and ignoring any fraction of a dollar. The provisions of this subsection apply to inactive accounts subject to this paragraph as if publication had been made in the year the person would have attained age 70.

(9) PAYMENTS OF BENEFITS TO MINORS AND INDIVIDUALS FOUND INCOMPETENT. In any case in which a benefit amount becomes payable to a minor or to an individual adjudicated incompetent, the department may waive guardianship proceedings, and pay the benefit to the person providing for or caring for the minor, or to the spouse or domestic partner, parent, or other relative by blood or adoption providing for or caring for the individual adjudicated incompetent.

(9m) GUARDIANS. An application for a benefit, a designation of a beneficiary or any other document which has a long−term effect on a person's rights and benefits under this chapter and which requires a signature may be signed and filed by a guardian of the estate when accompanied by a photocopy or facsimile of an order of guardianship issued by a circuit court judge or a register in probate or a circuit court commissioner who is assigned the authority to issue such orders under s. 851.73 (1) (g).

(10) LIMITATIONS ON CORRECTIONS. Service credits granted and contribution, premium and benefit payments made under this chapter are not subject to correction unless correction is requested or made prior to the end of 7 full calendar years after the date of the alleged error or January 1, 1987, whichever is later, unless the alleged error is the result of fraud or unless another limitation is specifically provided by statute. This subsection does not prohibit correction of purely clerical errors in reporting or recording contributions, service and earnings.

(11) ASSUMED CONSENT. The department, its employees, the fund, the employee trust fund board, the group insurance board and the deferred compensation board are held free from any liability for any money retained or paid in accordance with this section and the employee, participant or beneficiary shall be assumed to have assented and agreed to any disposition under this section of the money due.

(12) COURT REVIEW. Notwithstanding s. 227.52, any action, decision or determination of the board, the Wisconsin retirement board, the teachers retirement board, the group insurance board or the deferred compensation board in an administrative proceeding shall be reviewable only by an action for certiorari in the circuit court for Dane County that is commenced by any party to the administrative proceeding, including the department, within 30 days after the date on which notice of the action, decision or determination is mailed to that party, and any party to the certiorari proceedings may appeal the decision of that court.

(13) BENEFICIARY DESIGNATION. The department may not be required by a court order, or by any other action or proceeding, to enforce or otherwise monitor the beneficiary designation specified in a qualified domestic relations order.

(14) ROLLOVERS TO OTHER RETIREMENT PLANS. If a participant who is entitled to receive a lump sum payment or a monthly annuity certain under s. 40.24 (1) (f) for which the participant has specified a term of less than 120 months or an annuity certain of less than 10 years in duration from the Wisconsin retirement system and who has an account established under any other retirement plan located in the United States so directs in writing, on a form prescribed by the department, the department shall pay the lump sum payment or the monthly annuity directly to the participant's account under that other retirement plan for credit under that other retirement plan. The department shall cease payment of the monthly annuity payments to the annuitant's account under the other retirement plan within 30 days of the written request of the annuitant or written notice of the annuitant's death. This subsection shall be applied in compliance with section 401 (a) (31) of the Internal Revenue Code pursuant to any applicable federal regulations or guidance adopted under the Internal Revenue Code.

History: 1981 c. 96, 391; 1983 a. 290; 1985 a. 182 s. 57; 1987 a. 309; 1989 a. 31, 218; 1991 a. 141, 152; 1995 a. 302, 414; 1997 a. 35, 110, 125, 191, 237; 1999 a. 162; 2001 a. 61; 2003 a. 320; 2005 a. 153, 387; 2005 a. 443 s. 265; 2007 a. 131 ss. 12 to 16, 26; 2007 a. 226; 2009 a. 28, 180; 2013 a. 20.

Cross−reference: See also s. ETF 52.20, Wis. adm. code.

The limitation period under sub. (10) runs from the date on which benefits are calculated and paid to a plan participant. Benson v. Gates, 188 Wis. 2d 389, 525 N.W.2d 278 (Ct. App. 1994).

Whatever effect the Marital Property Act, ch. 766, may have with respect to property rights between spouses, it has no effect on the Board's determination of a beneficiary under ch. 40. Jackson v. Employee Trust Funds Board, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999), 98−3063.

The board's consistent interpretation of "Mr. & Mrs." beneficiary designations as relating to the identity of the beneficiary on the date of the designation was reasonable. Jackson v. Employee Trust Funds Board, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999), 98−3063.

Sub. (1) does not permit the division of a deferred compensation account pursuant to a qualified domestic relations order. Preiss v. Preiss, 2000 WI App 185, 238 Wis. 2d 368, 617 N.W.2d 514, 99−3261.

An appeal to the board was an inadequate remedy under the facts of the case because the board does not have the statutory authority to award interest on delayed benefit payments based either on a claim of unjust enrichment or a takings claim under Art. I, s. 13. The doctrine of exhaustion of administrative remedies did not require an appeal of the department's dismissal of the claim to the board before filing a court action. Fazio v. Department of Employee Trust Funds, 2002 WI App 127, 255 Wis. 2d 801, 645 N.W.2d 618, 01−2595.

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40.19 Rights preserved. (1) Rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

(2) Any person, or if the person dies prior to applying for a benefit then any beneficiary of that person, who is a participant in the Wisconsin retirement fund or a member of either the state teachers retirement system or the Milwaukee teachers retirement fund on the day prior to January 1, 1982, and who becomes a participating employee in the Wisconsin retirement system may request, prior to application for any benefit from the system, that the amount of and eligibility for benefits from the Wisconsin retirement system be determined in accord with the laws in effect on that date but the election shall be totally in lieu of any benefit amount or eligibility provided by this act or any subsequent act.

(2m) Any person who is a participant in the Wisconsin retirement system before March 9, 1984, and who is not subsequently a participating employee in the Wisconsin retirement system shall continue to have the amount of, and eligibility for, the person's benefits determined in accordance with the statutes in effect on the date the person terminated as a participating employee in the Wisconsin retirement system, but the form of payment, processing procedures and accounting controls shall be determined in accordance with this chapter.

(3) Any person who is a participant in the Wisconsin retirement fund or a member of either the state teachers retirement system or the Milwaukee teachers retirement fund prior to January 1, 1982, and who does not subsequently become a participating employee in the Wisconsin retirement system, shall continue, except as provided in s. 40.08 (8), to have the amount of and eligibility for the person's benefits determined in accord with the stat-

utes in effect on the date the person terminated as a participating employee in the Wisconsin retirement fund or as an active member of the state teachers retirement system or Milwaukee teachers retirement fund, but the form of payment, processing procedures and accounting controls shall be determined in accord with this chapter.

(4) (a) The department shall assume, and be responsible for, all authority previously exercised by village or city officials relative to pension funds and benefits provided under s. 61.65, 1975 stats., and s. 62.13 (9), (9a) and (10), 1975 stats., except the governing body of the employer shall exercise the authority provided under the first sentence of s. 62.13 (9) (c) 3., 1975 stats.

(b) The liabilities of each pension fund terminated by chapter 182, laws of 1977, shall be accounted for and paid by the Wisconsin retirement system in accord with procedures set forth in this subsection.

(c) Each employee subject to par. (g) shall make contributions to the Wisconsin retirement system in an amount equal to 4% of salary.

(d) Each employer affected by this subsection shall reimburse the Wisconsin retirement system for all payments made under par. (f) or (g) as a result of employment with that employer. Payments made under s. 40.27 are not included as payments for which the Wisconsin retirement system is to be reimbursed. The reimbursements due from the employer under this paragraph shall be offset by application of contributions made under par. (c), applied by the department at times determined by it, and by any contributions made under s. 41.60 (2) (a) 1. and 2., 1977 stats., which have not been applied prior to January 1, 1982.

(e) All amounts due under this subsection shall be paid in accordance with procedures established by the department.

(f) Each benefit being paid under s. 61.65, 1975 stats., or s. 62.13 (9), (9a) or (10), 1975 stats., on March 30, 1978, shall be continued in full force and effect, on the terms and conditions under which the benefit was originally granted, regardless of whether the granting was in accordance with the law then in effect, but after January 1, 1982 each benefit shall be paid by the Wisconsin retirement system and if all or a portion of the benefit was in accord with the law then in effect, that portion of the benefit shall be subject to s. 40.27 (1). No supplemental benefit shall be paid under s. 40.27 (1) with respect to any portion of a benefit which was not granted in accordance with the law then in effect.

(g) After January 1, 1982, each member of a pension fund created under s. 61.65, 1975 stats., or s. 62.13 (9), (9a) or (10), 1975 stats., who was an actively employed member of that fund on March 30, 1978, shall continue to have benefits and obligations determined in accordance with the applicable provisions of s. 61.65, 1975 stats., or s. 62.13 (9), (9a) or (10), 1975 stats., but paid by the Wisconsin retirement system, except that for any member whose employment terminates after March 9, 1984, the monthly pension shall equal 55% of the member's monthly compensation. The provisions of s. 40.23 (1) (f) relating to compulsory retirement shall not apply to those actively employed members.

(h) This subsection does not apply to any pension fund operated by a 1st class city in accordance with s. 62.13 (10) (h), 1975 stats.

(5) For the purpose of complying with section 401 (a) (7) of the Internal Revenue Code, a participant shall be 100 percent vested in, and have a nonforfeitable right to, his or her retirement benefits upon attaining eligibility for the retirement benefits. A participant shall also be 100 percent vested in, and have a nonforfeitable right to, his or her accumulated employee contributions at all times. In the event of a termination of, or a complete discontinuance of employer contributions to the Wisconsin retirement system, a participant shall be 100 percent vested in, and have a nonforfeitable right to, his or her accrued retirement benefits. All such benefits are nonforfeitable to the extent funded. For the purpose of complying with section 401 (a) (8) of the Internal Revenue Code, any forfeitures of benefits by participants or former participants of the Wisconsin retirement system may not be used to pay benefit increases.

History: 1981 c. 96; 1983 a. 141; 1987 a. 403 s. 256; 1989 a. 56, 359; 1997 a. 26; 2013 a. 20.

All participants who have benefits accrued are protected by sub. (1) from the abrogation of those benefits unless the benefits are replaced by benefits of equal or greater value. Statutory changes to ch. 40 may be made as long as accrued benefits are not abrogated. Nonstatutory distributions made by 1999 Wis. Act 11 did not abrogate accrued benefits nor did they violate the constitutional protections against the taking of property or impairment of contract. Wisconsin Professional Police Association, Inc. v. Lightbourn, 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 80, 99−3297.

SUBCHAPTER II

WISCONSIN RETIREMENT SYSTEM

40.20 Creation. A Wisconsin retirement system is created, including the benefits provided by this subchapter, the disability annuities provided by s. 40.63 and the death benefits provided by ss. 40.71 and 40.73. For purposes of determining an employee's eligibility for social security coverage only, the former state teachers retirement system and Milwaukee teachers retirement fund and the local police and fire pension funds established under s. 61.65 (1), (6) and (7), 1975 stats., and s. 62.13 (9) (e), (9a) and (10) (f) and (g), 1975 stats., shall continue to be considered separate retirement systems but for all other purposes the Wisconsin retirement system is a continuation of the Wisconsin retirement fund.

History: 1981 c. 96; 1987 a. 403 s. 256.

40.21 Participating employers. (1) Any employer shall be included within and thereafter subject to the provisions of the Wisconsin retirement system by so electing, through adoption of a resolution by the governing body of the employer. If the official notice of election to be included has been received by the department on or before November 15 the effective date of participation of the employer shall be the ensuing January 1. If the department receives the notice of election after November 15 the effective date shall be the January 1 after the ensuing January 1.

(1m) Notwithstanding sub. (1), if the governing body of a federated public library system, established under s. 43.19, whose territory lies within a single county with a population of 500,000 or more adopts a resolution to become a participating employer, the effective date shall be June 1, 1994.

(2) Any employer who elected or was required to participate in the Wisconsin retirement fund under s. 41.05, 1979 stats., shall be included in the Wisconsin retirement system on the same basis as the employer was included in the Wisconsin retirement fund.

(3) Every employer authorized by law to employ or pay the salaries of teachers, who is not otherwise a participating employer, is a participating employer with respect to teacher employees only.

(3m) A city−county health department that is established under s. 251.02 (1m), that is subject to s. 251.02 (1r), and that is not otherwise a participating employer, is a participating employer with respect to its employees who are included in a collective bargaining unit for which a representative is recognized or certified under subch. IV of ch. 111 and is not required to adopt a resolution electing to participate in the Wisconsin retirement system or provide notice of such election to the department under sub. (1).

(4) Every city or village which was subject to s. 61.65, 1975 stats., and s. 62.13, 1975 stats., on or before March 30, 1978, except a city of the 1st class, which is not otherwise a participating employer, is a participating employer but only with respect to present and future employees of its police and fire departments specified by s. 61.65 (6) and (7), 1975 stats., and s. 62.13 (9) (e), (9a) and (10) (f) and (g), 1975 stats.

(5) Whenever any employer is created, the territory of which includes more than one−half of the last assessed valuation of an employer which at the time of creation was a participating employer on a basis other than that specified in sub. (3) or (4) and the employer so created assumes the functions and responsibili-

ties of the previous employer with respect to the territory, then the employer so created shall automatically be a participating employer from its inception, but no prior service credits shall be provided for any personnel of the employer unless the new participating employer adopts a resolution as provided in sub. (1). If a resolution is adopted, no employee shall receive prior service credit for any period of service which was previously covered by a retirement system.

(6) (a) Any employer electing to be included within the provisions of the Wisconsin retirement system in accordance with this section may in the resolution and in the certified notice of election recognize 100%, 75%, 50%, 25% or none of the prior creditable service of its employees earned by the employees while employed by the employer, if the same percentage of each employee's prior creditable service is recognized.

(b) Any employer which recognizes less than all of the prior creditable service of its employees under par. (a) may adopt another resolution as provided in this section, increasing, for each person who is still a participating employee on the effective date of the increase determined under this section, the percentage of the employee's prior creditable service which is recognized to one of the higher levels provided by par. (a) provided the accumulated percentage does not exceed 100%.

(c) Whenever the percentage of recognized prior creditable service is increased as provided in par. (b), the employer contributions computed under s. 40.05 (2) shall be increased to reflect the value of the increased prior creditable service being granted, amortized over the remainder of the funding period provided for prior creditable service costs of that employer.

History: 1981 c. 96; 1987 a. 309; 1987 a. 403 s. 256; 1989 a. 56 s. 259; 1993 a. 383; 2001 a. 16.

Sub. (4) limits prospective mandatory Wisconsin Retirement System coverage to present and future police and firefighter employees of cities and villages that had police and firefighter employees included in the Wisconsin Retirement Fund prior to March 31, 1978. 75 Atty. Gen. 34.

40.22 Participating employees. (1) Except as provided in sub. (2), each employee currently in the service of, and receiving earnings from, a state agency or other participating employer shall be included within the provisions of the Wisconsin retirement system as a participating employee of that state agency or participating employer.

(2) No person may be included within, or receive benefits from, the Wisconsin retirement system for any service if any of the following conditions apply:

(a) Except as provided in sub. (2m), the employee was a participating employee before July 1, 2011, and is not expected to work at least one−third of what is considered full−time employment by the department, as determined by rule.

(am) Except as provided in sub. (2r), the employee was initially employed by a participating employer on or after July 1, 2011, and is not expected to work at least two−thirds of what is considered full−time employment by the department, as determined by rule.

(b) The employee's expected duration of employment is less than one year.

(c) The employee is excluded from participation by s. 40.21 (3) or (4).

(d) The employee is subject to s. 40.19 (4) provided that contributions and benefits shall be paid as provided by that subsection.

(e) The employee is subject to a contract involving the furnishing by the person of more than the person's personal services.

(f) The employee is a member of a retirement system of a 1st class city and was an employee of a technical college district created under ch. 38 on the date the district was created.

(g) The employee is appointed by the university under s. 36.19, or by the University of Wisconsin Hospitals and Clinics Authority, as a student assistant or employee in training or is appointed by a school or other education system in which the person is regularly enrolled as a student and is attending classes to perform services incidental to the person's course of study at that school or education system.

(gm) The employee is initially employed by a participating employer on or after April 23, 1992, is under the age of 20 and is regularly enrolled, or is expected to be regularly enrolled, as a full−time student in a school, as defined in s. 118.257 (1) (d).

(h) The employee is teaching while on leave from an educational institution not a part of the University of Wisconsin System, if the person is a visiting professor, visiting associate professor, visiting assistant professor or visiting lecturer at the university and if the employment at the university is all within 12 consecutive calendar months. If the employment at the university is continued beyond the 12−month period the person shall, at the start of the 13th consecutive calendar month of employment, come under the system for future service.

(i) The employee contributes to the employee retirement system of the county of Milwaukee if the person was contributing to that system on September 10, 1959.

(j) The employee is employed by a transportation system in a position that is excluded from the Wisconsin retirement system and is included in another retirement system under s. 66.1023.

(k) The employee is eligible to receive similar benefits from any other state covering the same service and earnings.

(L) The employee is employed by a participating employer after the person becomes an annuitant, unless the service is after the annuity is suspended under s. 40.26.

(m) Notwithstanding sub. (3m), the employee was formerly employed by Milwaukee County, is a state employee described in s. 49.825 (4) or (5) or 49.826 (4), and is a covered employee under the retirement system established under chapter 201, laws of 1937, pursuant to s. 49.825 (4) (c) or (5) (c) or 49.826 (4) (c).

(2m) An employee who was a participating employee before July 1, 2011, who is not expected to work at least one−third of what is considered full−time employment by the department, as determined by rule, and who is not otherwise excluded under sub. (2) from becoming a participating employee shall become a participating employee if he or she is subsequently employed by the state agency or other participating employer for either of the following periods:

(a) At least one year for at least one−third of what is considered full−time employment by the department, as determined by rule, or, for an educational support personnel employee, at least one year for at least one−third of what is considered full−time employment for a teacher.

(b) At least 600 hours in the immediately preceding 12−month period.

(2r) An employee who was initially employed by a participating employer on or after July 1, 2011, who is not expected to work at least two−thirds of what is considered full−time employment by the department, as determined by rule, and who is not otherwise excluded under sub. (2) from becoming a participating employee shall become a participating employee if he or she is subsequently employed by the state agency or other participating employer for either of the following periods:

(a) At least one year for at least two−thirds of what is considered full−time employment by the department, as determined by rule, or, for an educational support personnel employee, at least one year for at least two−thirds of what is considered full−time employment for a teacher.

(b) At least 1,200 hours in the immediately preceding 12−month period.

(3) A person who qualifies as a participating employee shall be included within, and shall be subject to, the Wisconsin retirement system effective on one of the following dates:

(a) The employer's effective date of participation if the person is an employee of that employer on the employer's effective date

and has met all requirements for inclusion on or prior to that effective date.

(b) 1. The first day after completion of one year of employment for at least one−third of what is considered full−time employment by the department, as determined by rule, if the person becomes a participating employee under sub. (2m) after the employer's effective date of participation.

2. The first day after completion of one year of employment for at least two−thirds of what is considered full−time employment by the department, as determined by rule, if the person becomes a participating employee under sub. (2r) after the employer's effective date of participation.

(c) The first day of employment if the person is a participating employee not covered under par. (a) or (b).

(3m) Any employee who becomes a participating employee shall continue to be a participating employee notwithstanding sub. (2) (a) or (b) for periods of subsequent employment with that state agency or other participating employer unless the employment with the state agency or other participating employer is terminated for 12 or more consecutive calendar months or unless the employee receives a benefit under s. 40.23, 40.25 (1) or (2) or 40.63.

(4) For purposes of s. 40.02 (25), a person who is employed by a state agency shall be deemed to have become a state employee on the date the person becomes a participating state employee. No participating employee may be included under s. 40.52 (3).

(5) A determination as to whether an employee has met or will meet the actual or anticipated performance of duty or other requirements of this section shall be made by the employer in accordance with rules of the department. The department may by rule identify circumstances and establish procedures under which eligibility for participation shall be based on combined employment when a person is employed by 2 or more employers.

(6) Notwithstanding subs. (1), (2), (3), (4) and (5), if an employee's employment with an employer terminates after a period of service of less than 30 calendar days, the employee is not eligible for retirement coverage for that period of service. This subsection shall not apply to employment covered under sub. (3m) and shall not affect an employee's eligibility for insurance coverage for that period of service.

History: 1981 c. 96, 386; 1989 a. 13; 1991 a. 152; 1993 a. 399; 1995 a. 216; 1997 a. 69, 110; 1999 a. 150 s. 672; 2001 a. 104; 2009 a. 15, 28; 2011 a. 32; 2013 a. 20.

40.23 Retirement annuities. (1) (a) Except as provided in par. (am), any participant who has attained age 55, and any protective occupation participant who has attained age 50, on or before the annuity effective date shall be entitled to a retirement annuity in accordance with the actuarial tables in effect on the effective date of the annuity if the participant submits an application for a retirement annuity on a form furnished by the department and all of the following apply:

1. The participant is separated, regardless of cause, and continues to be separated until the annuity effective date, the date 30 days after the application is received by the department or the date 30 days after separation, whichever is later, from all employment meeting the qualifications for inclusion specified in s. 40.22 for any participating employer.

2. The participant is not on authorized leave of absence from any participating employer.

(am) 1. In this paragraph "part−time service" is service in a position normally requiring actual performance of duty during fewer than 1,044 hours per calendar year.

2. Any participant who has attained age 55 and who is a participant because of employment other than part−time service as an elected official and who is also a participating employee because of part−time service as an elected official may, after termination of all covered employment other than service as a part−time elected official, waive further participation under the fund for his or her current, and any future, part−time service as an elected official. Any election under this paragraph is irrevocable and is effective beginning the day after the date of election. Notwithstanding par. (a), any participant who elects under this paragraph may receive a retirement annuity for all service under the fund credited to the participant to the date he or she elects. The date a participant elects under this paragraph is deemed to be the date of separation from the last participating employer by which that participant was employed.

3. No participant who elects under subd. 2. may have his or her annuity suspended under s. 40.26 (1) because of earnings received for any part−time services as an elected official.

(b) Except as provided in par. (bm), all retirement annuities shall be effective on the day following, or on the first day of a month following, the date of separation from the last participating employer by which the participant was employed, as specified by the participant in the written application for the annuity. However, the date shall not be more than 90 days prior to the date of receipt of the application by the department. The participant may specify that additional contribution accumulations shall not be applied to provide an annuity until a subsequent application is filed for an annuity to be paid from the additional contribution accumulations. The subsequent application shall be made as specified under sub. (4) or the department shall automatically distribute the accumulated additional contribution accumulations as a lump sum.

(bm) If an application by a participant age 55 or over, or by a protective occupation participant age 50 or over, for long−term disability insurance benefits is disapproved under rules promulgated by the department, the date which would have been the effective date for the insurance benefits shall be the retirement annuity effective date if requested by the applicant within 60 days of the disapproval or, if the disapproval is appealed, within 60 days of the final disposition of the appeal.

(c) No application specifying an annuity effective date later than 60 days after the date of its receipt by the department shall be accepted, unless the participant files the application on or after January 1 of the calendar year in which the participant attains the age of 69.5 years specifying an annuity effective date that begins before April 1 of the calendar year following the calendar year in which the participant attains the age of 70.5 years.

(d) Notwithstanding par. (c), an application for an annuity to be effective on the day following termination of employment may be filed up to 90 days prior to the employee's anticipated termination date. The anticipated termination date shall be stated in the application and the department shall not make an annuity payment until the employee has terminated. The department shall reject any application that is filed more than 90 days prior to the employee's termination date.

(e) Whenever it is determined that an annuity effective date is incorrect, the annuity effective date shall be corrected and any related computational and payment adjustments shall be made.

(f) Any participating employee may be retired by the employer after attainment of the employee's normal retirement date, under policies established or agreed to by the employer, except:

1. As prohibited by federal law or by s. 111.33.

2. Each elected official's and each sheriff's employment shall be continued to the end of the official's or sheriff's term of office and to the end of each subsequent term of office to which elected.

4. Any employer may, in a collective bargaining agreement, limit its right to require retirement.

(2) Except as provided in s. 40.19 (2), this subsection applies only to participants who are not participating employees after March 9, 1984. The retirement annuity in the normal form shall be an annuity payable for the life of the annuitant with a guarantee of 60 monthly payments. Except as provided in sub. (3), the initial monthly amount of the normal form annuity shall be the amount which, when added to the OASDHI benefit, equals 85% of the participant's final average earnings plus the amount which can be provided under pars. (a) and (c) and adjusted under pars. (d) and

(e) or, if less, shall be in the monthly amount equal to the sum of the amounts determined under pars. (a), (b) and (c) as modified by pars. (d) and (e) and in accordance with the actuarial tables in effect on the annuity effective date.

(a) The annuity which can be provided from a sum equal to 200% of the excess accruing after June 30, 1966, for teacher participants, or December 31, 1965, for all other participants, of the participant's required contribution accumulation reserved for a variable annuity over the amount to which the contributions would have accumulated if not so reserved. If the participant's required contribution accumulation reserved for a variable annuity is less than the amount to which the contributions would have accumulated if not so reserved, the annuity shall be reduced by the amount which could be provided by a sum equal to 200% of the deficiency.

(b) A monthly annuity in the normal form computed on the basis of the participant's final average earnings and creditable service, if the annuity becomes effective on or after the normal retirement date of the participant, determined by multiplying the participant's final average earnings by the participant's creditable service and the following applicable percentage:

1. For each participant for creditable service of a type not otherwise specified in this paragraph, 1.3%.

2. For each participant for creditable service as an elected official and for executive service, as defined under s. 40.02 (31), 1985 stats., 1.8%.

3. For each participant, subject to Titles II and XVIII of the federal social security act, for service as a protective occupation participant, 1.8%.

4. For each participant not subject to Titles II and XVIII of the federal social security act, for service as a protective occupation participant, 2.3%.

(c) The amount, if any, which can be provided by accumulated employee and employer additional contributions credited to the participant's account.

(d) If the annuity effective date is prior to the normal retirement date of the participant, the annuity amount computed under par. (b) shall be reduced, as recommended by the actuary and approved by the board, by a percentage or percentages of the amount of the annuity for each month and any major portion of a month between the effective date of the annuity and the participant's normal retirement date.

(e) The amount of the annuity computed under par. (b) shall be reduced by the amounts, determined under s. 42.244 (4) (b) and (c), 1979 stats., s. 42.246 (1) (e), 1979 stats., s. 42.77 (3) (b) and (c), 1979 stats., and s. 42.79 (1) (e), 1979 stats., for those teacher participants specified in those sections.

(2m) The following provisions apply only to participants who are participating employees after March 9, 1984:

(a) The retirement annuity in the normal form is a straight life annuity payable for the life of the annuitant.

(b) Except as provided in s. 40.26, subject to the limitations under section 415 of the Internal Revenue Code, the initial amount of the normal form annuity shall be an amount equal to 70%, or 65% for participants whose formula rate is determined under par. (e) 3. or 85% for participants whose formula rate is determined under par. (e) 4., of the participant's final average earnings plus the amount which can be provided under pars. (c) and (d) or, if less, shall be in the monthly amount equal to the sum of the amounts determined under pars. (c), (d) and (e) as modified by par. (f) and in accordance with the actuarial tables in effect on the annuity effective date. If the participant has creditable service under both par. (e) 4. and another category under par. (e), the percent applied under this paragraph shall be determined by multiplying the percent that each type of creditable service is of the participant's total creditable service by 85% and 65% or 70%, respectively, and adding the results, except that the resulting benefit may not be less than the amount of the normal form annuity that could be paid based solely on the creditable service under par. (e) 4.

(c) The annuity which can be provided from a sum equal to 200 percent of the excess accruing after June 30, 1966, for teacher participants, or December 31, 1965, for all other participants, of the participant's required contribution accumulation reserved for a variable annuity over the amount to which the contributions would have accumulated at the core annuity division effective rate if not so reserved. If the participant's required contribution accumulation reserved for a variable annuity is less than the amount to which the contributions would have accumulated at the core annuity division effective rate if not reserved, the annuity shall be reduced by the amount which could be provided by a sum equal to 200 percent of the deficiency.

(d) The amount, if any, which can be provided by accumulated employee and employer additional contributions credited to the participant's account.

(e) A monthly annuity in the normal form computed on the basis of the participant's final average earnings and creditable service, if the annuity becomes effective on or after the normal retirement date of the participant, determined by multiplying the participant's final average earnings by the participant's creditable service and the following applicable percentage:

1. For each participant for creditable service of a type not otherwise specified in this paragraph that is performed before January 1, 2000, 1.765%; for such creditable service that is performed on or after January 1, 2000, 1.6%.

2. For each participant for creditable service as an elected official or as an executive participating employee that is performed before January 1, 2000, 2.165%; for such creditable service that is performed on or after January 1, 2000, but before June 29, 2011, 2%; and for such creditable service that is performed on or after June 29, 2011, 1.6%.

3. For each participant subject to titles II and XVIII of the federal Social Security Act, for service as a protective occupation participant that is performed before January 1, 2000, 2.165%; for such creditable service that is performed on or after January 1, 2000, 2%.

4. For each participant not subject to titles II and XVIII of the federal Social Security Act, for service as a protective occupation participant that is performed before January 1, 2000, 2.665%; for such creditable service that is performed on or after January 1, 2000, 2.5%.

(em) 1. For the purpose of determining the applicable percentage rate under par. (e), all of the following shall apply:

a. Any creditable service forfeited by a participating employee before January 1, 2000, and which is subsequently reestablished by the participating employee under s. 40.285 (2) (a), shall be considered to have been performed before January 1, 2000.

b. Any creditable service received under s. 40.285 (2) (b), which is based on service performed before January 1, 2000, shall be considered to have been performed before January 1, 2000.

c. Any creditable military service received under s. 40.02 (15) (c), which is based on creditable service performed before January 1, 2000, shall be considered to have been performed before January 1, 2000.

2. This paragraph shall only apply to participants who are participating employees on or after January 1, 2000.

(er) For a participant who initially becomes a participating employee on or after July 1, 2011, the following shall apply:

5. If the participant has less than 5 years of creditable service, the annuity amount under par. (e) shall be 0.

(f) 1. If the annuity effective date is before the normal retirement date of the participant, the annuity amount computed under par. (e) shall be reduced by 0.4% for each full month, and for each partial month including at least 15 days, before the participant's normal retirement date, except as provided in subds. 2. to 4.

2. For a participant who terminates covered employment on or after July 1, 1990, and whose annuity is computed under par.

(e) 1. or 2., the 0.4% reduction of the annuity amount under subd. 1. shall be reduced by subtracting from the 0.4% an amount equal to 0.001111% for each month of creditable service, except as provided in subds. 3. and 4.

3. Subdivision 2. shall not apply to those months specified in subd. 1. that precede the date on which the participant attains the age of 57.

4. The resulting percentage by which the annuity amount is reduced under subd. 2. may not be less than zero.

(fm) Notwithstanding s. 40.02 (17) (intro.), for purposes of determining creditable service under par. (f) 2., a participant's amount of creditable service in any annual earnings period shall be treated as the amount of creditable service that a teacher would earn for that annual earnings period. To be eligible for the treatment provided by this paragraph, the participant must have earned only a partial year of creditable service in at least 5 of the 10 annual earnings periods immediately preceding the annual earnings period in which the participant terminated covered employment. This paragraph does not apply to service credited under s. 40.02 (15).

(g) The employer may pay to the department part or all of the costs of the actuarial reduction applicable to a participating employee under par. (f), and the actuarial reduction for the amount paid may not be applied under par. (f), if all of the following conditions are met:

1. The employer has elected to pay part or all of the costs of the required actuarial reduction, the action is effective after June 30, 1990, and the employer has not taken any action to rescind the election.

2. The participant voluntarily terminates employment with the employer after June 30, 1990, and after the employer elects under subd. 1.

3. The employer pays to the department the difference, as determined by the department, between the actuarial cost of the annuity which would have been paid if the employer had not elected under subd. 1. and the actuarial cost of the annuity payable. The amount so paid shall be credited as employer current service contributions under s. 40.05 (2) (a), and shall be included with the first payment made under s. 40.05 (2) after the department notifies the employer of the amount due.

(3) (a) Except as provided in par. (b), the initial monthly amount of any retirement annuity in the normal form shall not be less than the money purchase annuity which can be provided by applying the sum of the participant's accumulated additional and required contributions, including interest credited to the accumulations, plus an amount from the employer accumulation reserve equal to the participant's accumulated required contributions, less any accumulated contributions to purchase other governmental service under s. 40.25 (7), 2001 stats., or s. 40.285 (2) (b) to fund the annuity in accordance with the actuarial tables in effect on the annuity effective date.

(b) For a participant who initially becomes a participating employee on or after July 1, 2011, the following shall apply for purposes of calculating a money purchase annuity under par. (a):

5. If the participant has less than 5 years of creditable service, the amount from the employer accumulation reserve shall equal 0.

(4) (a) Subject to all requirements under section 401 (a) (9) of the Internal Revenue Code and federal regulations applicable to that section, which relate to a governmental plan, as defined in section 414 (d) of the Internal Revenue Code, the department shall distribute to the participant the entire amount that is credited to the account of a participant under the Wisconsin retirement system no later than the required beginning date, unless the department distributes this amount as an annuity or in more than one payment. If the department distributes this amount as an annuity or in more than one payment, the department shall begin the distribution no later than the required beginning date.

(b) In the calendar year immediately preceding the calendar year of a participant's required beginning date, if the department distributes the amount that is credited to the account of a participant under the Wisconsin retirement system in a form other than as a lump sum payment, the department, subject to all requirements under the Internal Revenue Code, shall calculate the distribution to the participant according to one of the following:

1. The life of a participant or, if the annuity is in the form of a joint and survivor annuity, the joint lives of the participant and the named survivor.

2. For an annuity authorized under s. 40.24 (1) (f), a term certain not to exceed the life expectancy of the participant or, if the annuity is in the form of a joint and survivor annuity, the joint life expectancies of the participant and the named survivor.

(c) If a participant during the calendar year in which he or she attains 69.5 years, or the alternate payee during the calendar year in which the participant attains 69.5 years, does not apply before December 31 in that year for a distribution of the amount that is credited to the account of a participant under the Wisconsin retirement system, the department shall begin, effective the following January 1, an automatic distribution to the participant or alternate payee in the form of an annuity specified under s. 40.24 (1) (c) or as determined by the department by rule. If the department makes an automatic distribution under this paragraph, the beneficiary designation filed with the department before the date on which the department begins the automatic distribution is no longer applicable under ss. 40.71 and 40.73. Unless the participant or alternate payee files a subsequent beneficiary designation with the department after the date on which the department begins the automatic distribution, the department shall pay any death benefit as provided under s. 40.02 (8) (a) 2.

(d) If a participant dies after the department begins to distribute the amount that is credited to the account of a participant under the Wisconsin retirement system, but before the entire amount in the account has been distributed, the department shall distribute the remaining portion of the account at least as rapidly as is provided in the manner of distribution selected by the participant. If the beneficiary does not apply to the department to continue the distribution, within a period specified by rule, the department shall pay the remaining distribution to the beneficiary as a lump sum.

(e) 1. Subject to subds. 2. to 4. and section 401 (a) (9) of the Internal Revenue Code, if a participant dies before the distribution of benefits has commenced and the participant's beneficiary is the spouse or domestic partner, the department shall begin the distribution within 5 years after the date of the participant's death.

2. Subject to section 401 (a) (9) of the Internal Revenue Code, if the spouse or domestic partner files a subsequent beneficiary designation with the department, the payment of the distribution may be deferred until the January 1 of the year in which the participant would have attained the age of 70.5 years.

3. Subject to section 401 (a) (9) of the Internal Revenue Code, if the spouse or domestic partner does not apply for a distribution, the distribution shall begin as an automatic distribution as provided under subd. 1. or under par. (c), whichever distribution date is earlier.

4. Subject to section 401 (a) (9) of the Internal Revenue Code, if the spouse or domestic partner dies, but has designated a new beneficiary, the birth date of the spouse or domestic partner shall be used for the purposes of determining the required beginning date.

5. The department shall specify by rule all procedures relating to an automatic distribution to the spouse or domestic partner. These rules shall comply with the Internal Revenue Code.

(f) If a participant dies before the distribution of benefits has commenced and the beneficiary cannot delay the automatic payment of benefits under section 401 (a) (9) of the Internal Revenue Code, the beneficiary shall do one of the following:

1. Elect a lump sum payment by December 31 of the 5th calendar year after the date of the participant's death.

2. Elect an annuity benefit, not to exceed his or her life expectancy, by December 31 of the calendar year after the date of the participant's death.

(g) Nothing in this subsection shall be construed to create any benefit, lump sum payment option or form of annuity not otherwise expressly provided for in this subchapter.

(h) Death and disability benefits provided under this chapter are limited by the incidental benefit rule under section 401 (a) (9) (G) of the Internal Revenue Code and applicable federal regulations and guidance adopted under the Internal Revenue Code.

(i) Distributions of benefits shall conform to a reasonable and good faith interpretation of section 401 (a) (9) of the Internal Revenue Code.

(j) Pursuant to a qualified domestic relations order, the department may establish separate benefits for a participant and an alternate payee.

History: 1981 c. 96, 386; 1983 a. 141, 267, 391; 1987 a. 309, 372; 1987 a. 403 s. 256; 1989 a. 13; 1989 a. 56 s. 259; 1991 a. 152; 1995 a. 225, 302, 414; 1997 a. 35, 69; 1999 a. 11; 2003 a. 33; 2005 a. 153, 154; 2007 a. 96; 2009 a. 28; 2011 a. 10, 32; 2013 a. 20.

Cross−reference: See also ch. ETF 20, Wis. adm. code.

40.24 Annuity options. (1) Except as provided in subs. (2) to (4) and (7), any participant who is eligible to receive a retirement annuity in the normal form may elect to receive the actuarial equivalent of the normal form annuity in any of the following optional annuity forms:

(a) A straight−life annuity terminating at the death of the annuitant.

(b) A straight life annuity with a guarantee of 60 monthly payments.

(c) An annuity payable for the life of the annuitant with a guarantee of 180 monthly payments.

(d) An annuity payable for the life of the annuitant, and after the death of the annuitant, monthly payments as elected by the participant of either 100% or 75% of the amount of the annuity paid to the annuitant to be continued to the named survivor, for life, who was designated by the participant in the original application for an annuity. If the participant's annuity effective date is on or after January 1, 1992, or, if the department specifies an earlier date that is not earlier than April 23, 1992, on or after the date specified by the department, and if the death of the named survivor occurs before the death of the annuitant and before the first day of the 61st month beginning after the annuity effective date, the annuity option under this paragraph shall be converted to the annuity option under par. (a) and, beginning with the annuity payment for the first month beginning after the death of the named survivor, the annuity amount shall be the amount that the annuitant would be receiving on that date if the participant had elected the annuity option under par. (a) in the original application for an annuity.

(e) A reduced annuity payable in the normal form or any of the optional life forms provided under this section, plus a temporary annuity payable monthly but terminating with the payment payable in the month following the month in which the annuitant attains age 62. If the annuitant dies before the end of the final payment, the remaining payments of the temporary annuity certain shall be made to the named survivor or, if there is no living named survivor, in accordance with s. 40.73 (2) to the annuitant's beneficiary. It is the intent of this option that so far as is practicable the amounts of the life annuity and temporary annuity shall be determined so that the annuitant's total anticipated benefits from the fund and from his or her primary OASDHI benefit will be the same each month both before and after attainment of age 62.

(f) From accumulated additional contributions made under s. 40.05 (1) (a) 5. only, an annuity certain payable for and terminating after the number of months specified by the applicant, regardless of whether the applicant dies before or after the number of months specified, provided that the monthly amount of the annuity certain is at least equal to the minimum amount established under s. 40.25 (1) (a). Subject to the period of distribution required under s. 40.23 (4) (b) 2., the number of months specified shall not exceed 180 and shall not be less than 24. If the death of the annuitant occurs prior to the expiration of the certain period, the remaining payments shall be made in accordance with s. 40.73 (2) without regard to any other annuity payments payable to the beneficiary. An annuity under this paragraph may be initiated prior to any other annuity amount provided under this subchapter and prior to age 55 if all other qualifications for receiving an annuity payment are met.

(g) Any one optional life annuity form provided by rule.

(2) The department may modify any optional annuity form prescribed in sub. (1) (a) to (f) by rule as necessary to conform to federal regulations.

(3) Any participant specified under sub. (1) (intro.) may elect to receive the amount provided by accumulated additional contributions in a different optional form than the balance of the annuity.

(4) Any optional annuity form under this section shall be based on actuarial equivalent values with due regard to selection against the fund, shall not provide a greater monthly amount payable to others upon the death of the participant than the amount which would have been payable to the participant if the participant had continued to live and shall not be changed after the effective date of the annuity unless the participant's request for the change is received by the department within 60 days after the date on which the first annuity check, share draft or other draft is issued or funds are otherwise transferred.

(5) An annuity in a form other than the normal form shall be the actuarial equivalent of the annuity in the normal form if, on the effective date of the annuity, the annuity has the same single−sum present value as the annuity in the normal form, as calculated by the department according to methods and assumptions specified by the actuary.

(6) If a participant's annuity is not effective until after the earlier of the participant's normal retirement date under s. 40.02 (42) (a) to (d) or the date on which the participant attains the age of 62 years and the participant elects an optional annuity form, the monthly amount of annuity provided by conversion of the benefit computed under s. 40.23 (2m) (e) to the optional form elected shall not be less than the monthly amount of annuity which would have been paid had the participant retired on the earlier of the participant's normal retirement date under s. 40.02 (42) (a) to (d) or the date on which the participant attains the age of 62 years and elected the same optional form of annuity and the same beneficiary. It shall be assumed for purposes of calculating the amount of an annuity under this subsection that all of the participant's earned annuity was earned prior to the participant's normal retirement date, but the department shall use the beneficiary's actual age on the effective date of the annuity.

(7) (a) Any participant who has been married to the same spouse, or in a domestic partnership with the same domestic partner, for at least one year immediately preceding the participant's annuity effective date shall elect the annuity option under sub. (1) (d), the annuity option under sub. (1) (e), if the reduced annuity under sub. (1) (e) is payable in an optional life form provided under sub. (1) (d), or an annuity option in a form provided by rule, if the annuity is payable for life with monthly payments of at least 75% of the amount of the annuity to be continued to the beneficiary, for life, upon the death of the participant, and the participant shall designate the spouse or domestic partner as the beneficiary, unless the participant's application for a retirement annuity in a different optional annuity form is signed by both the participant and the participant's spouse or domestic partner or unless the participant establishes to the satisfaction of the department that, by reason of absence or other inability, the spouse's or domestic partner's signature may not be obtained. This subsection does not apply to any of the following:

1. Participants whose applications for a retirement annuity specify an annuity effective date before August 1, 1986.

2. That portion of a disability annuity which, under s. 40.63 (8) (d), is not eligible for election of an annuity option by the participant.

3. Benefits paid under s. 40.25 (1) (a).

4. Benefits paid from accumulated additional contributions.

5. Benefits payable to a beneficiary from a deceased participant's account.

6. Automatic distributions under s. 40.23 (4).

(b) In administering this subsection, the secretary may require the participant to provide the department with a certification of the participant's marital or domestic partnership status and of the validity of the spouse's or domestic partner's signature. If a participant is exempted from the requirements under par. (a) on the basis of a certification which the department or a court subsequently determines to be invalid, the liability of the fund and the department shall be limited to a conversion of annuity options at the time the certification is determined to be invalid. The conversion shall be from the present value of the annuity in the optional form originally elected by the participant to an annuity with the same present value but in the optional form under sub. (1) (d) and with monthly payments of 100% of the amount of the annuity paid to the annuitant to be continued to the spouse or domestic partner beneficiary.

History: 1981 c. 96; 1983 a. 141 ss. 17, 20; 1983 a. 290, 368, 538; 1985 a. 151; 1989 a. 13, 166; 1991 a. 152; 1993 a. 426; 1995 a. 302; 1997 a. 110; 2007 a. 131; 2009 a. 28.

Cross−reference: See also s. ETF 20.07, Wis. adm. code.

40.25 Lump sum payments. (1) (a) If all other requirements for payment of a retirement annuity are met and if the retirement annuity in the normal form which could be provided under s. 40.23 is equal to or less than $100 monthly for a benefit with an effective date that is on or after April 23, 1994, but before the end of the calendar year of 1993 or, for a benefit with an effective date in a subsequent calendar year, the monthly amount applied under this paragraph for the previous calendar year increased by the salary index and ignoring fractions of the dollar, the then present value, including additional contributions, of the annuity shall be paid in a single sum instead of as an annuity. The additional contribution accumulations shall not be included in determining whether a single sum should be paid if the optional form provided by s. 40.24 (1) (f) or a lump sum under sub. (4) is selected.

(b) If all other requirements for payment of a retirement annuity are met and if the retirement annuity in the normal form which could be provided under s. 40.23 from all available accumulations and credits, other than accumulations from additional contributions, is more than $100 and less than $200 monthly for a benefit with an effective date that is on or after April 23, 1994, but before the end of the calendar year of 1993 or, for a benefit with an effective date in a subsequent calendar year, the monthly amounts applied under this paragraph for the previous calendar year increased by the salary index and ignoring fractions of the dollar, then any participant may elect to receive, in lieu of the annuity, the then present value, including additional contributions, of the annuity in a single sum.

(2) Subject to sub. (2t), if all requirements for payment of a retirement annuity are met except attainment of age 55 or age 50 for protective occupation participants, a separation benefit may be paid, if the participant's written application for a separation benefit is received by the department prior to the participant's 55th birthday or 50th birthday for protective occupation participants, in an amount equal to the additional and employee required contribution accumulations of the participant on the date the application for a separation benefit is approved.

(2t) A protective occupation participant who is covered by the presumption under s. 891.455 and who applied for a duty disability benefit under s. 40.65 on or after May 12, 1998, may not be paid a separation benefit under sub. (2) during the period in which he or she is receiving the duty disability benefit.

(3) Upon administrative approval of payment of an amount under either sub. (1) or (2), the participant's account shall be closed and there shall be no further right, interest or claim on the part of the former participant to any benefit from the Wisconsin retirement system except as provided by sub. (5) and s. 40.285 (2) (a). Any former participant who is subsequently employed by any participating employer shall be treated as a new participating employee for all purposes of this chapter. New accumulations of contributions and credits and the computation of any future benefits shall bear no relationship to any accumulations and credits paid as single sums under sub. (1) or (2).

(3m) A participant's application for a lump sum payment under sub. (1) (b) or (2), filed after May 7, 1994, shall be signed by both the participant and the participant's spouse or domestic partner, if the participant has been married to that spouse, or in a domestic partnership with that domestic partner, for at least one year immediately preceding the date the application is filed. The department may promulgate rules that allow for the waiver of the requirements of this subsection for a situation in which, by reason of absence or incompetency, the spouse's or domestic partner's signature may not be obtained. This subsection does not apply to any benefits paid from accumulated additional contributions.

(4) If all the requirements for payment of a retirement annuity or a separation benefit are met, except filing of an application, a participant may elect that the accumulation from the participant's additional contributions made under s. 40.05 (1) (a) 5. be paid as a lump sum in lieu of an annuity from those additional contributions.

(5) (a) Rights and creditable service forfeited under sub. (3) or s. 40.04 (4) (a) 3. shall be reestablished if the participant receives the benefit resulting in the forfeiture after being discharged and is subsequently reinstated to a position with the participating employer by court order, arbitration award or compromise settlement as a result of an appeal of the discharge.

(b) The full amount of the benefit paid, plus interest at the assumed rate, unless the department sets a different rate by rule, shall be repaid to the Wisconsin retirement system by the employer of an employee whose rights and creditable service are reestablished under par. (a) within 60 days after the effective date of the employee's reinstatement. The amount repaid by the employer under this paragraph shall be deducted by the employer from any payment due the employee as a result of the resolution of the appeal or, if that amount is insufficient, the balance shall be deducted from the employee's earnings except the amount deducted from each earnings payment shall be not less than 10% nor more than 25% of the earnings payment. If the employee terminates employment the employer shall notify the department of the amount not yet repaid, including any interest due, at the same time it notifies the department of the termination of employment, and the department shall repay to the employer the balance of the amount due from retentions made under s. 40.08 (4). The employer may charge interest at a rate not in excess of the current year's assumed rate on any amount unpaid at the end of any calendar year after the year of reinstatement.

History: 1981 c. 96, 201; 1981 c. 386 ss. 14 to 16, 19; 1983 a. 290; 1989 a. 13, 166; 1991 a. 152, 269; 1993 a. 229, 360, 426; 1995 a. 302; 1997 a. 69, 173, 237; 1999 a. 32; 2003 a. 33; 2007 a. 131; 2009 a. 28.

40.26 Reentry into service. (1) Except as provided in sub. (1m) and ss. 40.05 (2) (g) 2. and 40.23 (1) (am), if a participant receiving a retirement annuity, or a disability annuitant who has attained his or her normal retirement date, receives earnings that are subject to s. 40.05 (1) or that would be subject to s. 40.05 (1) except for the exclusion specified in s. 40.22 (2) (L), the annuity shall be suspended, including any amount provided by additional contributions, and no annuity payment shall be payable after the month in which the participant files with the department a written election to be included within the provisions of the Wisconsin retirement system as a participating employee.

(1m) (a) If a participant receiving a retirement annuity, or a disability annuitant who has attained his or her normal retirement date, is employed in a position in covered employment in which he or she is expected to work at least two−thirds of what is considered full−time employment by the department, as determined under s. 40.22 (2r), the participant's annuity shall be suspended and no annuity payment shall be payable until after the participant terminates covered employment.

(b) If a participant receiving a retirement annuity, or a disability annuitant who has attained his or her normal retirement date, enters into a contract to provide employee services with a participating employer and he or she is expected to work at least two−thirds of what is considered full−time employment by the department, as determined under s. 40.22 (2r), the participant's annuity shall be suspended and no annuity payment shall be payable until after the participant no longer provides employee services under the contract.

(2) Upon suspension of an annuity under sub. (1) or (1m), the retirement account of the participant whose annuity is so suspended shall be established on the following basis:

(b) *Crediting of amounts under suspended annuity.* The amount of the annuity payments which would have been paid under the suspended annuity, from the original annuity suspension date to the subsequent retirement date, shall be credited to a memorandum account which is subject to ss. 40.04 (4) (a) 2., 2g. and 2m. and 40.08 (1m).

(c) *Establishment of subsequent retirement account.* Upon becoming a participating employee, a subsequent retirement account shall be established, including any amounts in a memorandum account under par. (b), crediting of interest, and any contributions made and creditable service earned during the subsequent participating employment.

(3) Upon subsequent retirement and application for an annuity, the suspended annuity shall be reinstated and the subsequent annuity of a former annuitant shall be computed as an original annuity, based upon the participant's attained age on the effective date of the subsequent annuity, in an optional form as elected by the participant under s. 40.24. The subsequent annuity shall be initiated at the same time the suspended annuity is reinstated.

(5) If a participant applies for an annuity or lump sum payment during the period in which less than 75 days have elapsed between the termination of employment with a participating employer and becoming a participating employee with any participating employer, all of the following shall apply:

(a) The participant shall not qualify for an annuity under s. 40.23 (1) (a) 1.

(b) The participant may not receive any benefit under this chapter on which the receipt of an annuity is a condition.

(c) Any annuity or lump sum payment made to the participant shall be considered to have been made in error and is subject to s. 40.08 (4). The sum of the payments made in error shall be credited to a memorandum account. The memorandum account is subject to s. 40.04 (4) (a) 2., 2g. and 2m. and (c). If the annuity was recomputed under s. 40.08 (1m), the memorandum account established under this paragraph shall be adjusted pursuant to s. 40.08 (1m) (f) 2. The retirement account of a participant paid in error, and whose annuity was terminated, shall be reestablished as if the terminated annuity had never been effective, including the crediting of interest.

History: 1981 c. 96; 1983 a. 255, 267, 290, 538; 1987 a. 138, 372; 1989 a. 13, 218; 1991 a. 141, 152, 315; 1993 a. 213; 1995 a. 302; 1999 a. 11; 2013 a. 20.

40.27 Post−retirement adjustments. (1) SUPPLEMENTAL BENEFITS. Any person who received a supplemental benefit under s. 41.23, 1979 stats., s. 42.49 (10), 1979 stats., or s. 42.82, 1979 stats., is eligible to continue receiving a supplemental benefit in the amounts determined under s. 41.23, 1979 stats., s. 42.49 (10), 1979 stats., or s. 42.82, 1979 stats. Any portion of a benefit payable under s. 40.19 (4) (f) which was not granted in accordance with the law in effect at the time of the granting shall not be subject to this subsection and shall not be eligible for a supplemental benefit.

(a) Any benefit payable by virtue of this subsection in excess of the amounts payable under other provisions of this chapter shall be paid from and shall be subject to the continuation of the appropriation made by s. 20.515 (1) (a).

(b) Determinations of eligibility and the amount of any payment to be made under this subsection or sub. (1m) or (3) shall be made by the department, and shall be certified by the department for payment in the same manner as for payments from the Wisconsin retirement system.

(c) No payment shall be made under this subsection or sub. (1m) or (3), nor shall any right accrue under this subsection or sub. (1m) or (3), for or after any month following termination of the annuity on which the supplement was based.

(d) Benefits under this subsection and subs. (1m) and (3) shall be payable to the surviving beneficiary, who receives an annuity, of eligible persons.

(1m) ADDITIONAL SUPPLEMENTAL BENEFITS. Any person who received an annuity for September 1974 from the Wisconsin retirement system shall be eligible to receive all of the following:

(a) The monthly annuities for which that person was eligible and which that person received for September 1974.

(b) An amount to be paid from the appropriation account under s. 20.515 (1) (a), subject to the continuation of that appropriation, equal to 4% times 5 years times either $200 or the initial monthly annuity, excluding amounts provided from additional deposits, whichever is smaller.

(c) Any supplement for which that person is eligible under sub. (1) and s. 41.23, 1979 stats., s. 42.49 (10), 1979 stats., or s. 42.82, 1979 stats.

(2) CORE ANNUITY RESERVE SURPLUS DISTRIBUTIONS. Surpluses in the core annuity reserve established under s. 40.04 (6) and (7) shall be distributed by the board if the distribution will result in at least a 0.5 percent increase in the amount of annuities in force, except as otherwise provided by the department by rule, on recommendation of the actuary, as follows:

(a) The distributions shall be expressed as percentage increases in the amount of the monthly annuity in force, including prior distributions of surpluses but not including any amount paid from funds other than the core annuity reserve fund, preceding the effective date of the distribution. For purposes of this subsection, annuities in force include any disability annuity suspended because the earnings limitation had been exceeded by that annuitant in that year.

(b) Prorated percentages based on the annuity effective date may be applied to annuities with effective dates during the calendar year preceding the effective date of the distribution, as provided by rule, but no other distinction may be made among the various types of annuities payable from the core annuity reserve.

(c) The distributions shall not be offset against any other benefit being received but shall be paid in full, nor shall any other benefit being received be reduced by the distributions. The annuity reserve surplus distributions authorized under this subsection may be revoked by the board in part or in total as to future payments upon recommendation of the actuary if a deficit occurs in the core annuity reserves and such deficit would result in a 0.5 percent or greater decrease in the amount of annuities in force, except as otherwise provided by the department by rule.

(d) Notwithstanding s. 40.03 (2) (i), (7) (d), and (8) (d), the department may promulgate rules under this subsection without the approval of the teachers retirement board and the Wisconsin retirement board.

(3) ADDITIONAL SUPPLEMENTAL BENEFIT ADJUSTMENT. Beginning on November 1, 1997, any person who is eligible to receive supplemental benefits under subs. (1) and (1m) shall be eligible to receive an additional supplemental benefit, to be paid from the appropriation account under s. 20.515 (1) (a), in an amount equal to the amount by which the supplemental benefits paid under subs.

(1) and (1m) are exceeded by the supplemental benefit that the person was eligible to receive on October 1, 1997, from the distribution paid under s. 40.04 (3) (e) 1. c., 1995 stats., as affected by adjustments under sub. (2) made after 1987, less any increase to the person's base annuity under this chapter that results from any equitable distribution made by the board under the judgment in Wisconsin Retired Teachers Ass'n v. Employee Trust Funds Bd., 207 Wis. 2d 1 (1997), without regard to adjustments to sub. (2).

History: 1981 c. 96; 1983 a. 290, 394; 1987 a. 27, 43; 1995 a. 302; 1997 a. 26; 2003 a. 153; 2005 a. 153.

Cross−reference: See also s. ETF 20.25, Wis. adm. code.

40.28 Variable benefits. (1) Any annuity provided to a participant whose accounts include credits segregated for a variable annuity shall consist of a core annuity and a variable annuity.

(a) The initial amount of the variable annuity shall be the amount which can be provided on the basis of the actuarial tables in effect on the effective date of the annuity by the following amounts, if otherwise available:

1. The amount of the additional contribution accumulations reserved for a variable annuity as of the date the annuity begins;

2. The amount equal to 200% of employee required contribution accumulations reserved for a variable annuity as of the date the annuity begins; and

3. The amount equal, as of the date the annuity begins, to the accumulated prior service credits reserved for the participant for a variable annuity within the employer accumulation account, together with the net gain or loss credited to the accumulations.

(b) The initial amount of the core annuity shall be the excess of the total annuity payable, as determined under s. 40.23, over the amount of the variable annuity.

(2) Whenever the balance in the variable annuity reserve, as of December 31 of any year, exceeds or is less than the then present value of all variable annuities in force, determined in accordance with the rate of interest and approved actuarial tables then in effect, by at least 2% of the present value of all variable annuities in force, the amount of each variable annuity payment shall be proportionately increased or decreased, disregarding fractional percentages, and effective on a date determined by rule, so as to reduce the variance between the balance of the variable annuity reserve and the present value of variable annuities to less than one percent.

(3) Except as otherwise specifically provided, benefits based on variable accumulations shall be determined on the same basis and paid in the same manner and at the same time as benefits based on accumulations not so segregated insofar as practicable considering the nature of variable annuities.

History: 1981 c. 96; 2005 a. 153.

Cross−reference: See also s. ETF 20.25, Wis. adm. code.

40.285 Purchase of creditable service. (1) GENERAL REQUIREMENTS. (a) *Deadline for purchase of creditable service.* An application to purchase creditable service must be received by the department, on a form provided by the department, from an applicant who is a participating employee on the day that the department receives the application.

(b) *Calculation of creditable service.* Creditable service purchased under this section shall be calculated in an amount equal to the year and fractions of a year to the nearest one−hundredth of a year.

(c) *Use of creditable service.* Credit for service purchased under this section is added to a participant's total creditable service, but may not be treated as service for a particular annual earnings period and does not confer any other rights or benefits.

(d) *Applicability of Internal Revenue Code.* The crediting of service under this section is subject to any applicable limit or requirement under the Internal Revenue Code.

(2) CONDITIONS FOR THE PURCHASE OF DIFFERENT TYPES OF CREDITABLE SERVICE. (a) *Forfeited service.* 1. A participating employee may purchase creditable service forfeited in the manner specified in subd. 2., subject to all of the following:

a. The participating employee must have at least 3 continuous years of creditable service at the time of application to purchase the creditable service.

b. The number of years that may be purchased may not be greater than the accumulated current creditable service of the participating employee at the date of application, excluding all creditable service purchased under this section or s. 40.02 (17) (b), 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (e), 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (i), 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (k), 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.25 (6), 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., or s. 40.25 (7), 1991, 1993, 1995, 1997, 1999, and 2001 stats., less the number of years of creditable service previously purchased under this paragraph or s. 40.25 (6), 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats.

c. The participating employee pays to the fund an amount equal to the employee's statutory contribution on earnings under s. 40.05 (1) (a) for each year of forfeited service to be purchased, based upon the participating employee's final average earnings, determined as if the employee had retired on the first day of the annual earnings period during which the department receives the application. The amount payable shall be paid in a lump sum payment, except as provided in sub. (4) (b), and no employer may pay any amount payable on behalf of a participating employee.

d. Upon receipt by the fund of the total payment required under this subdivision, the creditable service meeting the conditions and requirements of this paragraph shall be credited to the account of the participating employee making the payment.

2. Creditable service may be purchased under this paragraph if it was forfeited as a result of any of the following:

a. Payment of an amount under s. 40.25 (2).

b. The receipt of a separation or withdrawal benefit under the applicable laws and rules in effect prior to January 1, 1982.

c. Payment of an amount under s. 40.25 (2m), 1991, 1993, 1995, and 1997 stats.

3. Unless otherwise provided by the department by rule, a participating employee may not purchase creditable service under this paragraph more than 2 times in any calendar year.

(b) *Other governmental service.* 1. Each participating employee whose creditable service terminates on or after May 1, 1992, and who has performed service, other than military service, as an employee of the federal government or a state or local governmental entity in the United States, other than a participating employer, that is located within or outside of this state, or each participating employee whose creditable service terminates on or after May 4, 1994, and who has performed service as an employee for an employer who was not at the time a participating employer but who subsequently became a participating employer, may receive creditable service for such service if all of the following occur:

a. The participant has at least 3 continuous years of creditable service at the time of application.

b. The number of years of creditable service applied for under this paragraph does not exceed the number of years of creditable service that the participant has at the date of application, excluding all creditable service purchased under this section or s. 40.02 (17) (b), 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (e), 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (i), 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.02 (17) (k), 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., s. 40.25 (6), 1981, 1983,

1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, and 2001 stats., or s. 40.25 (7), 1991, 1993, 1995, 1997, 1999, and 2001 stats., less the number of years of creditable service previously purchased under this paragraph or s. 40.25 (7), 1991, 1993, 1995, 1997, 1999, and 2001 stats.

c. At the time of application, the participant furnishes evidence of such service that is acceptable to the department.

d. Except as provided in sub. (4) (b), at the time of application, the participant pays to the department a lump sum equal to the present value of the creditable service applied for under this paragraph, in accordance with rates actuarially determined to be sufficient to fund the cost of the increased benefits that will result from granting the creditable service under this paragraph. The department shall by rule establish different rates for different categories of participants, based on factors recommended by the actuary.

2. The creditable service granted under this paragraph shall be the same type of creditable service as the type that is granted to participants who are not executive participating employees, elected officials, or protective occupation participants.

3. A participating employee may apply to receive part or all of the creditable service that he or she is eligible to receive under this paragraph.

4. A participant may not receive creditable service under this paragraph for service that is used for the purpose of establishing entitlement to, or the amount of, any other benefit to be paid by any federal, state, or local government entity, except a disability or OASDHI benefit or a benefit paid for service in the national guard.

5. Unless otherwise provided by the department by rule, a participating employee may not purchase creditable service under this paragraph more than 2 times in any calendar year.

(c) *Uncredited elected official and executive participating employee service.* Each executive participating employee whose creditable service terminates on or after May 3, 1988, and each participating employee who is a present or former elected official or an appointee of a present or former elected official and who did not receive creditable service under s. 40.02 (17) (e), 1987 stats., or s. 40.02 (17) (e), 1989 stats., and whose creditable service terminates on or after August 15, 1991, who was previously in the position of the president of the University of Wisconsin System or in a position designated under s. 20.923 (4), (8), or (9), but did not receive creditable service because of age restrictions, may receive creditable service equal to the period of executive service not credited if the participant pays to the department a lump sum payment equal to 5.5% of one−twelfth of the employee's highest earnings in a single annual earnings period multiplied by the number of months of creditable service granted under this paragraph.

(d) *Qualifying service.* Each participating employee in the Wisconsin retirement system whose creditable service terminates on or after January 1, 1982, who was previously a participant in the Wisconsin retirement fund and who has not received a separation benefit may receive creditable service equal to the period of service during any qualifying period under s. 41.02 (6) (c), 1969 stats., s. 66.901 (4) (d), 1967 stats., or under any predecessor statute, but not to exceed 6 months. The additional creditable service shall be granted upon application by the employee if the applicant pays to the department a lump sum payment equal to 5% of one−twelfth of the employee's highest earnings in a single annual earnings period multiplied by the number of months of creditable service granted under this paragraph.

(e) *Teacher improvement leave.* Each participating employee in the Wisconsin retirement system whose creditable service terminates on or after April 25, 1990, and whose earnings include compensation for teacher improvement leave granted by the board of regents of the Wisconsin State Colleges during the period beginning on January 1, 1964, and ending on August 31, 1967, in a written and satisfied contract, may receive creditable service for the period for which those earnings were received in an amount not to exceed one year if all of the following apply:

1. The participant meets the requirements of this paragraph and submits an application to the board of regents of the University of Wisconsin System.

2. The board of regents of the University of Wisconsin System certifies the creditable service requested under subd. 1.

3. The participant pays to the department a lump sum equal to 5% of one−twelfth of the employee's highest earnings in a single annual earnings period multiplied by the number of months of creditable service that is granted under this paragraph.

4. The employer does not pay any amount payable under this paragraph on behalf of any participating employee.

(f) *Uncredited junior teaching service.* Each participating employee whose creditable service terminates on or after May 11, 1990, and who submits to the department proof that the participant performed service in this state as a junior teacher, as defined in s. 42.20 (6), 1955 stats., that was not credited under s. 42.40, 1955 stats., shall receive creditable service for the period for which that service was performed, even if the participant did not become a member of the state teachers retirement system after performing that service, if all of the following occur:

1. The participant pays to the department a lump sum equal to 5% of one−twelfth of the employee's highest earnings in a single annual earnings period multiplied by the number of months of creditable service that is granted under this paragraph.

2. The employer does not pay any amount payable under this paragraph on behalf of any participating employee.

(3) APPLICATION PROCESS. (a) *Provision of application forms and estimates.* Upon request, the department shall provide a participating employee an application form for the purchase of creditable service under sub. (2) and shall also provide to the participating employee an estimate of the cost of purchasing the creditable service.

(b) *Certification of plan−to−plan transfers.* Upon request, the department shall provide a participating employee a transfer certification form for payments made by a plan−to−plan transfer under sub. (5) (b). If the participating employee intends to make payments from more than one plan, the participating employee must submit to the department a separate transfer certification form for each plan from which moneys will be transferred.

(4) PAYMENT. (a) *Required with application.* Except as provided in par. (b), the department may not accept an application for the purchase of creditable service without payment in full of the department's estimated cost of creditable service accompanying the application. A participating employee may also do any of the following:

1. Use his or her accumulated after−tax additional contributions that are made under s. 40.05 (1) (a) 5., including interest, to make payment.

2. Use his or her accumulated contributions, including interest, to a tax sheltered annuity under section 403 (b) of the Internal Revenue Code, to make payment, but only if the participating employee's plan under section 403 (b) of the Internal Revenue Code authorizes the transfer.

(b) *Alternate payment options.* Notwithstanding par. (a), the department may accept an application under this section without full payment if payment of at least 10% of the department's estimate of the cost of the creditable service is included with the application, in the manner required under par. (a), and the remaining balance is received by the department no later than 90 days after receipt of the application, in the form of a plan−to−plan transfer under sub. (5) (b).

(c) *Final cost calculation for purchase of creditable service.* The department may audit any transaction to purchase creditable service under this subsection and make any necessary correction to the estimated cost of purchasing the creditable service to reflect the amount due under sub. (2). Except as otherwise provided in sub. (7), if the department determines that the final amount that is

due is more than the amount paid to the department, the department shall notify the participant of the amount of the shortfall. If payment of the amount of the shortfall is not received by the department within 30 calendar days after the date on which the department sends notice to the participant, the department shall complete the creditable service purchase transaction by prorating the amount of creditable service that is purchased based on the payment amount actually received and shall notify the participant of the amount and category of service that is credited. The department, by rule, shall specify how a forfeited service purchase is prorated when the participant forfeited service under more than one category of employment under s. 40.23 (2m) (e).

(d) *Treatment of amounts to purchase creditable service.* All amounts retained by the department for the purchase of creditable service under sub. (2) shall be credited and treated as employee required contributions for all purposes of the Wisconsin Retirement System, except as provided in ss. 40.23 (3) and 40.73 (1) (am).

(5) TRANSFER OF FUNDS; PLAN−TO−PLAN TRANSFERS. (a) *Transfer from certain benefit plans.* Subject to any applicable limitations under the Internal Revenue Code, a participating employee may elect to use part or all of any of the following to purchase creditable service under this section:

1. Accumulated after−tax additional contributions, including interest, made under s. 40.05 (1) (a) 5.

2. Accumulated contributions treated by the department as contributions to a tax sheltered annuity under section 403 (b) of the Internal Revenue Code, but only if the employer sponsoring the annuity plan authorizes the transfer.

(b) *Other plan−to−plan transfers.* The department may also accept a plan to plan transfer from any of the following:

1. Accumulated contributions under a state deferred compensation plan under subch. VII.

2. The trustee of any plan qualified under sections 401 (a) or (k), 403 (b), or 457 of the Internal Revenue Code, but only if the purpose of the transfer is to purchase creditable service under this section.

(c) *Payment shortfall.* Except as otherwise provided in sub. (7), if the department determines that the amount paid to the department to purchase creditable service under this subsection, together with the amount transferred under a plan−to−plan transfer, is less than the amount that is required to purchase the creditable service, the department shall notify the participant of the amount of the shortfall. If payment of the amount of the shortfall is not received by the department within 30 calendar days after the date on which the department sends notice to the participant, the department shall complete the creditable service purchase transaction by prorating the amount of creditable service that is purchased based on the payment amount actually received and shall notify the participant of the amount and category of service that is credited. The department, by rule, shall specify how a forfeited service purchase is prorated when the participant forfeited service under more than one category of employment under s. 40.23 (2m) (e).

(6) REFUNDS. Except as provided in sub. (7), if the department determines that the amount paid to the department to purchase creditable service, including any amount in a plan−to−plan transfer, is greater than the amount that is required to purchase the creditable service, as determined by the department, the department shall refund the difference. The department shall pay any refund to the participant, up to the amount received from the participant. Any remaining amount shall be returned to the applicable account in the trust fund for transfers under sub. (5) (a) or to the trustee of a plan which was the source of a plan−to−plan transfer under sub. (5) (b). When more than one plan−to−plan transfer occurs, the department may determine which transfer is to be refunded, in whole or part. No funds transferred to the department by a plan−to−plan transfer may be refunded to a participant.

(7) LIMIT ON PAYMENT OF CORRECTIONS. The department may not require a participant to pay any shortfall under sub. (4) (c) or (5) (c) that is $25 or less. The department may not pay any refund under sub. (6) if the amount of the refund is $25 or less.

History: 2003 a. 33 ss. 996 to 999, 1025; 2003 a. 320; 2005 a. 154.
Cross−reference: See also s. ETF 20.17, Wis. adm. code.

40.29 Temporary disability; creditable service. (1) If a participating employee receives temporary disability compensation under s. 102.43 for any period prior to termination of employment with the participating employer which commences on or after April 30, 1980, the employee shall be:

(a) Credited with creditable service during that period on the same basis as the employee was credited with creditable service immediately prior to the commencement of the period; and

(b) Treated for all purposes of the Wisconsin retirement system, including, but not limited to, contributions and benefits, as having received the amount and rate of earnings the employee would have received if the disability had not occurred, including adjustments in the rate of earnings of the employee made during that period in good faith.

(2) Earnings and creditable service determined under sub. (1) shall be reported by the employer to the department. The employer shall pay all employer and required employee contributions payable under this section with respect to the earnings and current service except the employer may recover from the employee's earnings paid after the employee returns to employment with the employer the amount which the employer paid on behalf of the employee which is customarily actually paid by the employee under s. 40.05 (1). The employer may not deduct the amount recoverable under this subsection from the employee's earnings at a rate greater than 5% of each payment of earnings.

History: 1981 c. 96; 1983 a. 290.

40.30 Intrastate retirement reciprocity. (1) This section shall be construed as an enactment of statewide concern to encourage career public service by employees of the state, 1st class cities and counties having a population of 500,000 or more but shall not be construed to affect the authority of any 1st class city to exercise its power granted under article XI, section 3, of the constitution and chapter 441, laws of 1947, section 31 over any other provisions of any of the retirement systems established by chapter 589, laws of 1921, chapter 423, laws of 1923 or chapter 396, laws of 1937, or to affect the authority of any county having a population of 500,000 or more to exercise its power granted under chapter 405, laws of 1965, over any other provisions of the retirement system established by chapter 201, laws of 1937.

(2) Except as provided in sub. (7), any individual who has vested annuity benefit rights under the Wisconsin retirement system or under one of the retirement systems established by chapter 589, laws of 1921, chapter 423, laws of 1923, chapter 201, laws of 1937 or chapter 396, laws of 1937, who subsequently becomes covered by one or more of those other retirement systems, who, on or after May 11, 1990, terminates all employment covered by any of those retirement systems and who applies to have benefits begin within a 60−day period under all of those retirement systems from which the individual is entitled to receive benefits may, on a form provided by and filed with the department, elect to have retirement benefit computations and eligibility under each of those retirement systems determined as provided in this section.

(3) The sum of all service credited to the individual under each retirement system specified in sub. (2) shall be used in determining whether the individual has met any vesting period required for retirement benefit eligibility during any subsequent employment covered by any retirement system specified in sub. (2), but shall not be used in determining the amount of the benefit nor in determining credit for military service.

(4) The individual's retirement benefits under each retirement system specified in sub. (2) shall be determined as follows:

(a) The benefit formula used for each type of service credited to the individual shall be the benefit formula in effect for that type of service under the respective retirement system on the date on which the individual terminated all employment covered by any retirement system specified in sub. (2).

(b) Subject to federal annual compensation limits, the final average salary or final average earnings used in the benefit formula computation for each retirement system under par. (a) shall be the individual's final average salary or final average earnings under the respective retirement system, determined in accordance with the provisions of that retirement system based on the earnings covered by that retirement system and on all service permitted under that retirement system to be used in determining the final average salary or final average earnings, increased by the percentage increase in the average of the total wages, as determined under 42 USC 415 (b) (3) (A), between the date on which the individual terminated all employment covered by that retirement system and the date on which the individual terminated all employment covered by any of those retirement systems.

(5) The benefits computed under this section for each retirement system shall be in lieu of any other benefit payable by that retirement system and may not begin before the individual terminates all employment covered by any retirement system specified in sub. (2).

(6) The secretary may promulgate rules affecting any retirement system specified in sub. (2) to carry out the purposes of this section.

(7) (a) Retirement benefit computations or eligibility may not be determined as provided in this section with respect to service performed by an individual under any retirement system established by chapter 589, laws of 1921, chapter 423, laws of 1923, or chapter 396, laws of 1937, or to service performed by that individual under the Wisconsin retirement system, before the date on which the governing body of the city that established the retirement system under chapter 589, laws of 1921, chapter 423, laws of 1923, or chapter 396, laws of 1937, adopts a resolution approving the application of this section to the retirement benefit computations and eligibility determinations under all of those retirement systems that it has established.

(b) Retirement benefit computations or eligibility may not be determined as provided in this section with respect to service performed by an individual under a retirement system established by chapter 201, laws of 1937, or to service performed by that individual under the Wisconsin retirement system, before the date on which the governing body of the county that established the retirement system under chapter 201, laws of 1937, adopts a resolution approving the application of this section to the retirement benefit computations and eligibility determinations under that retirement system.

(c) A resolution adopted under par. (a) or (b) is irrevocable. Any governing body that adopts a resolution under par. (a) or (b) shall provide the department with a copy of the resolution.

History: 1989 a. 323; 1995 a. 81; 2013 a. 20.

40.31 Maximum benefit limitations. (1) GENERAL LIMITATION. The maximum retirement benefits payable to a participant in a calendar year, excluding benefits attributable to contributions subject to the limit under s. 40.32, may not exceed the maximum benefit limitation established under section 415 (b) of the Internal Revenue Code, as adjusted under section 415 (d) of the Internal Revenue Code and any applicable regulations or guidance adopted under the Internal Revenue Code, except that the limit for an individual who first became a participant before January 1, 1990, may not be less than the accrued benefits of the participant, as determined without regard to any changes to the retirement system after October 14, 1987.

(3) TREATMENT OF DEFINED BENEFIT AND DEFINED CONTRIBUTION PLANS. For the purpose of determining whether a participant's retirement benefits exceed the maximum retirement limitations under this section, all defined benefit plans of the employer, including defined benefit plans that are terminated, shall be treated as a single defined benefit plan and all defined contribution plans of the employer, including defined contribution plans that are terminated, shall be treated as a single defined contribution plan. The department may provide by rule additional limitations for participants who are participating in more than one retirement system.

(4) DIVISION OF BENEFITS. For the purpose of determining whether a participant's retirement benefits exceed the maximum retirement limitations under this section for a participant whose retirement benefits have been divided under s. 40.08 (1m), the participant's retirement benefits shall be measured as if no division had occurred.

History: 1995 a. 302; 1997 a. 237; 2013 a. 20.

40.32 Limitations on contributions. (1) The sum of all employee post−tax contributions allocated to a participant's account may not in any calendar year exceed the maximum contribution limitation established under section 415 (c) of the Internal Revenue Code, as adjusted under section 415 (d) of the Internal Revenue Code and any applicable regulations adopted by the federal department of the treasury.

(2) The department may provide by rule additional limitations for participants who are participating in more than one retirement system.

(3) Any contribution that the department receives, which is allocated to the account of a participant and which exceeds the contributions limitation under this section, may be refunded or credited as provided in s. 40.08 (6). If the department refunds any contributions that exceed the limitation under this section, the department shall first refund amounts voluntarily contributed by a participating employee as an additional contribution under s. 40.05 (1) (a) 5.

History: 1995 a. 302; 1997 a. 237; 2011 a. 10; 2013 a. 20.

SUBCHAPTER III

SOCIAL SECURITY FOR PUBLIC EMPLOYEES

40.40 State−federal agreement. The secretary may, upon receipt of a certified copy of a resolution adopted by the governing body of any employer in accordance with s. 40.41 execute on behalf of the state a modification of the state−federal agreement with the secretary of the federal department of health and human services for the inclusion of a coverage group of the employees of the employer under the OASDHI system in conformity with federal regulations. The state and each employer included under the agreement or modification of the agreement shall thereafter be bound by federal regulations.

History: 1981 c. 96.

40.41 Coverage. (1) Except as provided in sub. (6), all the employees of any employer shall be included under OASDHI through adoption of a resolution by the governing body of the employer providing for the coverage and stating the effective date of coverage. All groups covered by OASDHI, under s. 40.41, 1979 stats., prior to January 1, 1982, shall continue to be covered by OASDHI. Whenever any employer is created, the territory of which includes more than one−half of the last assessed valuation of an employer which prior to creation of the new employer had adopted a resolution under this subsection, and the employer so created assumes the functions and responsibilities of the previous employer with respect to the territory, then the employees of the employer so created shall be covered from the inception of the created employer as if a resolution had been adopted under this subsection.

(2) The resolution provided for in sub. (1) may specify a coverage group comprised of persons under a retirement system which is eligible under federal regulations for inclusion under the state−federal OASDHI agreement, in which case a referendum in

conformity with section 218 (d) (3) of the federal social security act shall be conducted. The governor may take any and all actions which may be required in connection with such a referendum. The agreement with the secretary of health and human services may be modified to cover the coverage group.

(3) No agreement with the federal department of health and human services may be executed for the purpose of permitting one or more individuals to transfer by individual choice from that part of a retirement system which is composed of positions of employees who do not desire coverage under OASDHI to that part of a retirement system which is composed of positions of employees who desire OASDHI coverage.

(4) Except as provided in sub. (6), all state employees, all teachers, the participating employees of all participating employers under the Wisconsin retirement system and all employees who would have become a participating employee of a participating employer except for the requirement of s. 40.22 (6) shall be included under OASDHI, notwithstanding sub. (1).

(5) Except as provided in sub. (6), employees under any retirement system included in whole or in part under OASDHI, prior to January 1, 1982, under a referendum or a choice held in conformity with section 218 (d) (3) or 218 (d) (6) of the federal social security act, shall continue to be included under OASDHI in accordance with the results of the referendum or choice, notwithstanding sub. (1).

(6) The following services shall be excluded from OASDHI coverage, and subsequent modifications of the state−federal agreement shall continue to provide for their exclusion:

(a) Services performed by persons or in positions not eligible for inclusion under federal regulations. Any exclusion under this paragraph shall not continue if federal regulations are subsequently modified to include the services.

(b) Services performed by a member of a board or commission, except members of governing bodies, in a position or office which does not normally require actual performance of duty for at least 600 hours in each calendar year. For purposes of this paragraph, a "board" or "commission" is a body referred to in the statutes as a board or commission.

(c) Service performed in the employ of a school, college or university, if the service is performed by a student who is enrolled and regularly attending classes at the school, college or university.

(d) Services of an employee whose participating employment in a position covered by a specific retirement system is not covered by OASDHI by reason of eligibility for a choice provided by statute prior to January 1, 1982, but only with respect to services in a position covered by that retirement system.

(e) Services in police and fire fighter positions under a retirement system except:

1. If the services were covered under the federal OASDHI system under this section prior to the effective date of the retirement system coverage.

2. If the services have been covered under the federal OASDHI system under section 218 (m) of the federal social security act.

(f) Services in a position eligible for participation in the Wisconsin retirement system only by virtue of s. 40.22 (2m). This exclusion does not apply to any employee who is a teacher, who is a participating employee in the Wisconsin retirement system or whose employer has adopted a resolution under sub. (1).

History: 1981 c. 96; 1987 a. 372; 1989 a. 13; 1999 a. 9.

SUBCHAPTER IV

HEALTH AND LONG−TERM CARE BENEFITS

40.51 Health care coverage. (1) The procedures and provisions pertaining to enrollment, premium transmitted and coverage of eligible employees for health care benefits shall be established by contract or rule except as otherwise specifically provided by this chapter.

(2) Except as provided in subs. (10), (10m), (11) and (16), any eligible employee may become covered by group health insurance by electing coverage within 30 days of being hired, to be effective as of the first day of the month which begins on or after the date the application is received by the employer, or by electing coverage prior to becoming eligible for employer contribution towards the premium cost as provided in s. 40.05 (4) (a) to be effective upon becoming eligible for employer contributions. An eligible employee who is not insured, but who is eligible for an employer contribution under s. 40.05 (4) (ag) 1., may elect coverage prior to becoming eligible for an employer contribution under s. 40.05 (4) (ag) 2., with the coverage to be effective upon becoming eligible for the increase in the employer contribution. Any employee who does not so elect at one of these times, or who subsequently cancels the insurance, shall not thereafter become insured unless the employee furnishes evidence of insurability satisfactory to the insurer, at the employee's own expense or obtains coverage subject to contractual waiting periods. The method to be used shall be specified in the health insurance contract.

(2m) (a) In addition to the restriction under par. (b), a domestic partner of an eligible employee may not become covered under a group health insurance plan under this subchapter unless the eligible employee submits an affidavit, designed by the group insurance board, attesting that the eligible employee and his or her domestic partner satisfy the requirements for a domestic partnership under s. 40.02 (21d). The eligible employee shall submit this affidavit to his or her employer at the time the eligible employee first enrolls in a group health insurance plan under this subchapter or at the time the eligible employee requests a change in dependent status while the eligible employee is enrolled in a group health insurance plan under this subchapter. Upon the dissolution of a domestic partnership, the eligible employee shall submit in a timely manner to his or her employer an affidavit, designed by the group insurance board, attesting to the dissolution of the domestic partnership.

(b) If an eligible employee is divorced or was a domestic partner in a dissolved domestic partnership, the eligible employee may not enroll a new spouse or domestic partner in a group health insurance plan under this subchapter until 6 months have elapsed since the date of the divorce or dissolved domestic partnership.

(3) The health insurance contract shall establish provisions by which an insured employee or dependents may continue group coverage or convert group coverage to a nongroup policy which, at a minimum, comply with s. 632.897.

(4) The group insurance board shall establish provisions for the continuance of insurance coverage which shall, at a minimum, comply with s. 632.897.

(5) The health insurance contract shall comply with s. 632.897.

(6) This state shall offer to all of its employees at least 2 insured or uninsured health care coverage plans providing substantially equivalent hospital and medical benefits, including a health maintenance organization or a preferred provider plan, if those health care plans are determined by the group insurance board to be available in the area of the place of employment and are approved by the group insurance board. The group insurance board shall place each of the plans into one of 3 tiers established in accordance with standards adopted by the group insurance board. The tiers shall be separated according to the employee's share of premium costs.

(7) (a) Any employer, other than the state, including an employer that is not a participating employer, may offer to all of its employees a health care coverage plan through a program offered by the group insurance board. Notwithstanding sub. (2) and ss. 40.05 (4) and 40.52 (1), the department may by rule establish different eligibility standards or contribution requirements for such employees and employers. Beginning on January 1, 2012,

except as otherwise provided in a collective bargaining agreement under subch. IV of ch. 111 and except as provided in par. (b), an employer may not offer a health care coverage plan to its employees under this subsection if the employer pays more than 88 percent of the average premium cost of plans offered in any tier with the lowest employee premium cost under this subsection.

(b) 1. A municipal employer shall pay, on behalf of a nonrepresented law enforcement or fire fighting managerial employee or a nonrepresented managerial employee described in s. 111.70 (1) (mm) 2., who was initially employed by the municipal employer before July 1, 2011, the same percentage under par. (a) that is paid by the municipal employer for represented law enforcement or fire fighting personnel or personnel described in s. 111.70 (1) (mm) 2. who were initially employed by the municipal employer before July 1, 2011.

2. A municipal employer shall pay, on behalf of a represented law enforcement or fire fighting employee, who was initially employed by the municipal employer before July 1, 2011, and who on or after July 1, 2011, became employed in a nonrepresented law enforcement or fire fighting managerial position with the same municipal employer, or a successor municipal employer in the event of a combined department that is created on or after July 1, 2011, the same percentage under par. (a) that is paid by the municipal employer for represented law enforcement or fire fighting personnel who were initially employed by the municipal employer before July 1, 2011.

(8) Every health care coverage plan offered by the state under sub. (6) shall comply with ss. 631.89, 631.90, 631.93 (2), 631.95, 632.72 (2), 632.746 (1) to (8) and (10), 632.747, 632.748, 632.798, 632.83, 632.835, 632.85, 632.853, 632.855, 632.87 (3) to (6), 632.885, 632.89, 632.895 (5m) and (8) to (17), and 632.896.

(8m) Every health care coverage plan offered by the group insurance board under sub. (7) shall comply with ss. 631.95, 632.746 (1) to (8) and (10), 632.747, 632.748, 632.798, 632.83, 632.835, 632.85, 632.853, 632.855, 632.885, 632.89, and 632.895 (11) to (17).

(9) Every health maintenance organization and preferred provider plan offered by the state under sub. (6) shall comply with s. 632.87 (2m).

(10) Beginning on July 1, 1988, any eligible employee, as defined in s. 40.02 (25) (b) 11., may become covered by group health insurance by electing coverage within 60 days after the date on which he or she ceases to be a participating employee, and by paying the cost of the required premiums, as provided in s. 40.05 (4) (ad). Any eligible employee who does not so elect at the time specified, or who later cancels the insurance, shall not thereafter become insured unless the employee furnishes evidence of insurability satisfactory to the insurer, at the employee's expense or obtains coverage subject to contractual waiting periods, and pays the cost of the required premiums, as provided in s. 40.05 (4) (ad). The method of payment shall be specified in the health insurance contract.

(10m) Any eligible employee, as defined in s. 40.02 (25) (b) 6e. and 6g., may become covered under any health care coverage plan offered under sub. (6), without furnishing evidence of insurability, by submitting to the department, on a form provided by the department and within 30 days after the date on which the department receives the employee's application for a retirement annuity or for a lump sum payment under s. 40.25 (1), an election to obtain the coverage, by obtaining coverage subject to contractual waiting periods and by paying the cost of the required premiums, as provided in s. 40.05 (4) (ad).

(11) An eligible state employee who elects insurance coverage with a county under s. 978.12 (6) may not elect coverage under this section.

(12) Every defined network plan, as defined in s. 609.01 (1b), and every limited service health organization, as defined in s. 609.01 (3), that is offered by the state under sub. (6) shall comply with ch. 609.

(13) Every defined network plan, as defined in s. 609.01 (1b), and every limited service health organization, as defined in s. 609.01 (3), that is offered by the group insurance board under sub. (7) shall comply with ch. 609.

(15m) Every health care plan, except a health maintenance organization or a preferred provider plan, offered by the state under sub. (6) shall comply with s. 632.86.

(16) Beginning on the date specified by the department, but not earlier than March 20, 1992, and not later than July 1, 1992, any eligible employee, as defined in s. 40.02 (25) (b) 6m., may elect coverage under any health care coverage plan offered under sub. (6) by furnishing, at the employee's expense, evidence of insurability satisfactory to the insurer or by obtaining coverage subject to contractual waiting periods, and by paying the cost of the required premiums, as provided in s. 40.05 (4) (ad). The method to be used shall be specified in the health insurance contract.

History: 1981 c. 96; 1983 a. 27; 1985 a. 29; 1987 a. 27, 107, 356; 1987 a. 403 s. 256; 1989 a. 31, 93, 121, 129, 182, 201, 336, 359; 1991 a. 39, 70, 113, 152, 269, 315; 1993 a. 450, 481; 1995 a. 289; 1997 a. 27, 155, 202, 237, 252; 1999 a. 32, 95, 115, 155; 2001 a. 16, 38, 104; 2003 a. 33; 2005 a. 194; 2007 a. 36; 2009 a. 14, 28, 146, 218, 346; 2011 a. 10, 32, 133, 260.

Monies appropriated to the Public Employee Trust Fund are not "state funds"; the legislature may not restrict the use of those funds by a statute governing the use of "state or local funds." The restrictions on the use of "state and local" funds for abortions under s. 20.927 do not apply to health plans offered under this section. OAG 1−95

40.515 Health savings accounts; high−deductible health plan. (1) In addition to the health care coverage plans offered under s. 40.51 (6), beginning on January 1, 2015, the group insurance board shall offer to all state employees the option of receiving health care coverage through a high−deductible health plan and the establishment of a health savings account. Under this option, each employee shall receive health care coverage through a high−deductible health plan. The state shall make contributions into each employee's health savings account in an amount specified by the director of the office of state employment relations under s. 40.05 (4) (ah) 4. In designing a high−deductible health plan, the group insurance board shall ensure that the plan may be used in conjunction with a health savings account.

(2) The group insurance board may contract with any person to provide administrative and other services relating to health savings accounts established under this section.

(3) The group insurance board may collect fees from state agencies to pay all administrative costs relating to the establishment and operation of health savings accounts established under this section. The group insurance board shall develop a methodology for determining each state agency's share of the administrative costs. Moneys collected under this subsection shall be credited to the appropriation account under s. 20.515 (1) (tm).

(4) Beginning on January 1, 2015, to the extent practicable, any agreement with any insurer or provider to provide health care coverage to state employees under s. 40.51 (6) shall require the insurer or provider to also offer a high−deductible health plan that may be used in conjunction with a health savings account.

History: 2013 a. 20.

40.52 Health care benefits. (1) The group insurance board shall establish by contract a standard health insurance plan in which all insured employees shall participate except as otherwise provided in this chapter. The standard plan shall provide:

(a) A family coverage option for persons desiring to provide for coverage of all eligible dependents and a single coverage option for other eligible persons.

(b) Coverage for expenses incurred by the installation and use of an insulin infusion pump, coverage for all other equipment and supplies used in the treatment of diabetes, including any prescription medication used to treat diabetes, and coverage of diabetic

self−management education programs. Coverage required under this paragraph shall be subject to the same exclusions, limitations, deductibles, and coinsurance provisions of the plan as other covered expenses, except that insulin infusion pump coverage may be limited to the purchase of one pump per year and the plan may require the covered person to use a pump for 30 days before purchase.

(2) Health insurance benefits under this subchapter shall be integrated, with exceptions determined appropriate by the group insurance board, with benefits under federal plans for hospital and health care for the aged and disabled. Exclusions and limitations with respect to benefits and different rates may be established for persons eligible under federal plans for hospital and health care for the aged and disabled in recognition of the utilization by persons within the age limits eligible under the federal program. The plan may include special provisions for spouses, domestic partners, and other dependents covered under a plan established under this subchapter where one spouse or domestic partner is eligible under federal plans for hospital and health care for the aged but the others are not eligible because of age or other reasons. As part of the integration, the department may, out of premiums collected under s. 40.05 (4), pay premiums for the federal health insurance.

(3) The group insurance board, after consulting with the board of regents of the University of Wisconsin System, shall establish the terms of a health insurance plan for graduate assistants, for teaching assistants, and for employees−in−training designated by the board of regents, who are employed on at least a one−third full−time basis and for teachers who are employed on at least a one−third full−time basis by the University of Wisconsin System with an expected duration of employment of at least 6 months but less than one year. Annually, the director of the office of state employment relations shall establish the amount that the employer is required to pay in premium costs under this subsection.

(3m) The group insurance board, after consulting with the board of directors of the University of Wisconsin Hospitals and Clinics Authority, shall establish the terms of a health insurance plan for graduate assistants, and for employees−in−training designated by the board of directors, who are employed on at least a one−third full−time basis with an expected duration of employment of at least 6 months.

(4) The group insurance board shall establish the terms of health insurance plans for eligible employees, as defined under s. 40.02 (25) (b) 9. and 11., who elect coverage under s. 40.51 (7) or (10).

History: 1981 c. 96, 381; 1983 a. 429; 1987 a. 107; 1987 a. 327, 356; 1987 a. 403 s. 256; 1989 a. 13; 1991 a. 45; 1995 a. 216; 2001 a. 82; 2009 a. 28; 2011 a. 10.

The denial of a homosexual employee's request for family coverage for herself and her companion did not violate equal protection or the prohibition of discrimination on the basis of marital status, sexual orientation or gender under s. 111.321. Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

The insurance subrogation law permitting a subrogated insurer to be reimbursed only if the insured has been made whole applies to the state employee health plan. Leonard v. Dusek, 184 Wis. 2d 267, 516 N.W.2d 463 (Ct. App. 1994).

Barring spouses who are both state employees from each electing family medical coverage does not discriminate on the basis of marital status. Kozich v. Employee Trust Funds Board, 203 Wis. 2d 363, 553 N.W.2d 830 (Ct. App. 1996), 95−2219.

Barring spouses who are both public employees from each electing family medical coverage is excepted from the prohibition under ch. 111 against discrimination based on marital status. Motola v. LIRC, 219 Wis. 2d 588, 580 N.W.2d 297 (1998), 97−0896.

40.55 Long−term care coverage. (1) Except as provided in sub. (5), the state shall offer, through the group insurance board, to eligible employees under s. 40.02 (25) (bm) and to state annuitants long−term care insurance policies which have been filed with the office of the commissioner of insurance and which have been approved for offering under contracts established by the group insurance board. The state shall also allow an eligible employee or a state annuitant to purchase those policies for his or her spouse, domestic partner, or parent.

(2) For any long−term care policy offered through the group insurance board, the insurer may impose underwriting considerations in determining the initial eligibility of persons to cover and what premiums to charge.

(4) The group insurance board may charge a fee to each insurer whose policy is offered under this section, but the fee may not exceed the direct costs incurred by the group insurance board in offering the policy.

(5) An eligible state employee who elects insurance coverage with a county under s. 978.12 (6) may not elect coverage under this section.

History: 1987 a. 356; 1989 a. 31; 1991 a. 152; 2007 a. 168; 2009 a. 28; 2011 a. 32.

SUBCHAPTER V

DISABILITY BENEFITS

40.61 Income continuation coverage. (1) The procedures and provisions pertaining to enrollment, premium transmitted and coverage of eligible employees for income continuation benefits shall be established by contract or rule except as otherwise specifically provided by this chapter.

(2) Except as provided in sub. (4), any eligible employee may become covered by income continuation insurance by electing coverage within 30 days of initial eligibility, to be effective as of the first day of the month which begins on or after the date the application is received by the employer, or by electing coverage within 30 days of initially becoming eligible for a higher level of employer contribution towards the premium cost to be effective as of the first day of the month following the date the application is received by the employer for teachers employed by the university and effective as of the following April 1 for all other employees. Any employee who does not so elect at one of these times, or who subsequently cancels the insurance, may not thereafter become insured unless the employee furnishes evidence of insurability under the terms of the contract, or as otherwise provided by rule for employees under sub. (3), at the employee's own expense or obtains coverage subject to contractual waiting periods if contractual waiting periods are provided for by the contract or by rule for employees under sub. (3). An employee who furnishes satisfactory evidence of insurability under the terms of the contract shall become insured as of the first day of the month following the date of approval of evidence. The method to be used shall be determined by the group insurance board under sub. (1).

(3) Any employer under s. 40.02 (28), other than the state, may offer to all of its employees an income continuation insurance plan through a program offered by the group insurance board. Notwithstanding sub. (2) and ss. 40.05 (5) and 40.62, the department may by rule establish different eligibility standards or contribution requirements for such employees and employers and may by rule limit the categories of employers which may be included as participating employers under this subchapter.

(4) An eligible state employee who elects insurance coverage with a county under s. 978.12 (6) may not elect coverage under this section.

(5) If, as a result of employer error, an eligible employee has not filed an application with the department as required under sub. (2) or (3) or made premium contributions as required under s. 40.05 (5) within 60 days after becoming eligible for income continuation insurance coverage, the employee is considered not to be insured for that coverage. The employee may become insured by filing a new application under sub. (2) or (3) within 30 days after the employee receives from the employer written notice of the error. An employee is not required to furnish evidence of insurability to become insured under this subsection. An employee becomes insured under this subsection on the first day of the first month beginning after the date on which the employer

receives the employee's new application under sub. (2) or (3) and upon approval by the department.

History: 1981 c. 96; 1985 a. 29; 1987 a. 309; 1989 a. 31; 2005 a. 402.

40.62 Income continuation insurance benefits. (1) The group insurance board shall establish an income continuation insurance plan providing for full or partial payment of the financial loss of earnings incurred as a result of injury or illness with separate provisions for short−term insurance with a benefit duration of no more than one year and long−term insurance covering injury or illness of indefinite duration. Employees insured under the plan shall be eligible for benefits upon exhaustion of accumulated sick leave and completion of the elimination period established by the group insurance board.

(1m) Notwithstanding sub. (1), no employee may be required to use more than 130 days of accumulated sick leave unless required to exhaust accumulated sick leave under s. 40.63 (1) (c).

(2) Sick leave accumulation shall be determined in accordance with rules of the department, any collective bargaining agreement under subch. V of ch. 111, and ss. 13.121 (4), 36.30, 49.825 (4) (d) and (5) (d), 49.826 (4) (d), 230.35 (2), 233.10, 238.04 (8), 757.02 (5) and 978.12 (3).

NOTE: Sub. (2) is shown as affected by 2011 Wis. Acts 10 and 32 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

History: 1981 c. 96; 1987 a. 309; 1989 a. 13, 31; 1995 a. 27; 2009 a. 15, 28; 2011 a. 10, 32; s. 13.92 (2) (i).

40.63 Disability annuities. (1) Any participating employee is entitled to a disability annuity from the Wisconsin retirement system, beginning on the date determined under sub. (8) if, prior to attaining his or her normal retirement date, all of the following apply:

(a) The employee has earned at least one−half year of creditable service in each of at least 5 calendar years not including any calendar year preceding by more than 7 calendar years the year in which the application for the disability annuity is received by the department, or has earned a total of at least 5 years of creditable service during that period of time, or, if the disability was a result of employment as a participating employee for an employer, last rendered services to a participating employer not more than 2 years prior to the date the application for the disability annuity is received by the department.

(b) The employee becomes unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or to be of long−continued and indefinite duration.

(c) The employee is not entitled to any earnings from the employer and the employer has certified that it has paid to the employee all earnings to which the employee is entitled, that the employee is on a leave of absence and is not expected to resume active service, or that the employee's participating employment has been terminated, because of a disability as described in par. (b) and as a consequence the employee is not entitled to any earnings from the employer. In this paragraph, "earnings" does not include bonus compensation to which the employee was entitled under s. 25.156 (7) (a), 1997 stats.

(d) Except as provided in sub. (8) (h) 2., the employee is certified in writing by at least 2 licensed and practicing physicians approved or appointed by the department, to be disabled as described in par. (b).

(2) For purposes of sub. (1) a participant shall be considered a participating employee only if no other employment which is substantial gainful activity has intervened since service for the participating employer terminated and if the termination of active service for the participating employer was due to disability. For purposes of sub. (1) an elected official shall be considered to have terminated active service due to disability if a disability is determined, under sub. (1), to exist at the end of the elected official's term of office.

(3) For purposes of sub. (1) (a) only, if a participant was previously receiving a disability annuity which was terminated, the participant is deemed to have received full creditable service for any month for which the previous disability annuity was paid.

(4) Notwithstanding sub. (1) (b), a protective occupation participant is not disqualified from receiving a disability annuity if the participant has accumulated 15 or more years of creditable service and would attain age 55 in 60 months or less after the occurrence of disability and the medical evidence, as provided in sub. (1), establishes a disability to the extent that the participant can no longer efficiently and safely perform the duties required by the participant's position, and that the condition is likely to be permanent.

(5) The department shall make a report based on the evidence prescribed in subs. (1) to (4) as to whether a disability benefit shall be granted and the department shall submit the report to the teachers retirement board for teacher participants and to the Wisconsin retirement board for participants other than teachers. A copy of the report and notice of the date that the report was presented, or will be presented, to the appropriate board and the board's name, shall be mailed to the applicant and to the applicant's former employer. Either the applicant or the employer may request a hearing under s. 227.44 to contest the department's determination by filing a timely appeal with the appropriate board. If a request for a hearing is not timely filed, and the appropriate board does not disapprove the department's determination or request additional information within the time allowed for filing appeals, the report shall be final. If the board requests additional information, the report shall be final 30 days after the board's receipt of the requested information unless the board disapproves the report. If the report is disapproved, notice of the board's action shall be sent to the applicant and the applicant's former employer. Either the applicant or the employer may contest the board's action by submitting a written request for a hearing under s. 227.44 to the appropriate board within 30 days following the date on which the notice of the board's action was mailed to the applicant or the employer.

(6) Any person entitled to payments under this section who may otherwise be entitled to payments under s. 66.191, 1981 stats., may file with the department and the department of workforce development a written election to waive payments due under this section and accept in lieu of the payments under this section payments as may be payable under s. 66.191, 1981 stats., but no person may receive payments under both s. 66.191, 1981 stats., and this section. However any person otherwise entitled to payments under this section may receive the payments, without waiver of any rights under s. 66.191, 1981 stats., during any period as may be required for a determination of the person's rights under s. 66.191, 1981 stats. Upon the final adjudication of the person's rights under s. 66.191, 1981 stats., if waiver is filed under this section, the person shall immediately cease to be entitled to payments under this section and the system shall be reimbursed from the award made under s. 66.191, 1981 stats., for all payments made under this section.

(7) If an application, by a participant age 55 or over, or by a protective occupation participant age 50 or over, for any disability annuity is disapproved, the date which would have been the disability annuity effective date shall be the retirement annuity effective date if so requested by the applicant within 60 days of the disapproval or, if the disapproval is appealed, within 60 days of final disposition of the appeal.

(8) Disability annuity effective dates and amounts shall be determined in the same manner and shall be subject to the same limitations and options as retirement annuities except that separate actuarial tables may be applied and except that:

(a) The creditable service shall include assumed service between the date the disability occurred, or the last day for which creditable service was earned, if later, and the date on which the participant will reach the participant's normal retirement date.

The assumed service shall be prorated if the participant's employment was less than full time.

(b) For purposes of s. 40.23 (2m) (e) and (f) only, the participant is deemed to have attained the participant's normal retirement date on the effective date of the annuity.

(d) If an annuity option other than the normal form is elected, the amount of the normal form disability annuity which is greater than the normal form retirement annuity to which the participant would be entitled under s. 40.23, notwithstanding the minimum age requirement for receiving an annuity, shall be a straight life annuity terminating at the death of the annuitant. The balance of the present value of the disability annuity, after providing for the straight life annuity, shall be applied to provide an annuity in the optional form elected.

(e) The annuity option provided by s. 40.24 (1) (e) may not be elected.

(f) If an employer certifies that an employee's date of termination of employment is being extended past the last day worked due to any payment for accumulated sick leave, vacation or compensatory time, a participating employee may file an application for a disability annuity as if the last day worked were the last day paid. Regardless of the application date for a disability annuity, the date of termination of employment for effective date purposes shall be deemed to be the last day for which the participant was paid, including any payment for accumulated leave, but if a disability annuity applicant whose application has been approved dies before the last day paid, but after the last day worked, the effective date is the date of death.

(g) If processing of an application is delayed more than 12 months beyond the date the application is received by the department because of failure to receive some or all of the evidence required under subs. (1) to (4), the application shall be canceled but the applicant may reapply for a disability benefit if otherwise still eligible.

(h) If an applicant dies prior to the date a decision regarding the approval or disapproval of an application for a disability benefit becomes final under sub. (5), the application is deemed to have been approved prior to the applicant's death if:

1. The applicant was eligible for the disability benefit;

2. The department received an application for the disability benefit in the form approved by the department and at least one written qualifying medical certification required under sub. (1) (d); and

3. The applicant dies on or after the date which would have been the effective date of the disability benefit.

(i) For the purpose of par. (h) an applicant is conclusively presumed not eligible for a disability benefit if the application is based on an alleged disability which was the basis for a previous application which the department denied.

(9) (a) The board may require that any disability annuitant shall be examined by at least one licensed and practicing physician, designated or approved by the board, during any calendar year the annuitant is receiving the annuity. A written report of the examination in a form approved by the department which shall indicate whether or not the annuitant is still disabled as specified in sub. (1) (b), shall be filed with the department. This paragraph and par. (c) shall not apply to any annuitant who has attained the normal retirement date for the annuitant's former participant classification.

(b) If a disability annuitant, prior to attaining the normal retirement date for the annuitant's former participant classification, receives earnings or other earned income from any source whatsoever for personal services, including services performed on a contractual basis, the annuity shall be suspended, except for any amount provided by additional contributions, and no payment shall be payable after the first of the month in which the earnings or earned income received during any calendar year exceed the amount established under sub. (11), except that if payment was being made under sub. (4) the annuity may only be suspended if the annuitant is employed in a law enforcement or fire fighting capacity and then the suspension shall be effective immediately. The suspended amount shall be reinstated on January 1 following the date of suspension, or, if earlier, on the first day of the 2nd month following the termination of personal services. An amount, which is reinstated in any calendar year, other than on January 1 of the calendar year, shall again be suspended for any subsequent month in the calendar year following a month in which the disability annuitant receives any amount of earnings or earned income for personal services. The department may request any earnings or compensation information as it deems necessary to implement the provisions of this paragraph and par. (c).

(c) The disability annuity shall be terminated and no payment shall be payable after the first of the month in which a determination is made by the department that:

1. The written physician's report required in par. (a) indicates that the annuitant has recovered from the disability so the annuitant is no longer disabled to the extent required under sub. (1) (b);

2. The annuitant refuses to submit to an examination under par. (a); or

3. The annuitant refuses to submit information regarding earnings or compensation as requested by the department.

(d) If the department terminates a disability annuity under this subsection, the department shall make a report which shall include the department's determination and the reasons for the determination. The department shall submit the report to the teachers retirement board for teacher participants and to the Wisconsin retirement board for participants other than teachers. A copy of the report and notice of the date that the report was presented, or will be presented to the appropriate board, and the board's name, shall be mailed to the affected annuitant. An annuitant may request a hearing under s. 227.44 to contest the department's determination by filing a timely appeal with the appropriate board. If a request for a hearing is not timely filed, and the appropriate board does not disapprove the department's determination or request additional information within the time allowed for filing appeals, the report shall be final. If the board requests additional information, the report shall be final 30 days after the board's receipt of the requested information unless the board disapproves the department's determination.

(10) Upon termination of an annuity in accordance with sub. (9), each participant whose annuity is so terminated shall, as of the beginning of the calendar month following termination, be credited with additional contributions equal to the then present value of the portion of the terminated annuity which was originally provided by the corresponding type of additional contributions. Except for additional contributions, the retirement account of the participant shall be reestablished as if the terminated annuity had never been effective, including crediting of interest and of any contributions and creditable service earned during the period the annuity was in force.

(11) In this section "substantial gainful activity" means employment for which the annual compensation exceeds, for determinations made in the calendar year commencing on January 1, 1982, $3,600 or, for determinations made in subsequent calendar years, the amount applied under this section in the previous calendar year increased by the salary index and ignoring fractions of the dollar.

History: 1981 c. 96, 386; 1983 a. 141 s. 20; 1983 a. 191 s. 6; 1983 a. 290; 1985 a. 11; 1985 a. 182 s. 57; 1987 a. 303, 372; 1989 a. 13, 166; 1991 a. 39, 152; 1995 a. 27 s. 9130 (4); 1997 a. 3, 69; 1999 a. 9.

Under sub. (1) (c), the employer's failure to certify that it terminated the employee because of a disability was fatal to an application for disability benefits. State ex. rel Bliss v. Wisconsin Retirement Board, 216 Wis. 2d 223, 576 N.W.2d 76 (Ct. App. 1998), 97−1639.

40.65 Duty disability and death benefits; protective occupation participants. (2) (a) This paragraph applies to participants who first apply for benefits before May 3, 1988. Any person desiring a benefit under this section must apply to the department of workforce development, which department shall determine whether the applicant is eligible to receive the benefit

and the participant's monthly salary. Appeals from the eligibility decision shall follow the procedures under ss. 102.16 to 102.26. If it is determined that an applicant is eligible, the department of workforce development shall notify the department of employee trust funds and shall certify the applicant's monthly salary. If at the time of application for benefits an applicant is still employed in any capacity by the employer in whose employ the disabling injury occurred or disease was contracted, that continued employment shall not affect that applicant's right to have his or her eligibility to receive those benefits determined in proceedings before the department of workforce development or the labor and industry review commission or in proceedings in the courts. The department of workforce development may promulgate rules needed to administer this paragraph.

(b) 1. This paragraph applies to participants who first apply for benefits under this section on or after May 3, 1988.

2. An applicant for benefits under this section shall submit or have submitted to the department an application that includes written certification of the applicant's disability under sub. (4) by at least 2 physicians, as defined in s. 448.01 (5), who practice in this state and one of whom is approved or appointed by the department, and a statement from the applicant's employer that the injury or disease leading to the disability was duty−related.

3. The department shall determine whether or not the applicant is eligible for benefits under this section on the basis of the evidence in subd. 2. An applicant may appeal a determination under this subdivision to the department of workforce development.

4. In hearing an appeal under subd. 3., the department of workforce development shall follow the procedures under ss. 102.16 to 102.26.

5. The department shall be an interested party in an appeal under subd. 3., and the department shall receive legal assistance from the department of justice, as provided under s. 165.25 (4).

(3) The Wisconsin retirement board shall determine the amount of each monthly benefit payable under this section and its effective date. The board shall periodically review the dollar amount of each monthly benefit and adjust it to conform with the provisions of this section. The board may request any income or benefit information, or any information concerning a person's marital status, which it considers to be necessary to implement this subsection and may require a participant to authorize the board to obtain a copy of his or her most recent state or federal income tax return. The board may terminate the monthly benefit of any person who refuses to submit information requested by the board, who refuses to authorize the board to obtain a copy of his or her most recent state or federal income tax return, or who submits false information to the board.

(4) A protective occupation participant is entitled to a duty disability benefit as provided in this section if:

(a) The employee is injured while performing his or her duty or contracts a disease due to his or her occupation;

(b) The disability is likely to be permanent; and

(c) 1. The disability causes the employee to retire from his or her job;

2. The employee's pay or position is reduced or he or she is assigned to light duty; or

3. The employee's promotional opportunities within the service are adversely affected if state or local employer rules, ordinances, policies or written agreements specifically prohibit promotion because of the disability.

(4m) A protective occupation participant who is a state motor vehicle inspector hired on or after January 1, 1968, is not entitled to a duty disability benefit under this section for an injury or disease occurring before May 1, 1990.

(4r) A protective occupation participant who is an emergency medical technician is not entitled to a duty disability benefit under this section for an injury or disease occurring before the date on which the department receives notification of the participant's name as provided in s. 40.06 (1) (d) and (dm).

(4v) A state probation and parole officer who becomes a protective occupation participant on or after January 1, 1999, is not entitled to a duty disability benefit under this section for an injury or disease occurring before January 1, 1999.

(5) (a) The monthly benefit payable to participants who qualify for benefits under s. 40.63 or disability benefits under OASDHI is 80% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 80% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II at the date of application, but not to less than 50% of the participant's monthly salary. For participants who do not qualify for benefits under s. 40.63 or disability benefits under OASDHI, the monthly benefit under this section is 75% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 75% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II on the date of application.

(b) The Wisconsin retirement board shall reduce the amount of a participant's monthly benefit under this section by the amounts under subds. 1. to 6., except that the board may determine not to reduce a participant's benefit because of income related to therapy or rehabilitation. The Wisconsin retirement board may assume that any benefit or amount listed under subds. 1. to 6. is payable to a participant until it is determined to the board's satisfaction that the participant is ineligible to receive the benefit or amount, except that the department shall withhold an amount equal to 5% of the monthly benefit under this section until the amount payable under subd. 3. is determined.

1. Any OASDHI benefit payable to the participant or the participant's spouse, domestic partner, or a dependent because of the participant's work record.

2. Any unemployment insurance benefit payable to the participant because of his or her work record.

3. Any worker's compensation benefit payable to the participant, including payments made pursuant to a compromise settlement under s. 102.16 (1). A lump sum worker's compensation payment or compromise settlement shall reduce the participant's benefit under this section in monthly amounts equal to 4.3 times the maximum benefit which would otherwise be payable under ch. 102 for the participant's disability until the lump sum amount is exhausted.

4. Any disability and retirement benefit payable to the participant under this chapter, or under any other retirement system, that is based upon the participant's earnings record and years of service. A reduction under this subdivision may not be greater in amount than the amount of disability or retirement benefit received by the participant. If the participant is not eligible for a retirement benefit because he or she received a lump sum payment or withdrew his or her contributions on or after the date the participant became eligible to receive a benefit under this section, the amount received or withdrawn shall reduce the participant's benefit under this section in the amount of benefit that would be payable if, on the date the amount was received or withdrawn, the full amount received or withdrawn was applied under s. 40.23 (2m) (d) as additional employee contributions credited to the participant's account.

5. All earnings payable to the participant from the employer under whom the duty disability occurred.

6. All earnings payable to the participant from an employer, other than the employer under whom the duty disability occurred, and all income from self−employment, the total of such earnings and income shall reduce the participant's benefit as follows:

a. For the amount of the total that is less than 40% of the participant's monthly salary, one−third of such amount;

b. For the amount of the total that is from 40% to 80% of the participant's monthly salary, one−half of such amount; and

c. For the amount of the total that is more than 80% of the participant's monthly salary, two−thirds of such amount.

(c) The Wisconsin retirement board may not reduce a participant's benefit because of income or benefits that are attributable to the earnings or work record of the participant's spouse, domestic partner, or other member of the participant's family, or because of income or benefits attributable to an insurance contract, including income continuation programs.

(6) The Wisconsin retirement board shall adjust the monthly salary of every participant receiving a benefit under this section using the salary index for the previous calendar year as follows:

(a) For the purposes of sub. (5) (b) 6., annually on January 1 until the participant's death;

(b) For the purposes of sub. (5) (a), if the participant is receiving an annuity under s. 40.63 (1), annually on January 1 until the participant's death; and

(c) For the purposes of sub. (5) (a), if the participant is not receiving an annuity under s. 40.63 (1), annually on January 1 until the first January 1 after the participant's 60th birthday. Beginning on the January 1 after the participant's 60th birthday the participant's monthly salary shall be increased annually in a percentage amount equal to the percentage amount of dividend awarded under s. 40.27 (2) until the participant's death. Notwithstanding s. 40.27 (2), any benefits payable under this section are not subject to distribution of annuity reserve surpluses.

(7) (a) This paragraph applies to benefits based on applications filed before May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under age 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse, if the spouse was married to the participant on the date the participant was disabled within the meaning of sub. (4), one−third of the participant's monthly salary as reflected at the time of death until the surviving spouse marries again.

2. To the guardian of a surviving unmarried child under age 18, $15 per child until the child marries, dies or reaches 18 years of age.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 65% of the participant's monthly salary as reflected at the time of death. Any reduction of benefits caused by such limitation shall be done on a proportional basis.

(am) This paragraph applies to benefits based on applications filed on or after May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse, domestic partner, or an unmarried child under the age of 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse or domestic partner until the surviving spouse remarries or the surviving domestic partner enters into a new domestic partnership or marries, if the spouse was married to the participant on the date that the participant was disabled under sub. (4) or the domestic partner was in a domestic partnership with the participant on the date that the participant was disabled under sub. (4), 50% of the participant's monthly salary at the time of death, but reduced by any amount payable under sub. (5) (b) 1. to 6.

2. To a guardian for each of that guardian's wards who is an unmarried surviving child under the age of 18, 10% of the participant's monthly salary at the time of death, payable until the child marries, dies or reaches the age of 18, whichever occurs first. The marital or domestic partnership status of the surviving spouse or domestic partner shall have no effect on the payments under this subdivision.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 70% of the participant's monthly salary at the time of death reduced by any amounts under sub. (5) (b) 1. to 6. that relate to the participant's work record.

4. Benefits payable under this paragraph shall be increased each January 1 by the salary index determined for the prior year.

(ar) 1. This paragraph applies to benefits based on applications filed on or after May 12, 1998. If a protective occupation participant, who is covered by the presumption under s. 891.455, dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse, domestic partner, or an unmarried child under the age of 18, a monthly benefit shall be paid as follows:

a. To the surviving spouse or domestic partner until the surviving spouse or domestic partner remarries or enters into a new domestic partnership, if the surviving spouse was married to the participant on the date that the participant was disabled under sub. (4) or the domestic partner was in a domestic partnership with the participant on the date that the participant was disabled under sub. (4), 70% of the participant's monthly salary at the time of death, but reduced by any amount payable under sub. (5) (b) 1. to 6.

b. If there is no surviving spouse or domestic partner or the surviving spouse or domestic partner subsequently dies, to a guardian for each of that guardian's wards who is an unmarried surviving child under the age of 18, 10% of the participant's monthly salary at the time of death, payable until the child marries, dies or reaches the age of 18, whichever occurs first.

2. Benefits payable under this paragraph shall be increased each January 1 by the salary index determined for the prior year.

(b) Any person entitled to a benefit under both this subsection and ch. 102 because of the death of the same participant, shall have his or her benefit under this subsection reduced in an amount equal to the death benefit payable under ch. 102.

(9) This section is applicable to protective occupation participants who apply for a benefit under this section on or after July 1, 1982. A participant may not apply for a benefit under this section if he or she is receiving a benefit under s. 66.191, 1981 stats., on July 1, 1982.

History: 1981 c. 278; 1983 a. 9; 1983 a. 141 s. 20; 1983 a. 191 s. 6; 1983 a. 255; 1985 a. 332 s. 251 (1); 1987 a. 363; 1989 a. 240, 357; 1995 a. 27 s. 9130 (4); 1997 a. 3, 39, 173, 237; 2007 a. 131; 2009 a. 28.

Cross−reference: See s. 891.45 for provision as to presumption of employment−connected disease for certain municipal fire fighters.

Cross−reference: See also LIRC and ss. ETF 52.01 and DWD 80.31, Wis. adm. code.

The Wisconsin Retirement Board may not reduce duty disability benefits under sub. (5) (b) 3. for worker's compensation benefits that are paid to a participant before the duty disability payments commence, and may do so only for worker's compensation not yet paid. Coutts v. Wisconsin Retirement Board, 209 Wis. 2d 655, 563 N.W.2d 917 (1997), 95−1905.

The Retirement Board is authorized to promulgate administrative rules interpreting sub. (3). Kuester v. Wisconsin Retirement Board, 2004 WI App 10, 269 Wis. 2d 462, 674 N.W.2d 877, 03−0056.

The Retirement Board correctly construed sub. (5) (b) in determining duty disability benefits when it reduced those benefits by earnings and lump sum worker's compensation benefits received after the effective date of the duty disability benefits. The board was reasonable in reading *Coutts* to hold that the statutorily specified sums are payable when they are received and that it is proper to offset them against duty disability benefits. Carey v. Wisconsin Retirement Board, 2007 WI App 17, 298 Wis. 2d 373, 728 N.W.2d 22, 06−1233.

SUBCHAPTER VI

SURVIVOR BENEFITS

40.70 Life insurance coverage. (1) Except as provided in sub. (11), each eligible employee of an employer shall be insured under the group life insurance plan provided under this subchapter if all of the following apply:

(a) The employer is a participating employer under the Wisconsin retirement system and was included in the group life insurance program by s. 40.20 (5m), 1979 stats., or the governing body of the employer has adopted a resolution in a form prescribed by the department to make coverage available to its employees or is the state. Coverage may also be extended by rule to employees

under other retirement systems if the employer adopts a resolution as specified in this paragraph. A certified copy of the resolution shall be filed with the department and the resolution takes effect on the first day of the 4th month beginning after the date of filing. An employer may provide group life insurance for its employees through separate contracts in addition to, or in lieu of, the group life insurance provided by the department under this subchapter.

(b) The employee files an application in the manner provided by rule or contract, to be effective on a date fixed by the department, for one or more of the types of coverage established under this subchapter. The group insurance board may provide a different method of enrollment than provided under this subsection.

(c) The employee pays the employee contribution toward the life insurance premium under s. 40.05 (6).

(2) A resolution adopted under sub. (1) (a) takes effect only if the department determines that at least 50% of the eligible employees of that employer will be covered at the time that the resolution is effective. The department's determination shall be based on the employer's prior year−end report of the number of employees participating in the Wisconsin retirement system or, if the employer was not a participating employer in the prior year, on the number of employees who, on or before the 15th day of the month immediately preceding the effective date of the resolution, have applied for group life insurance coverage under this subchapter. If the department nullifies a resolution based on insufficient participation, the employer may not file another resolution under sub. (1) (a) during the first 6 months after the date of the previous filing.

(3) Employers may adopt resolutions providing all the coverages provided under this subchapter or provided by contract or may identify in the resolution only specified coverages that are authorized by contract to be offered separately. Employees may file an application under sub. (1) (b) for the amount of coverage provided under s. 40.72 (1) and for any other coverage offered by their employer. The department shall determine the method of administration and the procedure for collection of premiums and employer costs.

(4) (a) The governing body of any employer may do any of the following:

1. Change the coverage that it makes available to its employees under s. 40.72 (2) or (3) by adopting an amended resolution and filing a certified copy of the amended resolution with the department.

2. Withdraw from making coverage under this subchapter available to its employees by adopting a withdrawal resolution and filing a certified copy of the withdrawal resolution with the department.

3. Nullify its amended resolution or withdrawal resolution at any time before it becomes effective by adopting a nullifying resolution and filing a certified copy of the nullifying resolution with the department.

(b) Except as provided in sub. (5), amended resolutions and withdrawal resolutions take effect on the first day of the 4th month beginning after the date of filing. Nullifying resolutions take effect on the date of filing.

(c) If a withdrawal resolution becomes effective, the employer may not file another resolution under sub. (1) (a) during the first 12 months after the effective date of the withdrawal resolution.

(5) The department may accept or reject an amended resolution, or a resolution under sub. (1) (a) that is filed after the employer's withdrawal resolution becomes effective, and may charge the employer for any postretirement insurance liability.

(6) Except as provided in sub. (7m), any employee who has not applied for coverage under sub. (1) within the time period specified by rule or contract after becoming eligible for coverage or any employee whose insurance terminates under sub. (8) shall not thereafter become insured for that coverage unless the employee furnishes evidence of insurability satisfactory to the insurer, at his or her own expense. If the evidence is approved, the employee shall become insured on the first day of the first month beginning after the approval.

(7m) If, as a result of employer error, an employee has not filed an application with the department as required under sub. (1) (b) or made premium contributions as required under sub. (1) (c) within 60 days after becoming eligible for group life insurance coverage, the employee is considered not to be insured for that coverage. The employee may become insured by filing a new application under sub. (1) (b) within 30 days after the employee receives from the employer written notice of the error. An employee is not required to furnish evidence of insurability to become insured under this subsection. An employee becomes insured under this subsection on the first day of the first month beginning after the date on which the employer receives the employee's new application under sub. (1) (b).

(8) An insured employee may at any time cancel one or more of the types of life insurance coverage provided under this subchapter by filing a cancellation form with the employing office. The cancellation form shall be transmitted immediately to the department. The cancellation shall be effective and the insurance shall cease at the end of the calendar month which begins after the cancellation form is received by the appropriate office.

(9) The life insurance shall terminate as provided in the contract which shall also provide an option for an employee to convert insurance coverage upon termination of employment if covered by the insurance during the entire 6 months preceding termination or if covered by the insurance from the initial effective date for that employer, to the date of termination.

(10) The group insurance board may provide for the continuation or suspension of insurance coverage during any month in which no earnings are received during a leave of absence.

(11) An eligible state employee shall not be insured under the group life insurance provided under this subchapter if the employee elects insurance coverage with a county under s. 978.12 (6).

History: 1981 c. 96; 1989 a. 13, 31, 182; 1991 a. 152; 2007 a. 131.
Cross−reference: See also s. ETF 60.31, Wis. adm. code.

40.71 Death benefit eligibility. The following described persons are entitled to death benefits from the Wisconsin retirement system, in the form and at the times specified:

(1) The beneficiary of any participant or of any annuitant on the date of death of the participant or annuitant. For purposes of this subsection:

(a) A participant is deemed a participating employee on the date of death even though the participant is then an applicant for a retirement or disability annuity, except as provided by s. 40.63 (8) (h), if the participant's application was received by the board within 30 days after the participant ceased to be a participating employee and the participant would have been entitled to the annuity had the participant lived.

(b) If the date of death is less than one year after the last day for which earnings were paid, a participant is deemed a participating employee on leave of absence, notwithstanding the fact that no formal leave of absence is in effect, if the participating employer for which the participant last performed services as a participating employee has not filed notice of the termination of employment prior to the employee's death.

Cross−reference: See also s. ETF 20.37, Wis. adm. code.

(c) If the death of a participating employee on leave of absence, other than a leave for purposes of military service, arises from employment by any employer other than a participating employer, employment is deemed to have terminated and the participant shall not be considered a participating employee on the date of his or her death.

(d) Every participant is deemed an annuitant immediately upon the effective date of the participant's annuity, or the date the

application is received by the department if the participant is living on that date, whichever is later.

(e) Any annuitant whose annuity is terminated shall cease to be an annuitant as of the last day of the month preceding the last day on which the annuity is payable.

(2) Any death benefit may be paid as a beneficiary annuity, subject to s. 40.73 (3), or as a single cash sum as specified by the beneficiary in the application for the death benefit unless the participant prohibited payment of a single cash sum in a written notice received by the department prior to the participant's death. A prohibition on payment of a single cash sum shall not be effective if the monthly amount of the annuity would be less than the amount determined under s. 40.25 (1) (a) or if the beneficiary is the participant's estate or a trust in which the beneficiary has a beneficial interest.

(3) Whenever any death benefit is payable in a single cash sum, it shall be paid only after receipt by the department of the following:

(a) A copy of the death certificate of the participant or annuitant;

(b) A written application of the beneficiary for the benefit; and

(c) Any additional evidence deemed necessary or desirable by the department.

History: 1981 c. 96; 1987 a. 309.

Cross−reference: See also s. ETF 20.37, Wis. adm. code.

Nothing in s. 40.73 creates an entitlement in the beneficiary to the annuity−value single cash sum benefit as of the date of death even though the value of the single cash sum benefit is calculated as of the date of death. A beneficiary does not acquire a property interest in a single cash sum death benefit under s. 40.73 (1) (c) until the beneficiary applies for a death benefit as required by sub. (3). Fazio v. Department of Employee Trust Funds, 2006 WI 7, 287 Wis. 2d 106, 708 N.W.2d 326, 04−0064.

40.72 Life insurance benefits. (1) Except as provided in sub. (2), (3), (3m), (8) or (10), the amount of group life insurance of an insured employee under age 70 shall be $1,000 of insurance for each $1,000 or part of $1,000 of the employee's annual earnings during the prior calendar year, notwithstanding any limitation of amount that may otherwise be provided by law. For persons covered initially the earnings shall be a projection on an annual basis of the compensation at the time of coverage until the date determined by the group insurance board for establishing new annual amounts of insurance.

(2) Except as provided by sub. (3), the amount of life insurance for any insured eligible employee who is 70 years of age or older or insured retired eligible employee under sub. (4) who is 65 years of age or over shall be the amount as computed under sub. (1) reduced by 25% of that amount on each birthday of the employee commencing with the employee's 65th birthday, with a maximum reduction of 75%.

(3) The maximum reduction in the amount of insurance for any insured employee to whom this subsection applies by an election under s. 40.70 (3) and for any insured state employee shall be 50%.

(3m) The group insurance board may, by contract, limit the amount of group life insurance for any insured employee who becomes insured by electing coverage under s. 40.70 (6).

(4) The amount of life insurance for any insured employee who was either a participating employee before January 1, 1990, or who has been covered under the group life insurance plan in at least 5 calendar years after 1989, who terminates employment shall be the same as if the employee had not terminated employment and earnings had continued at the same amount as at the time of termination, except as provided in subs. (2) and (3) and s. 40.70 (3), if any of the following applies on the date of termination:

(a) The employee meets all of the requirements for receiving an immediate annuity except the filing of an application.

(b) The sum of the employee's creditable service on January 1, 1990, and the number of calendar years after 1989 in which the employee has been covered under the group life insurance plan equals at least 20 years.

(c) The employee's number of years of service with the participating employer by whom the employee was employed immediately before termination equals at least 20 years.

(4g) Any individual who became an employee of the state under chapter 90, laws of 1973, section 546, as affected by chapter 333, laws of 1973, section 189b, may use service as a member of the Milwaukee County employee's retirement system to meet any service requirements under this subchapter.

(4r) At any time after an insured employee's amount of life insurance is reduced under subs. (2) and (3) and life insurance premiums are no longer required under s. 40.05 (6) (b), the employee may convert the present value of the life insurance to pay the premiums for health or long−term care insurance provided under subch. IV, but only if the department determines that the value of the conversion is exempt from taxation under the Internal Revenue Code.

(5) The amount of insurance specified under sub. (4) shall be adjusted when the person again becomes an employee of an employer participating in the group life insurance plan and while employed again the person shall pay premiums under s. 40.05 (6) for the insurance.

(6) The amount of insurance of an employee who retires on disability annuity shall be the same as if the employee had not retired and his or her earnings had continued in the same amount as at the time of his or her retirement, except as provided by subs. (2) and (3).

(7) During a period of disability in which premiums are waived under the terms of the insurance contract the amount of insurance shall be the same as if the employee had not become disabled and earnings had continued at the same amount as at the time of becoming disabled, and the contract may provide that the insurance continues during the continuance of the disability even if the person ceases to be an employee.

(8) The life insurance in effect during the previous year shall not be reduced during subsequent consecutive years of eligible employment with the same employer unless the employee elects to have the amount of life insurance recomputed under subs. (1) to (3) or cancels coverage. The election shall be made under procedures established by the department. This subsection is subject to the limitations of subs. (2) and (3).

(9) In addition to the insurance provided under sub. (1), insurance may be provided against accidental death and dismemberment as defined by the group insurance board in accordance with benefit schedules established by contract.

(10) Each insured state employee, and each insured employee to whom this subsection applies by an election under s. 40.70 (3), who is under 70 years of age, or 65 years of age if retired, shall be provided an amount of group life insurance in addition to that provided under sub. (1) equal to 100% of the employee's earnings rounded to the next higher $1,000, if earnings are not in even $1,000 increments. The employee may cancel, in accord with the procedures specified by s. 40.70, the amount of additional insurance provided under this subsection.

History: 1981 c. 96, 386; 1985 a. 332 s. 251 (3); 1989 a. 182; 1991 a. 152; 1993 a. 490; 2013 a. 20.

Cross−reference: See also ss. ETF 60.31 and 60.60, Wis. adm. code.

40.73 Death benefits. (1) The amount of the Wisconsin retirement system death benefit shall be:

(a) Upon the death of a participant, other than an annuitant or a participating employee, the sum of the additional and employee required contribution accumulations credited to the participant's account on the beneficiary annuity effective date or, in the case of a lump sum payment, the first day of the month in which the death benefit is approved. In addition:

1. For teacher participants who were members of the state teachers retirement system or the Milwaukee teachers retirement fund on June 30, 1966, the amount shall be increased by the employer contribution accumulation credited to the participant's

account on or prior to June 30, 1973, plus interest at the effective rate subsequently credited to the accumulations.

2. For participants who were participants of the Wisconsin retirement fund on or prior to December 31, 1965, the amount shall be increased by the employer contribution accumulation credited to the participant's account on December 31, 1965, plus interest at the effective rate subsequently credited to the accumulations.

(am) Upon the death of a participating employee, except as otherwise provided by par. (c), the sum of all of the following accumulations, including any interest credited to the accumulations, that are credited to the participant's account on the beneficiary annuity effective date or, in the case of a lump sum payment, the first day of the month in which the death benefit is approved:

1. Additional contributions.

2. Accumulated contributions to purchase other governmental service under s. 40.25 (7), 2001 stats., or s. 40.285 (2) (b).

3. Twice the employee required contributions, after first subtracting the accumulations under subd. 2., including interest on the accumulations.

(b) Upon the death of an annuitant, in addition to any amounts payable by virtue of the annuity option elected by an annuitant, the amount determined under par. (a) for contributions made under s. 40.05 (1) subsequent to the effective date of the annuity, or additional contributions not applied to provide an annuity, provided the amounts have not been previously paid out as a lump sum under s. 40.25.

(c) Upon the death of a participating employee who, prior to death, met the applicable minimum age under s. 40.23 (1) (a) (intro.), if the beneficiary to whom a death benefit is payable is a natural person, or a trust in which the natural person has a beneficial interest, the present value on the day following the date of death of the life annuity to the beneficiary which would have been payable if the participating employee had been eligible to receive a retirement annuity, computed under s. 40.23 or 40.26, beginning on the date of death and had elected to receive the annuity in the form of a joint and survivor annuity providing the same amount of annuity to the surviving beneficiary as the reduced amount payable during the participant's lifetime. If there is more than one beneficiary the amount of the annuity and its present value will be determined as if the oldest of the beneficiaries were the sole beneficiary. If the death benefit payable to the beneficiary under this paragraph would be less than the amount determined under par. (am) the death benefit shall be payable under par. (am) and this paragraph shall not be applicable to the beneficiary. An annuitant receiving an annuity only under s. 40.24 (1) (f), which annuity was an immediate annuity, shall be deemed a participating employee for purposes of this paragraph only, but the amount payable under s. 40.24 (1) (f) shall not be changed.

(d) Increased, upon the death of a participant who had elected the additional benefit provided by s. 42.81 (14), 1979 stats., and continued making the contributions provided for in s. 42.81 (14), 1979 stats., and was eligible for the benefit on December 15, 1988, by an amount and for a period determined by the actuary and approved by the board as being appropriate to the level of contributions provided for in s. 42.81 (14), 1979 stats., or any lower level of contributions, as determined by the actuary and approved by the board. The board may require that the payment of benefits under an insurance contract be paid in lieu of any benefits provided under this paragraph, but only if the benefits under the insurance contract are at least equal to the benefits that would otherwise have been paid under this paragraph on the date on which the insurance contract went into effect.

(2) (a) Upon the death, prior to the expiration of the guarantee period, of an annuitant receiving an annuity which provides a guaranteed number of monthly payments, monthly payments shall be continued until payments have been made for the guaranteed number of months. Any beneficiary under this paragraph may elect at any time to receive the then present value of the annuity, including monthly interest at the assumed benefit rate for each full month between the termination of annuity payments and the month in which the single sum payment is approved, in a single sum.

(b) In lieu of the continuation of monthly payments under par. (a), the then present value of the annuity shall be paid as a death benefit under sub. (1) if:

1. The estate of the annuitant is the beneficiary;

2. No beneficiary of the annuitant survives;

3. The death of the beneficiary occurs after having become entitled to receive payments under par. (a), but prior to the end of the period guaranteed;

4. The amount of the monthly payments to the beneficiary, including any amount payable under s. 40.27, is less than the amount determined under s. 40.25 (1) (a); or

5. At the death of the annuitant the remainder of the period for which payments are guaranteed is less than 12 months.

(3) (a) A death benefit may be paid as an annuity for the life of the beneficiary, if the amount of the death benefit is sufficient to provide a beneficiary annuity in the normal form at least equal to the amount determined under s. 40.25 (1) (a) and the beneficiary or the participant has elected to have the death benefit paid as a beneficiary annuity.

(c) Whenever any death benefit is payable in the form of an annuity, the annuity may begin on the day following the date of death of the participant or annuitant if the department has received a copy of the death certificate of the participant or annuitant, and a written application of the beneficiary for the benefit, subject to the same restrictions on effective dates as set forth for retirement annuities.

(d) The amount of any beneficiary annuity shall be that which can be provided from the death benefit, determined in accordance with the actuarial tables in effect on the effective date of the annuity.

(e) Any beneficiary who is eligible to receive a beneficiary annuity may elect to receive the annuity in any of the optional annuity forms provided for retirement annuities, other than as an annuity payable over the joint life expectancies of the beneficiary and another person. The number of guaranteed monthly payments available to a beneficiary may not exceed the life expectancy of the beneficiary.

(f) Any beneficiary between ages 18 and 21 or the legal or natural guardian of a minor beneficiary may, in lieu of a life annuity, elect that the death benefit be paid in the form of a temporary life annuity, beginning on the day following the date of death of the participant or annuitant and ending with the monthly payment immediately prior to the beneficiary's 21st birthday, and a final payment, payable one month after the termination of the temporary annuity, in the amounts specified in the application, provided the amounts can be provided from the death benefit, on the basis of the actuarial tables in effect on the date of initial approval of the annuity. A beneficiary, prior to the final payment, may, if the amount of the final payment is sufficient to provide an immediate beneficiary annuity in the normal form of at least an amount equal to the amount determined under s. 40.25 (1) (a) monthly, elect to receive in lieu of the final payment an annuity commencing on the day following the date of termination of the temporary annuity, determined on the basis of the actuarial tables in effect on the date of initial approval of the annuity.

History: 1981 c. 96; 1983 a. 141, 290; 1987 a. 309; 1989 a. 110, 166; 1995 a. 302, 414; 1997 a. 58; 1999 a. 11, 12; 2005 a. 154; 2007 a. 96, 131; 2013 a. 20.

Whatever effect the Marital Property Act, ch. 766, may have with respect to property rights between spouses, it has no effect on the Board's determination of a beneficiary under ch. 40. Jackson v. Employee Trust Funds Board, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999), 98−3063.

The board's consistent interpretation of "Mr. & Mrs." beneficiary designations as relating to the identity of the beneficiaries on the date of the designation. was reasonable. Jackson v. Employee Trust Funds Board, 230 Wis. 2d 677, 602 N.W.2d 543 (Ct. App. 1999), 98−3063.

Nothing in s. 40.73 creates an entitlement in the beneficiary to the annuity−value single cash sum benefit as of the date of death even though the value of the single cash sum benefit is calculated as of the date of death. A beneficiary does not acquire a

property interest in a single cash sum death benefit under s. 40.73 (1) (c) until the beneficiary applies for a death benefit as required by sub. (3). Fazio v. Department of Employee Trust Funds, 2006 WI 7, 287 Wis. 2d 106, 708 N.W.2d 326, 04−0064.

40.74 Beneficiaries. (1) Payment to 2 or more persons as joint beneficiaries shall be equal unless the participant, employee or annuitant has designated otherwise in the written designation of beneficiary on file with the department.

(2) A beneficiary of a deceased participant, annuitant, alternate payee, beneficiary, or employee may waive absolutely and without right of reconsideration or recovery all or part of any benefit payable under this chapter. The beneficiary shall then be determined as if the waiving beneficiary had died prior to the decedent except that if the person was a beneficiary under group 2 under s. 40.02 (8) (a) 2., payment shall be made as if at least one child had survived the participant, alternate payee, beneficiary, employee, or annuitant. Unless the department receives the beneficiary's written request to cancel the waiver before the date on which it would otherwise become effective, the waiver shall be effective 30 days after it is received by the department or the date specified in the waiver, if earlier. The waiver may be cancelled by the beneficiary in writing before the effective date. A waiver received after the effective date on which a beneficiary has commenced a monthly annuity under s. 40.73 (2) or (3) shall apply to monthly payments payable after the effective date of the waiver. Payment shall be subject to the restrictions specified in s. 40.73 (2) (b).

(4) If a participant, employee or annuitant fully terminates all coverage and closes all accounts to which a written beneficiary designation applies, the designation does not apply if the individual again becomes a participant, employee or annuitant.

(5) A designation of a testamentary trust as beneficiary shall satisfy the requirement of s. 40.02 (8) (a) 1. that a person or trust be specifically named in a written designation of beneficiary whether the will establishing the trust is written before or after the designation of beneficiary is received by the department. If, however, a designation specified the date or otherwise identified a specific will, the designation shall not apply if the will is not the last will and testament of the participant, employee or annuitant.

(6) Any potential primary beneficiary under s. 40.02 (8) who cannot be located by reasonable efforts within 12 months after the later of the date of death of the participant or the date on which the department determines the person, trust, or estate initially became a potential primary beneficiary may be treated as a beneficiary that predeceased the participant and all other potential beneficiaries.

(7) A trust that does not exist on the date of the participant's death or an estate not opened or reopened within 12 months after the department determines the estate initially became a potential primary beneficiary under s. 40.02 (8) may be treated as a beneficiary that predeceased the participant and all other potential beneficiaries.

History: 1981 c. 96; 1987 a. 309; 2005 a. 151; 2007 a. 131.

SUBCHAPTER VII

DEFERRED COMPENSATION PLANS

40.80 State deferred compensation plan. (1) The deferred compensation board shall select and contract with deferred compensation plan providers to be used by state agencies for providing deferred compensation plans to state employees.

(2) The deferred compensation board shall:

(a) Determine the requirements for and the qualifications of the deferred compensation plan providers.

(b) Approve the terms and conditions of the proposed contracts for administrative and investment services.

(c) Determine the procedure for the selection of the deferred compensation plan providers.

(d) Approve the terms and conditions of model salary reduction agreements which shall be used by each state agency.

(e) Require as a condition of the contractual agreements entered into under this section that approved deferred compensation plan providers shall provide service to state agencies only as approved by the deferred compensation board.

(f) Require as a condition of the contractual agreements entered into under this section that the deferred compensation plan providers shall reimburse the department, to be credited to the administrative account of the public employee trust fund in s. 40.04 (2), for any costs incurred directly or indirectly by the department in soliciting, evaluating, monitoring and servicing deferred compensation plans.

(g) Serve as trustee of any deferred compensation plan established under this section, hold the assets and income of the plan in trust for the exclusive benefit of the employees who participate in the plan and their beneficiaries, and maintain the plan as an eligible deferred compensation plan, as defined in section 457 (b) of the Internal Revenue Code, and as a governmental plan for eligible employers, as defined in section 457 (e) (1) (A) of the Internal Revenue Code.

(2g) The deferred compensation board may accept timely appeals of determinations made by the department affecting any right or benefit under any deferred compensation plan provided for under this section.

(2m) The deferred compensation board shall promulgate rules establishing procedures, requirements and qualifications for offering deferred compensation plans to state employees in addition to the deferred compensation plans offered by deferred compensation providers selected and contracted with under sub. (2).

(2r) (a) In this subsection, "domestic relations order" means a judgment, decree, or order issued by a court pursuant to a domestic relations law of any state or territory of the United States that does all of the following:

1. Relates to a marriage that terminated after December 1, 2001.

2. Assigns all or part of a participant's accumulated assets held in a deferred compensation plan under this subchapter to a spouse, former spouse, domestic partner, former domestic partner, child, or other dependent to satisfy a family support or marital property obligation.

3. Names the deferred compensation plan established under this subchapter and is submitted to the deferred compensation plan provider selected under sub. (1).

4. Satisfies the requirements established by the deferred compensation board under par. (c).

(c) The deferred compensation board shall prescribe the requirements for a domestic relations order and the administrative procedure for dividing an account in the deferred compensation plan established under this subchapter. The requirements shall be included in any deferred compensation plan and trust document approved by the deferred compensation board.

(d) The deferred compensation board and any member or agent thereof, the department and any employee or agent thereof, and the deferred compensation plan provider selected under sub. (1) are immune from civil liability for all of the following:

1. Any act or omission while performing official duties relating to implementing a domestic relations order under this subsection.

2. Any act or omission of a participant with respect to the participant's account under a deferred compensation plan, including specifically any deferral or investment election or distribution, during the period that begins on the day on which the participant's marriage is terminated by a court and ends on the day on which his or her account is divided pursuant to a domestic relations order.

(2t) The deferred compensation board may require a deferred compensation plan under this subchapter, upon election by a participant who is an eligible retired public safety officer, to allow for

the deduction of insurance premiums for health or long−term care insurance coverage from an amount distributed from a participant's account and for the payment of the premiums directly to an insurer.

(3) Any action taken under this section shall apply to employees covered by a collective bargaining agreement under subch. V of ch. 111.

History: 1981 c. 187; 1989 a. 13, 31, 336; 1991 a. 152; 1995 a. 27; 2003 a. 160; 2005 a. 150; 2007 a. 131, 226; 2009 a. 28; 2011 a. 10; 2013 a. 20.

Cross−reference: See also s. ETF 70.01, Wis. adm. code.

Sub. (2m) requires the establishment of rules for alternative or supplemental deferred compensation plans, but does not require that any such plans be offered. 79 Atty. Gen. 168.

40.81 Deferred compensation plan authorization. (1) An employer other than the state or the University of Wisconsin Hospitals and Clinics Authority may provide for its employees the deferred compensation plan established under s. 40.80. Any employer, including this state and the University of Wisconsin Hospitals and Clinics Authority, who makes the plan under s. 40.80 available to any of its employees shall make it available to all of its employees under procedures established by the department under this subchapter.

(2) Any local government employer, or 2 or more employers acting jointly, may also elect under procedures established by the employer or employers to contract directly with a deferred compensation plan provider to administer a deferred compensation plan or to manage any compensation deferred under the plan and may also provide a plan under section 403 (b) of the Internal Revenue Code under procedures established by the local government employer or employers.

(3) Any action taken under this section shall apply to employees covered by a collective bargaining agreement under subch. IV or V of ch. 111.

History: 1981 c. 187, 391; 1983 a. 290; 1991 a. 39; 1995 a. 27; 2009 a. 28; 2011 a. 10; 2013 a. 20.

40.82 General provisions. (1) Any part of gross compensation deferred under a deferred compensation plan established under this subchapter which would have been treated as current earnings or wages if paid immediately to the employee shall be treated as current earnings or wages for purposes of the federal social security act or any retirement, pension, or group insurance benefit plan provided by the department.

(2) Compensation that is withheld under a deferred compensation plan contract between an employer and an employee may be invested by the employer or a person other than the employer who is authorized by contract to administer the funds. The employer may determine the types of investments in which the deferred compensation funds may be invested. The deferred compensation funds may be invested and reinvested in the same manner provided for investments under s. 881.01.

(3) Each deferred compensation plan under this subchapter shall be maintained and administered as an eligible deferred compensation plan, as defined in section 457 of the Internal Revenue Code, and shall meet the requirements of section 401 (a) (37) of the Internal Revenue Code.

(4) (a) Beginning on December 31, 2008, a participating employee who is receiving differential wage payments shall be considered as having terminated covered employment during any period in which the person is performing service in the uniformed services, as defined in 38 USC 4303, on active duty for a period of more than 30 days, for purposes of receiving a distribution under section 457 (d) (1) (A) (ii) of the Internal Revenue Code.

(b) A person who is described under par. (a) and who elects to receive a distribution may not subsequently make an elective deferral or employee contribution into a deferred compensation plan during the 6−month period following the distribution.

History: 1981 c. 187; 2003 a. 264; 2011 a. 116.

Section 40.08 (1) does not permit the division of a deferred compensation account pursuant to a qualified domestic relations order. Preiss v. Preiss, 2000 WI App 185, 238 Wis. 2d 368, 617 N.W.2d 514, 99−3261.

SUBCHAPTER VIII

EMPLOYEE−FUNDED REIMBURSEMENT ACCOUNTS

40.85 Employee−funded reimbursement account plan. (1) The board shall select and contract with employee−funded reimbursement account plan providers to be used by state agencies.

(2) The board shall do all of the following:

(a) Determine the requirements for and the qualifications of the employee−funded reimbursement account plan providers.

(b) Approve the terms and conditions of the proposed contracts for administrative and related services.

(c) Determine the procedure for the selection of the employee−funded reimbursement account plan providers in accordance with s. 16.705.

(d) Approve the terms and conditions of model agreements which shall be used by each state employee to establish an employee−funded reimbursement account.

(e) Require as a condition of the contractual agreements entered into under this section that approved employee−funded reimbursement account plan providers may provide service to state agencies only as approved by the board.

(f) Require as a condition of the contracts entered into under sub. (1) that the employee−funded reimbursement account plan providers reimburse the department, to be credited to the administrative account of the public employee trust fund under s. 40.04 (2) (c), for administrative costs incurred by the department in connection with employee−funded reimbursement account plans.

(g) Deposit into the appropriate accounts established under s. 40.04 (9m) (a) that part of an employee's gross compensation that the employee wants placed in each employee−funded reimbursement account.

History: 1987 a. 399; 1989 a. 14; 2001 a. 16.

40.86 Covered expenses. An employee−funded reimbursement account plan may provide reimbursement to an employee for only the following expenses that are actually incurred and paid by an employee and that the board determines are consistent with the applicable requirements of the Internal Revenue Code:

(1) Dependent care assistance for a person who is dependent on the employee.

(2) The employee's share of premiums for any group insurance benefit plan provided by the department under this chapter, or any other group insurance benefit plan approved under s. 20.921 (1) (a) 3., except premiums for income continuation benefits under s. 40.62.

(3) Medical expenses which are not covered under a health insurance contract.

(4) Transportation expenses authorized under section 132 of the Internal Revenue Code.

History: 1987 a. 399; 1989 a. 14; 1991 a. 39, 189; 1995 a. 302; 2001 a. 16; 2013 a. 20.

40.87 Treatment of compensation. Any part of gross compensation that an employer places in a reimbursement account under an employee−funded reimbursement account plan established under this subchapter which would have been treated as current earnings or wages if paid immediately to the employee shall be treated as current earnings or wages for purposes of any retirement or group insurance benefit plan provided by the department.

History: 1987 a. 399; 1991 a. 39.

40.875 Administrative and contract costs. (1) The department shall do all of the following:

(a) Beginning on January 1, 1990, collect, from each state agency with employees eligible to participate in an employee−

funded reimbursement account plan, a fee in an amount determined by the department to equal that state agency's share of all of the following:

1. Costs under contracts with employee−funded reimbursement account plan providers.

2. The department's administrative costs under this subchapter.

(b) Establish a formula, subject to approval by the board, to determine the fees charged to state agencies under par. (a).

(c) Establish procedures for collecting the fees charged under par. (a).

(d) Collect forfeitures from employee−funded reimbursement accounts, under the terms of contracts with employee−funded reimbursement account plan providers or with employees.

(e) Deposit fees collected under par. (a), forfeitures collected under par. (d) and interest earned on the fees and forfeitures in the fund, credited to the account established under s. 40.04 (9m) (a) to pay costs described in par. (a) 1. and 2.

(f) Charge costs described in par. (a) 1. and 2. to the account established under s. 40.04 (9m) (a).

(2) The department may base the fees charged under sub. (1) (a) on estimates of anticipated administrative and contract costs.

History: 1989 a. 14.

SUBCHAPTER IX

HEALTH INSURANCE PREMIUM CREDITS

40.95 Health insurance premium credits. (1) (a) Subject to sub. (2), the department shall administer a program that provides health insurance premium credits for the purchase of health insurance for a retired employee, or the retired employee's surviving insured dependents; for an eligible employee under s. 40.02 (25) (b) 6e., or the eligible employee's surviving insured dependents; for an employee who is laid off, but who is not on a temporary, school year, seasonal, or sessional layoff, and his or her surviving insured dependents; and for the surviving insured dependents of an employee who dies while employed by the state, for the benefit of an eligible employee whose compensation includes such health insurance premium credits and who satisfies at least one of the following:

1. The employee accrues accumulated unused sick leave under s. 13.121 (4), 36.30, 230.35 (2), 233.10, 238.04 (8), or 757.02 (5).

2. The employee has his or her compensation established in a collective bargaining agreement under subch. V of ch. 111.

3. The employee has his or her compensation established in a collective bargaining agreement under subch. I of ch. 111 and the employee is employed by the University of Wisconsin Hospitals and Clinics Authority.

NOTE: Collective bargaining under subch. I of ch. 111 for employees of the University of Wisconsin Hospitals and Clinics Authority was eliminated by 2011 Wis. Act 10. Corrective legislation is pending.

(b) The health insurance premium credits shall be based on the employee's years of continuous service, accumulated unused sick leave and any other factor specified as part of the employee's compensation.

(2) The department is not required to administer any program that provides health insurance premium credits for the purchase of health insurance for a retired employee, or the retired employee's surviving insured dependents; for an eligible employee under s. 40.02 (25) (b) 6e., or the eligible employee's surviving insured dependents; for an employee who is laid off, but who is not on a temporary, school year, seasonal, or sessional layoff, and his or her surviving insured dependents; and for the surviving insured dependents of an employee who dies while employed by the state, if the department determines that the program does not conform to the program approved by the joint committee on employment relations under s. 230.12 (9).

History: 1995 a. 88, 89, 216; 2003 a. 33, 117, 326; 2009 a. 28; 2011 a. 10, 32.

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Reference Manual

For the Group Insurance Board

I. Wisconsin Open Meetings Law (Wis. Stat. §§ 19.81-19.98)
- Compliance Guide
- Statutes

II. Wisconsin Public Records Law (Wis. Stat. §§ 19.31-19.39)
- Compliance Outline
- Statutes

(Rev. January 2014)

WISCONSIN
OPEN MEETINGS LAW

A COMPLIANCE GUIDE

August 2010

DEPARTMENT OF JUSTICE
ATTORNEY GENERAL J.B. VAN HOLLEN

Effective citizen oversight of the workings of government is essential to our democracy and promotes confidence in it. Public access to meetings of governmental bodies is a vital aspect of this principle.

Promoting compliance with Wisconsin's open meetings law by raising awareness and providing education and information about the law is an ongoing part of the mission of the Wisconsin Department of Justice. Citizens and public officials who understand their rights and responsibilities under the law will be better equipped to advance Wisconsin's policy of openness in government.

Wisconsin Open Meetings Law: A Compliance Guide is not a comprehensive interpretation of the open meetings law. Its aim is to provide a workable understanding of the law by explaining fundamental principles and addressing recurring questions. Government officials and others seeking legal advice about the application of the open meetings law to specific factual situations should direct questions to their own legal advisors.

This Compliance Guide is also available on the Wisconsin Department of Justice website at *www.doj.state.wi.us*, to download, copy, and share. The website version contains links to many of the opinions and letters cited in the text of the Guide.

As Attorney General, I cannot overstate the importance of fully complying with the open meetings law and fostering a policy of open government for all Wisconsin citizens. To that end, I invite all government entities to contact the Department of Justice whenever our additional assistance can be of help to you.

J.B. Van Hollen
Attorney General
August 2010

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WISCONSIN
OPEN MEETINGS LAW[1]

I. POLICY OF THE OPEN MEETINGS LAW.

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. The state's open meetings law declares that:

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

Wis. Stat. § 19.81(1).[2]

In order to advance this policy, the open meetings law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." Wis. Stat. § 19.81(2). There is thus a presumption that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987). Although there are some exemptions allowing closed sessions in specified circumstances, they are to be invoked sparingly and only where necessary to protect the public interest. The policy of the open meetings law dictates that governmental bodies convene in closed session only where holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes. Wis. Stat. § 19.81(4); *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19, 278 Wis. 2d 388, 692 N.W.2d 304 ("The legislature has issued a clear mandate that we are to vigorously and liberally enforce the policy behind the open meetings law"). This rule of liberal construction applies in all situations, except enforcement actions in which forfeitures are sought. Wis. Stat. § 19.81(4). Public officials must be ever mindful of the policy of openness and the rule of liberal construction in order to ensure compliance with both the letter and spirit of the law. *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, ¶ 6, 300 Wis. 2d 649, 731 N.W.2d 640 ("The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored").

II. WHEN DOES THE OPEN MEETINGS LAW APPLY?

The open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).

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[1]The 2009 Open Meetings Law Compliance Guide was prepared by Assistant Attorneys General Thomas C. Bellavia and Bruce A. Olsen. The text reflects the continuing contributions of former Assistant Attorneys General Alan M. Lee and Mary Woolsey Schlaefer to earlier editions of the Guide. The assistance of reviewers Sandra L. Tarver, Steven P. Means, Kevin Potter, Kevin St. John, and Raymond P. Taffora, and the technical and administrative support of Connie L. Anderson, Amanda J. Welte, and Sara J. Paul is gratefully acknowledged.

[2]The text of this, and all other, sections of the open meetings law appears in Appendix A.

A. Definition Of "Governmental Body."

1. Entities that are governmental bodies.

a. State or local agencies, boards, and commissions.

The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]" Wis. Stat. § 19.82(1). This definition is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that a governmental body is defined primarily in terms of the manner in which it is created, rather than in terms of the type of authority it possesses. Purely advisory bodies are therefore subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

The words "constitution," "statute," and "ordinance," as used in the definition of "governmental body," refer to the constitution and statutes of the State of Wisconsin and to ordinances promulgated by a political subdivision of the state. The definition thus includes state and local bodies created by Wisconsin's constitution or statutes, including condemnation commissions created by Wis. Stat. § 32.08, as well as local bodies created by an ordinance of any Wisconsin municipality. It does not, however, include bodies created solely by federal law or by the law of some other sovereign.

State and local bodies created by "rule or order" are also included in the definition. The term "rule or order" has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Att'y Gen. 67, 68-69 (1989). This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department or division. *See* 78 Op. Att'y Gen. 67. A group organized by its own members pursuant to its own charter, however, is not created by any governmental directive and thus is not a governmental body, even if it is subject to governmental regulation and receives public funding and support.[3] The relationship of affiliation between the University of Wisconsin Union and various student clubs thus is not sufficient to make the governing board of such a club a governmental body. Penkalski Correspondence, May 4, 2009.

The Wisconsin Attorney General has concluded that the following entities are "governmental bodies" subject to the open meetings law:

State or local bodies created by constitution, statute, or ordinance:

- A municipal public utility managing a city-owned public electrical utility. 65 Op. Att'y Gen. 243 (1976).
- Departments of formally constituted subunits of the University of Wisconsin system or campus. 66 Op. Att'y Gen. 60 (1977).
- A town board, but not an annual or special town meeting of town electors. 66 Op. Att'y Gen. 237 (1977).
- A county board of zoning adjustment authorized by Wis. Stat § 59.99(3) (1983) (now Wis. Stat. § 59.694(1)). Gaylord Correspondence, June 11, 1984.

[3] *But see* the discussion of quasi-governmental corporations in section II.A.1.d. of this Guide.

- A public inland lake protection and rehabilitation district established by a county or municipality, pursuant to Wis. Stat. §§ 33.21 to 33.27. DuVall Correspondence, November 6, 1986.

State or local bodies created by resolution, rule, or order:

- A committee appointed by the school superintendent to consider school library materials. Staples Correspondence, February 10, 1981.
- A citizen's advisory group appointed by the mayor. Funkhouser Correspondence, March 17, 1983.
- An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director or Property Manager of that department. 78 Op. Att'y Gen. 67.
- A consortium of school districts created by a contract between districts; a resolution is the equivalent of an order. I-10-93, October 15, 1993.
- An industrial agency created by resolution of a county board under Wis. Stat. § 59.071. I-22-90, April 4, 1990.
- A deed restriction committee created by resolution of a common council. I-34-90, May 25, 1990.
- A school district's strategic-planning team whose creation was authorized and whose duties were assigned to it by the school board. I-29-91, October 17, 1991.
- A citizen's advisory committee appointed by a county executive. Jacques Correspondence, January 26, 2004.
- An already-existing numerically definable group of employees of a governmental entity, assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, when the group's meetings include the subject of the chief administrative officer's directive. Tylka Correspondence, June 8, 2005.
- A Criminal Justice Study Commission created by the Wisconsin Department of Justice, the University of Wisconsin Law School, the State Bar of Wisconsin, and the Marquette University Law School. Lichstein Correspondence, September 20, 2005.
- Grant review panels created by a consortium which was established pursuant to an order of the Wisconsin Commissioner of Insurance. Katayama Correspondence, January 20, 2006.
- A joint advisory task force established by a resolution of a Wisconsin town board and a resolution of the legislature of a sovereign Indian tribe. I-04-09, September 28, 2009.
- A University of Wisconsin student government committee, council, representative assembly, or similar collective body that has been created and assigned governmental responsibilities pursuant to Wis. Stat. § 36.09(5). I-05-09, December 17, 2009.

Any entity that fits within the definition of "governmental body" must comply with the requirements of the open meetings law. In most cases, it is readily apparent whether a particular body fits within the definition. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements.

b. Subunits.

A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att'y Gen. 38, 40 (1985). If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a "subunit" subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board. Even a committee with only two members is

considered a "subunit," as is a committee that is only advisory and that has no power to make binding decisions. Dziki Correspondence, December 12, 2006.

Groups that include both members and non-members of a parent body are not "subunits" of the parent body. Such groups nonetheless frequently fit within the definition of a "governmental body"—*e.g.*, as advisory groups to the governmental bodies or government officials that created them.

c. State Legislature.

Generally speaking, the open meetings law applies to the state Legislature, including the senate, assembly, and any committees or subunits of those bodies. Wis. Stat. § 19.87. The law does not apply to any partisan caucus of the senate or assembly. Wis. Stat. § 19.87(3). The open meetings law also does not apply where it conflicts with a rule of the Legislature, senate, or assembly. Wis. Stat. § 19.87(2). Additional restrictions are set forth in Wis. Stat. § 19.87.

d. Governmental or quasi-governmental corporations.

The definition of "governmental body" also includes a "governmental or quasi-governmental corporation," except for the Bradley sports center corporation. Wis. Stat. § 19.82(1). The term "governmental corporation" is not defined in either the statutes or the case law interpreting the statutes. It is clear, however, that a "governmental corporation" must at least include a corporation established for some public purpose and created directly by the state Legislature or by some other governmental body pursuant to specific statutory authorization or direction. *See* 66 Op. Att'y Gen. 113, 115 (1977).

The term "quasi-governmental corporation" also is not defined in the statutes, but its definition was recently discussed by the Wisconsin Supreme Court in *State v. Beaver Dam Area Dev. Corp. ("BDADC")*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a "quasi-governmental corporation" does not have to be *created* by the government or *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.*, ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.*, ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation's records. *Id.*, ¶ 62.

In adopting this case-specific, multi-factored "function, effect or status" standard, the Wisconsin Supreme Court followed a 1991 Attorney General opinion. *See* 80 Op. Att'y Gen. 129, 135 (1991) (Milwaukee Economic Development Corporation, a Wis. Stat. ch. 181 corporation organized by two private citizens and one city employee, is a quasi-governmental corporation); *see also* Kowalczyk Correspondence, March 13, 2006 (non-stock, non-profit corporations established for the purpose of providing emergency medical or fire department services for participating municipalities are quasi-governmental corporations). Prior to 1991, however, Attorney General opinions on this subject emphasized some of the more formal aspects of quasi-governmental corporations. Those opinions should now be read in light of the *BDADC* decision. *See* 66 Op. Att'y Gen. 113 (volunteer fire department organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 73 Op. Att'y Gen. 53 (1984) (Historic Sites Foundation organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 74 Op. Att'y Gen. 38 (corporation established to provide financial support to public broadcasting stations organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation). Geyer Correspondence, February 26, 1987 (Grant County Economic Development Corporation organized by private individuals under Wis. Stat. ch. 181 is not a quasi-governmental

corporation, even though it serves a public purpose and receives more than fifty percent of its funding from public sources).

In March 2009, the Attorney General issued an informal opinion which analyzed the *BDADC* decision in greater detail and expressed the view that, out of the numerous factors discussed in that decision, particular weight should be given to whether a corporation serves a public function and has any private functions. I-02-09, March 19, 2009. When a private corporation contracts to perform certain services for a governmental body, the key considerations in determining whether the corporation becomes quasi-governmental are whether the corporation is performing a portion of the governmental body's public functions or whether the services provided by the corporation play an integral part in any stage—including the purely deliberative stage—of the governmental body's decision-making process. *Id.*

2. Entities that are not governmental bodies.

a. Governmental offices held by a single individual.

The open meetings law does not apply to a governmental department with only a single member. *Plourde v. Habhegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130. Because the term "body" connotes a group of individuals, a governmental office held by a single individual likewise is not a "governmental body" within the meaning of the open meetings law. Thus, the open meetings law does not apply to the office of coroner or to inquests conducted by the coroner. 67 Op. Att'y Gen. 250 (1978). Similarly, the Attorney General has concluded that the open meetings law does not apply to an administrative hearing conducted by an individual hearing examiner. Clifford Correspondence, December 2, 1980.

b. Bodies meeting for collective bargaining.

The definition of "governmental body" explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under Wis. Stat. ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law. Wis. Stat. § 19.82(1). A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining. Wis. Stat. § 19.82(1). The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law, including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining. 66 Op. Att'y Gen. 93, 96-97 (1977). The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement in closed session. Wis. Stat. § 19.85(3).

c. Bodies created by the Wisconsin Supreme Court.

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976). Thus, generally speaking, the open meetings law does not apply to the Court or bodies created by the Court. In the *Lynch* case, for example, the Court held that the former open meetings law, Wis. Stat. § 66.77(1) (1973), did not apply to the Wisconsin Judicial Commission, which is responsible for handling misconduct complaints against judges. Similarly, the Attorney General has indicated that the open meetings law does not apply to: the Board of Attorneys Professional Responsibility, OAG 67-79 (July 31, 1979) (unpublished opinion); the Board of Bar Examiners, Kosobucki Correspondence, September 6, 2006; or the monthly judicial administration meetings of circuit court judges, conducted under the authority of the Court's superintending power over the judiciary. Constantine Correspondence, February 28, 2000.

d. Ad hoc gatherings.

Although the definition of a governmental body is broad, some gatherings are too loosely constituted to fit the definition. Thus, *Conta* holds that the directive that creates the body must also "confer[] collective power and define[] when it exists." 71 Wis. 2d at 681. *Showers* adds the further requirement that a "meeting" of a governmental body takes place only if there are a sufficient number of members present to determine the governmental body's course of action. 135 Wis. 2d at 102. In order to determine whether a sufficient number of members are present to determine a governmental body's course of action, the membership of the body must be numerically definable. The Attorney General's Office thus has concluded that a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power. Godlewski Correspondence, September 24, 1998.

The definition of a "governmental body" is only rarely satisfied when groups of a governmental unit's employees gather on a subject within the unit's jurisdiction. Thus, for example, the Attorney General concluded that the predecessor of the current open meetings law did not apply when a department head met with some or even all of his or her staff. 57 Op. Att'y Gen. 213, 216 (1968). Similarly, the Attorney General's Office has advised that the courts would be unlikely to conclude that meetings between the administrators of a governmental agency and the agency's employees, or between governmental employees and representatives of a governmental contractor were "governmental bodies" subject to the open meetings law. Peplnjak Correspondence, June 8, 1998. However, where an already-existing numerically definable group of employees of a governmental entity are assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, the group's meetings with respect to the subject of the directive are subject to the open meetings law. Tylka Correspondence, June 8, 2005.

B. Definition Of "Meeting."

A "meeting" is defined as:

> [T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . .

Wis. Stat. § 19.82(2). The statute then excepts the following: an inspection of a public works project or highway by a town board; or inspection of a public works project by a town sanitary district; or the supervision, observation, or collection of information about any drain or structure related to a drain by any drainage board. *Id.*

1. The *Showers* test.

The Wisconsin Supreme Court has held that the above statutory definition of a "meeting" applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body's course of action. *Showers*, 135 Wis. 2d at 102.

a. The purpose requirement.

The first part of the *Showers* test focuses on the purpose for which the members of the governmental body are gathered. They must be gathered to conduct governmental business. *Showers* stressed that "governmental business" refers to any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body's realm of authority. *Showers*, 135 Wis. 2d at 102-03. Thus, in

Badke, 173 Wis. 2d at 572-74, the Wisconsin Supreme Court held that the village board conducted a "meeting," as defined in the open meetings law, when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a development plan that was subject to the board's approval. The Court stressed that a governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *Id.* at 573-74. The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business. *Id.* at 574-76. The Court also held that the gathering of town board members was not chance or social because a majority of town board members attended plan commission meetings with regularity. *Id.* at 576. In contrast, the Court of Appeals concluded in *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77, 415 N.W.2d 528 (Ct. App. 1987), that no meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject the school board had the potential to decide.

b. The numbers requirement.

The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. People often assume that this means that the open meetings law applies only to gatherings of a majority of the members of a governmental body. That is not the case because the power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal. Therefore, a gathering of one-half of the members of a body, or even fewer, may be enough to control a course of action if it is enough to block a proposal. This is called a "negative quorum."

Typically, governmental bodies operate under a simple majority rule in which a margin of one vote is necessary for the body to pass a proposal. Under that approach, exactly one-half of the members of the body constitutes a "negative quorum" because that number against a proposal is enough to prevent the formation of a majority in its favor. Under simple majority rule, therefore, the open meetings law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body's realm of authority.

The size of a "negative quorum" may be smaller, however, when a governmental body operates under a super majority rule. For example, if a two-thirds majority is required for a body to pass a measure, then any gathering of more than one-third of the body's members would be enough to control the body's course of action by blocking the formation of a two-thirds majority. *Showers* made it clear that the open meetings law applies to such gatherings, as long as the purpose requirement is also satisfied (*i.e.*, the gathering is for the purpose of conducting governmental business). *Showers*, 135 Wis. 2d at 101-02. If a three-fourths majority is required to pass a measure, then more than one-fourth of the members would constitute a "negative quorum," etc.

2. Convening of members.

When the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action, there is no meeting within the meaning of the open meetings law. Katayama Correspondence, January 20, 2006. Nevertheless, the phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a "convening of members" under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange.

a. Written correspondence.

The circulation of a paper or hard copy memorandum among the members of a governmental body, for example, may involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Accordingly, the Attorney General

has long taken the position that such written communications generally do not constitute a "convening of members" for purposes of the open meetings law. Merkel Correspondence, March 11, 1993. Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it is still unlikely that a Wisconsin court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

b. Telephone conference calls.

A telephone conference call, in contrast, is very similar to an in-person conversation and thus qualifies as a convening of members. 69 Op. Att'y Gen. 143 (1980). Under the *Showers* test, therefore, the open meetings law applies to any conference call that: (1) is for the purpose of conducting governmental business and (2) involves a sufficient number of members of the body to determine the body's course of action on the business under consideration. To comply with the law, a governmental body conducting a meeting by telephone conference call must provide the public with an effective means to monitor the conference. This may be accomplished by broadcasting the conference through speakers located at one or more sites open to the public. 69 Op. Att'y Gen. 143, 145.

c. Electronic communications.

Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a "convening of members," depending on how the communication medium is used. Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body. Krischan Correspondence, October 3, 2000. In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies. Nevertheless, because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority. Krischan Correspondence, October 3, 2000; Benson Correspondence, March 12, 2004. Members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting. I-01-10, January 25, 2010.

3. Walking quorums.

The requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *Showers*, 135 Wis. 2d at 92, quoting *Conta*, 71 Wis. 2d at 687. In *Conta*, the Court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *Conta*, 71 Wis. 2d at 685-88. The Court commented that any attempt to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the open meetings law. *Conta*, 71 Wis. 2d at 687. The requirements of the open meetings law thus cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. Such a circumvention "almost certainly" violates the open meetings law. Clifford Correspondence, April 28, 1986; *see also* Herbst Correspondence, July 16, 2008 (use of administrative staff to individually poll a quorum of members regarding how they would vote on a proposed motion at a future meeting is a prohibited walking quorum).

The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. Kay Correspondence, April 25, 2007; Kittleson Correspondence, June 13, 2007. In contrast, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. Huff Correspondence, January 15, 2008; *see also* I-01-10, January 25, 2010 (use of email voting to decide matters fits the definition of a "walking quorum" violation of the open meetings law).

4. Multiple meetings.

When a quorum of the members of one governmental body attend a meeting of another governmental body under circumstances where their attendance is not chance or social, in order to gather information or otherwise engage in governmental business regarding a subject over which they have decision-making responsibility, two separate meetings occur, and notice must be given of both meetings. *Badke*, 173 Wis. 2d at 577. The Attorney General has advised that, despite the "separate public notice" requirement of Wis. Stat. § 19.84(4), a single notice can be used, provided that the notice clearly and plainly indicates that a joint meeting will be held and gives the names of each of the bodies involved, and provided that the notice is published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Friedman Correspondence, March 4, 2003.

The kinds of multiple meetings presented in the *Badke* case, and the separate meeting notices required there, must be distinguished from circumstances where a subunit of a parent body meets during a recess from or immediately following the parent body's meeting, to discuss or act on a matter that was the subject of the parent body's meeting. In such circumstances, Wis. Stat. § 19.84(6) allows the subunit to meet on that matter without prior public notice.

5. Burden of proof as to existence of a meeting.

The presence of members of a governmental body does not, in itself, establish the existence of a "meeting" subject to the open meetings law. The law provides, however, that if one-half or more of the members of a body are present, the gathering is presumed to be a "meeting." Wis. Stat. § 19.82(2). The law also exempts any "social or chance gathering" not intended to circumvent the requirements of the open meetings law. Wis. Stat. § 19.82(2). Thus, where one-half or more of the members of a governmental body rode to a meeting in the same vehicle, the law presumes that the members conducted a "meeting" which was subject to all of the requirements of the open meetings law. Karstens Correspondence, July 31, 2008. Similarly, where a majority of members of a common council gathered at a lounge immediately following a common council meeting, a

violation of the open meetings law was presumed. Dieck Correspondence, September 12, 2007. The members of the governmental body may overcome the presumption by proving that they did not discuss any subject that was within the realm of the body's authority. *Id.*

Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of proving that the gathering constituted a "meeting" subject to the law. *Showers*, 135 Wis. 2d at 102. That burden may be satisfied by proving: (1) that the members gathered to conduct governmental business and (2) that there was a sufficient number of members present to determine the body's course of action.

Again, it is important to remember that the overriding policy of the open meetings law is to ensure public access to information about governmental affairs. Under the rule of liberally construing the law to ensure this purpose, any doubts as to whether a particular gathering constitutes a "meeting" subject to the open meetings law should be resolved in favor of complying with the provisions of the law.

III. WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

The two most basic requirements of the open meetings law are that a governmental body:

(1) give advance public notice of each of its meetings, and

(2) conduct all of its business in open session, unless an exemption to the open session requirement applies.

Wis. Stat. § 19.83.

A. Notice Requirements.

Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how, and to whom notice must be given, as well as what information a notice must contain.

1. To whom and how notice must be given.

The chief presiding officer of a governmental body, or the officer's designee, must give notice of each meeting of the body to: (1) the public; (2) any members of the news media who have submitted a written request for notice; and (3) the official newspaper designated pursuant to state statute or, if none exists, a news medium likely to give notice in the area. Wis. Stat. § 19.84(1).

The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. 66 Op. Att'y Gen. 93, 95. As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves. *Id.* Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves. 63 Op. Att'y Gen. 509, 510-11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. Meeting notices may also be posted at a governmental body's website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice. Peck Correspondence, April 17, 2006. Nothing in the open meetings law prevents a governmental body from determining that multiple notice methods are necessary to provide adequate public notice of the body's meetings. Skindrud Correspondence, March 12, 2009. If a meeting notice is posted on a governmental body's website, amendments to the notice should also be posted. Eckert Correspondence, July 25, 2007.

The chief presiding officer must also give notice of each meeting to members of the news media who have submitted a written request for notice. *Lawton*, 278 Wis. 2d 388, ¶ 7. Although this notice may be given in writing or by telephone, 65 Op. Att'y Gen. Preface, v-vi (1976), it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. 65 Op. Att'y Gen. 250, 251 (1976). Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings. 77 Op. Att'y Gen. 312, 313 (1988).

In addition, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. *Lawton*, 278 Wis. 2d 388, ¶ 7. The governmental body is not required to pay for and the newspaper is not required to publish such notice. 66 Op. Att'y Gen. 230, 231 (1977). Note, however, that the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published.

When a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a). However, violations of those other statutory requirements are not redressable under the open meetings law. For example, the open meetings law is not implicated by a municipality's alleged failure to comply with the public notice requirements of Wis. Stat. ch. 985 when providing published notice of public hearings on proposed tax incremental financing districts. *See* Boyle Correspondence, May 4, 2005. Where a class 1 notice under Wis. Stat. ch. 985 has been published, however, the public notice requirement of the open meetings law is also thereby satisfied. Stalle Correspondence, April 10, 2008.

2. Contents of notice.

a. In general.

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2). The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att'y Gen. 68, 70 (1977). The Attorney General's Office has advised that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2). Schuh Correspondence, October 17, 2001.

A frequently recurring question is how specific a subject-matter description in a meeting notice must be. Prior to June 13, 2007, this question was governed by the "bright-line" rule articulated in *State ex rel. H.D. Ent. v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999). Under that standard, a meeting notice adequately described a subject if it identified "the general topic of items to be discussed" and the simple heading "licenses," without more, was found sufficient to apprise the public that a city council would reconsider a previous decision to deny a liquor license to a particular local grocery store. *Id.* at 486-87.

On June 13, 2007, the Wisconsin Supreme Court overruled *H.D. Enterprises* and announced a new standard to be applied prospectively to all meeting notices issued after that date. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804. In *Buswell*, the Court determined that "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business." *Id.*, ¶ 3. This reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances." *Id.*, ¶ 22. In making that determination, the factors to be considered include: "[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate." *Id.*, ¶ 28 (bracketed references added).

The first factor "balances the policy of providing greater information with the requirement that providing such information be 'compatible with the conduct of governmental affairs.' Wis. Stat. § 19.81(1)." *Id.*, ¶ 29. The determination must be made on a case-by-case basis. *Id.* "[T]he demands of specificity should not thwart the efficient administration of governmental business." *Id.*

The second factor takes into account "both the number of people interested and the intensity of that interest," though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis. *Id.*, ¶ 30.

The third factor considers "whether the subject of the meeting is routine or novel." *Id.*, ¶ 31. There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed. *Id.* "Novel issues may . . . require more specific notice." *Id.*

Whether a meeting notice is reasonable, according to the Court, "cannot be determined from the standpoint of when the meeting actually takes place," but rather must be "based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know." *Id.*, ¶ 32. Once reasonable notice has been given, "meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it." *Id.*, ¶ 34. However, "a meeting cannot address topics unrelated to the information in the notice." *Id.* The Attorney General has similarly advised, in an informal opinion, that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. I-05-93, April 26, 1993.

Whether a meeting notice reasonably apprises the public of the meeting's subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body. Linde Correspondence, May 4, 2007; Koss Correspondence, May 30, 2007; Musolf Correspondence, July 13, 2007; Martinson Correspondence, March 2, 2009.

In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed.

b. Generic agenda items.

Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all. Becker Correspondence, November 30, 2004; Heupel Correspondence, August 29, 2006. Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss. Erickson Correspondence, April 22, 2009. If such a notice is meant to indicate an intent to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting. *Id.*

Likewise, the Attorney General has advised that the practice of using such designations as "mayor comments," "alderman comments," or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful." Rude Correspondence, March 5, 2004. Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting process than the

public has, they should be held to a higher standard of specificity regarding the subjects they intend to address. Thompson Correspondence, September 3, 2004.

c. Action agenda items.

The Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken." *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that "adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *Badke*, 173 Wis. 2d at 573-74 and 577-78—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Buswell*, 301 Wis. 2d 178, ¶ 26; *Olson*, 252 Wis. 2d 628, ¶ 15. The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting. Herbst Correspondence, July 16, 2008.

Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given. Bukowski Correspondence, May 5, 1986.

d. Notice of closed sessions.

The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att'y Gen. 93, 98. Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session. Weinschenk Correspondence, December 29, 2006; Anderson Correspondence, February 13, 2007. In *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985), the Court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "'to conduct a hearing to consider the possible discipline of a public employee'" was sufficient.

3. Time of notice.

The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least twenty-four hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting. Wis. Stat. § 19.84(3).

No Wisconsin court decisions or Attorney General opinions discuss what constitutes "good cause" to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1) and (4). If there is any doubt whether "good cause" exists, the governmental body should provide the full twenty-four-hour notice.

When calculating the twenty-four hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. Posting notice of a Monday meeting on the preceding Sunday is, therefore, inadequate, but posting such notice on the preceding Saturday would suffice, as long as the posting location is open to the public on Saturdays. Caylor Correspondence, December 6, 2007.

Wisconsin Stat. § 19.84(4) provides that separate notice for each meeting of a governmental body must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a governmental body plans to hold over a given week, month, or year does not comply with the notice requirements of the open meetings law. *See* 63 Op. Att'y Gen. 509, 513. Similarly, a meeting notice that states that a quorum of various town governmental bodies may participate at the same time in a multi-month, on-line discussion of town issues fails to satisfy the "separate notice" requirement. Connors/Haag Correspondence, May 26, 2009.

University of Wisconsin departments and their subunits, as well as the Olympic ice training rink, are exempt from the specific notice requirements in Wis. Stat. § 19.84(1)-(4). Those bodies are simply required to provide notice "which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice." Wis. Stat. § 19.84(5). Also exempt from the specific notice requirements are certain meetings of subunits of parent bodies held during or immediately before or after a meeting of the parent body. *See* Wis. Stat. § 19.84(6).

4. Compliance with notice.

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *Buswell*, 301 Wis. 2d 178, ¶ 34. There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. Stencil Correspondence, March 6, 2008. Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence, April 22, 2009.

B. Open Session Requirements.

1. Accessibility.

In addition to requiring advance public notice of every meeting of a governmental body, the open meetings law also requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times." Wis. Stat. § 19.81(2). Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Every meeting of a governmental body must initially be convened in "open session." *See* Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

The requirement that meeting locations be reasonably accessible to the public and open to all citizens at all times means that governmental bodies must hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings. *Badke*, 173 Wis. 2d at 580-81. Absolute access is not, however, required. *Id.* In *Badke*, for instance, the Wisconsin Supreme Court concluded that a village board meeting that was held in a village hall capable of holding 55-75 people was reasonably accessible, although three members of the public were turned away due to overcrowding. *Id.* at 561, 563, 581. Whether a meeting place is reasonably accessible depends on the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility.

The policy of openness and accessibility favors governmental bodies holding their meetings in public places, such as a municipal hall or school, rather than on private premises. *See* 67 Op. Att'y Gen. 125, 127 (1978). The law prohibits meetings on private premises that are not open and reasonably accessible to the public. Wis. Stat. § 19.82(3). Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered "reasonably accessible." A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public's right to information about governmental affairs.

The policy of openness and accessibility also requires that governmental bodies hold their meetings at locations near to the public they serve. Accordingly, the Attorney General has concluded that a school board meeting held forty miles from the district which the school board served was not "reasonably accessible" within the meaning of the open meetings law. Miller Correspondence, May 25, 1977. The Attorney General advises that, in order to comply with the "reasonably accessible" requirement, governmental bodies should conduct all their meetings at a location within the territory they serve, unless there are special circumstances that make it impossible or impractical to do so. I-29-91, October 17, 1991.

Occasionally, a governmental body may need to leave the place where the meeting began in order to accomplish its business—*e.g.*, inspection of a property or construction projects. The Attorney General's Office has advised that such off-site business may be conducted consistently with the requirements of the open meetings law, as long as certain precautions are taken. First the public notice of the meeting must list all of the locations to be visited in the order in which they will be visited. This makes it possible for a member of the public to follow the governmental body to each location or to join the governmental body at any particular location. Second, each location at which government business is to be conducted must itself be reasonably accessible to the public at all times when such business is taking place. Third, care must be taken to ensure that government business is discussed only during those times when the members of the body are convened at one of the particular locations for which notice has been given. The members of the governmental body may travel together or separately, but if half or more of them travel together, they may not discuss government business when their vehicle is in motion, because a moving vehicle is not accessible to the public. Rappert Correspondence, April 8, 1993; Musolf Correspondence, July 13, 2007.

2. Access for persons with disabilities.

The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities." 69 Op. Att'y Gen. 251, 252 (1980). In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *without* assistance. *See* Wis. Stat. §§ 19.82(3) and 101.13(1); 69 Op. Att'y Gen. 251, 252. In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *with* assistance. 69 Op. Att'y Gen. 251, 253. In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible without assistance.

The Americans With Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities.

3. Tape recording and videotaping.

The open meetings law grants citizens the right to attend and observe meetings of governmental bodies that are held in open session. The open meetings law also grants citizens the right to tape record or videotape open session meetings, as long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, as long as the activity does not interfere with the meeting. Wis. Stat. § 19.90.

In contrast, the open meetings law does not require a governmental body to permit recording of an authorized closed session. 66 Op. Att'y Gen. 318, 325 (1977); Maroney Correspondence, October 31, 2006. If a governmental body wishes to record its own closed meetings, it should arrange for the security of the records to prevent their improper disclosure. 66 Op. Att'y Gen. 318, 325.

4. Citizen participation.

In general, the open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies, but does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting. Lundquist Correspondence, October 25, 2005. There are some other state statutes that require governmental bodies to hold public hearings on specified matters. *See* for example, Wis. Stat. § 65.90(4) (requiring public hearing before adoption of a municipal budget) and Wis. Stat. § 66.46(4)(a) (requiring public hearing before creation of a tax incremental finance district). Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. Zwieg Correspondence, July 13, 2006; Chiaverotti Correspondence, September 19, 2006.

Although it is not required, the open meetings law does permit a governmental body to set aside a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2) and 19.84(2). Such a period must be included on the meeting notice. During such a period, the body may receive information from the public and may discuss any matter raised by the public. If a member of the public raises a subject that does not appear on the meeting notice, however, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. In addition, the body may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice.

5. Ballots, votes, and records, including meeting minutes.

No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). For example, a body cannot vote by secret ballot to fill a vacancy on a city council. 65 Op. Att'y Gen. 131 (1976). If a member of a governmental body requests that the vote of each member on a particular matter be recorded, a voice vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who is present for the vote. I-95-89, November 13, 1989. A governmental body may not use email ballots to decide matters, even if the result of the vote is later ratified at a properly noticed meeting. I-01-10, January 25, 2010.

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. De Moya Correspondence, June 17, 2009. Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording. I-95-89, November 13, 1989. As long as the body creates and preserves a record of all motions and roll-call votes, it is not required by the open meetings law to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain

governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89, March 8, 1989. *See, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be, the general legislative policy of the open meetings law is that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). In light of that policy, it seems clear that a governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted. De Moya Correspondence, June 17, 2009.

Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a meaningful record of that decision. Huebscher Correspondence, May 23, 2008. "Consent agendas," whereby a body discusses individual items of business under separate agenda headings, but takes action on all discussed items by adopting a single motion to approve all the items previously discussed, are likely insufficient to satisfy the recordkeeping requirements of Wis. Stat. § 19.88(3). Perlick Correspondence, May 12, 2005.

Wisconsin Stat. § 19.88(3) also provides that meeting records created under that statute—whether for an open or a closed session—must be open to public inspection to the extent prescribed in the state public records law. Because the records law contains no general exemption for records created during a closed session, a custodian must release such items unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public. De Moya Correspondence, June 17, 2009. There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. But the custodian still must separate information that can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them. *See* 67 Op. Att'y Gen. 117, 119 (1978).

IV. WHEN IS IT PERMISSIBLE TO CONVENE IN CLOSED SESSION?

Every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

A. Notice Of Closed Session.

The notice provision in Wis. Stat. § 19.84(2) requires that, if the chief presiding officer of a governmental body is aware that a closed session is contemplated at the time he or she gives public notice of the meeting, the notice must contain the subject matter of the closed session.[4]

[4] *See* section III.A.2.d. of this Guide for information on how to comply with this requirement.

If the chief presiding officer was not aware of a contemplated closed session at the time he or she gave notice of the meeting, that does not foreclose a governmental body from going into closed session under Wis. Stat. § 19.85(1) to discuss an item contained in the notice for the open session. 66 Op. Att'y Gen. 106, 108 (1977). In both cases, a governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) before going into closed session.

B. Procedure For Convening In Closed Session.

Every meeting of a governmental body must initially be convened in open session. Wis. Stat. §§ 19.83 and 19.85(1). Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *Schaeve*, 125 Wis. 2d at 51. Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. 66 Op. Att'y Gen. 93, 97-98. Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure. For example, Wis. Stat. § 19.85(1)(c) allows governmental bodies to use closed sessions to interview candidates for positions of employment, to consider promotions of particular employees, to consider the compensation of particular employees, and to conduct employee evaluations—each of which is a different reason that should be identified in the meeting notice and in the motion to convene into closed session. Reynolds/Kreibich Correspondence, October 23, 2003. Similarly, merely identifying and quoting from a statutory exemption does not adequately announce what particular part of the governmental body's business is to be considered under that exemption. Weinschenk Correspondence, December 29, 2006; Anderson Correspondence, February 13, 2007. Enough specificity is needed in describing the subject matter of the contemplated closed meeting to enable the members of the governmental body to intelligently vote on the motion to close the meeting. Heule Correspondence, June 29, 1977; *see also Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. If several exemptions are relied on to authorize a closed discussion of several subjects, the motion should make it clear which exemptions correspond to which subjects. Brisco Correspondence, December 13, 2005. The governmental body must limit its discussion in closed session to the business specified in the announcement. Wis. Stat. § 19.85(1).

C. Authorized Closed Sessions.

Wisconsin Stat. § 19.85(1) contains thirteen exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶ 8. The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session. *See* 74 Op. Att'y Gen. 70, 73 (1985).

The following are some of the most frequently cited exemptions.

1. Judicial or quasi-judicial hearings.

Wisconsin Stat. § 19.85(1)(a) authorizes a closed session for "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body." In order for this exemption to apply, there must be a "case" that is the subject of a quasi-judicial proceeding. *Hodge*, 180 Wis. 2d at 72; *cf. State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963) (allowing zoning appeal boards to deliberate in closed session after hearing, decided before the Legislature added the "case" requirement in 1977). The Wisconsin Supreme Court held that the term "case" contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit. *Hodge*, 180 Wis. 2d at 74. An example of a governmental body that considers "cases" and thus can convene in closed

session under Wis. Stat. § 19.85(1)(a), where appropriate, is the Wisconsin Employment Relations Commission, 68 Op. Att'y Gen. 171 (1979). Bodies that consider zoning appeals, such as boards of zoning appeals and boards of adjustment, may not convene in closed session. Wis. Stat. §§ 59.694(3) (towns); 60.65(5) (counties); and 62.23(7)(e)3. (cities); White Correspondence, May 1, 2009. The meetings of town, village, and city boards of review regarding appeals of property tax assessments must also be conducted in open session. Wis. Stat. § 70.47(2m).

2. Employment and licensing matters.

a. Consideration of dismissal, demotion, discipline, licensing, and tenure.

Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for:

> Considering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter . . . .

If a closed session for such a purpose will include an evidentiary hearing or final action, then the governmental body must give the public employee or licensee actual notice of that closed hearing and/or closed final action. Evidentiary hearings are characterized by the formal examination of charges and by taking testimony and receiving evidence in support or defense of specific charges that may have been made. 66 Op. Att'y Gen. 211, 214 (1977). Such hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the governmental body's action might impose substantial stigma or disability upon the person. *Id.*

Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session. The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person's employment or license. *See State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998); Johnson Correspondence, February 27, 2009.

Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal. *Schaeve*, 125 Wis. 2d at 40.

b. Consideration of employment, promotion, compensation, and performance evaluations.

The second exemption which relates to employment matters authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c).

The Attorney General's Office has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ. Caturia Correspondence, September 20, 1982. The Attorney General's Office has also concluded that this exemption is sufficiently broad to authorize convening

in closed session to interview and consider applicants for positions of employment. Caturia Correspondence, September 20, 1982.

An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c). Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee. 76 Op. Att'y Gen. 276 (1987). Similarly, the exemption does not authorize a school board to convene in closed session to select a person to fill a vacancy on the school board. 74 Op. Att'y Gen. 70, 72. The exemption does not authorize a county board or a board committee to convene in closed session for the purposes of screening and interviewing applicants to fill a vacancy in the elected office of county clerk. Haro Correspondence, June 13, 2003. Nor does the exemption authorize a city council or one of its committees to consider a temporary appointment of a municipal judge. O'Connell Correspondence, December 21, 2004.

The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. *See* 80 Op. Att'y Gen. 176, 177-78 (1992); *see also Buswell*, 301 Wis. 2d 178, ¶ 37 (noting that Wis. Stat. § 19.85(1)(c) "provides for closed sessions for considering matters related to *individual* employees"). Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. 80 Op. Att'y Gen. 176, 178-82. The section authorizes closure to determine increases in compensation for specific employees, 67 Op. Att'y Gen. 117, 118. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, *see* 66 Op. Att'y Gen. 211, 213, but not to determine whether to reduce or increase staffing, in general.

3. Consideration of financial, medical, social, or personal information.

The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

> Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

An example is where a state employee was alleged to have violated a state law. *See Wis. State Journal v. U.W. Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990). This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation, however, the vote should be in open session. 74 Op. Att'y Gen. 70, 72.

At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session. 74 Op. Att'y Gen. 70, 72.

4. Conducting public business with competitive or bargaining implications.

A closed session is authorized for "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att'y Gen. 93, 96. (The opinion advised that governmental bodies that are not formed exclusively for collective bargaining comply with the open meetings law when meeting for the purpose of developing negotiating strategy).

Governmental officials must keep in mind, however, that this exemption applies only when "competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). The exemption is restrictive rather than expansive. *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶¶ 6-8. When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *Id.*, ¶ 10. An announcement of a contemplated closed session under Wis. Stat. § 19.85(1)(e) that provides only a conclusory assertion that the subject of the session will involve competitive or bargaining issues is inadequate because it does not reflect how the proposed discussion would implicate the competitive or bargaining interests of the body or the body's basis for concluding that the subject falls within the exemption. Wirth/Lamoreaux Correspondence, May 30, 2007.

The use of the word "require" in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting. *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶ 14. On the facts as presented in *Citizens for Responsible Development*, the Court thus found that a desire or request for confidentiality by a private developer engaged in negotiations with a city was not sufficient to justify a closed session for competitive or bargaining reasons. *Id.*, ¶¶ 13-14. Nor did the fear that public statements might attract the attention of potential private competitors for the developer justify closure under this exemption, because the Court found that such competition would be likely to benefit, rather than harm, the city's competitive or bargaining interests. *Id.*, ¶ 14 n.6. Similarly, holding closed meetings about ongoing negotiations between the city and private parties would not prevent those parties from seeking a better deal elsewhere. The possibility of such competition, therefore, also did not justify closure under Wis. Stat. § 19.85(1)(e). *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶¶ 15-16. The exemption did, however, allow the city to close those *portions* of its meetings that would reveal its negotiation strategy or the price it planned to offer for a purchase of property, but it could not close other parts of the meetings. *Id.*, ¶ 19. The competitive or bargaining interests to be protected by a closed session under Wis. Stat. § 19.85(1)(e) do not have to be shared by every member of the body or by every municipality participating in an intergovernmental body. *State ex rel. Herro v. Village of McFarland*, 2007 WI App 172, ¶¶ 16-19, 303 Wis. 2d 749, 737 N.W.2d 55.

Consistent with the above emphasis on the word "require" in Wis. Stat. § 19.85(1)(e), the Attorney General has advised that mere inconvenience, delay, embarrassment, frustration, or even speculation as to the probability of success would be an insufficient basis to close a meeting. Gempeler Correspondence, February 12, 1979. Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect negotiations with a third party, but not where the discussions might be one of several factors that indirectly influence the outcome of those negotiations. Henderson Correspondence, March 24, 1992. The meetings of a governmental body also may not be closed in a blanket manner merely because they may at times involve competitive or bargaining issues, but rather may only be closed on those occasions when the particular meeting is going to involve discussion which, if held in open session, would harm the competitive or bargaining interests at issue. I-04-09, September 28, 2009. Once a governmental body's bargaining team has reached a tentative agreement, the discussion whether the body should ratify the agreement should be conducted in open session. 81 Op. Att'y Gen. 139, 141 (1994).

5. Conferring with legal counsel with respect to litigation.

The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for "[c]onferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

6. Remaining exemptions.

The remaining exemptions in Wis. Stat. § 19.85(1) authorize closure for:

1. Considering applications for probation or parole, or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).

2. Specified deliberations by the state council on unemployment insurance and the state council on worker's compensation. Wis. Stat. § 19.85(1)(ee) and (eg).

3. Specified deliberations involving the location of a burial site. Wis. Stat. § 19.85(1)(em).

4. Consideration of requests for confidential written advice from an ethics board. Wis. Stat. § 19.85(1)(h).

5. Considering specified matters related to a business ceasing its operations or laying off employees. Wis. Stat. § 19.85(1)(i).

6. Considering specified financial information relating to the support of a nonprofit corporation operating an ice rink owned by the state. Wis. Stat. § 19.85(1)(j).[5]

D. Who May Attend A Closed Session.

A frequently asked question concerns who may attend the closed session meetings of a governmental body. In general, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. Schuh Correspondence, December 15, 1988. If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provide otherwise. Wis. Stat. § 19.89. Where enough non-members of a subunit attend the subunit's meetings that a quorum of the parent body is present, a meeting of the parent body occurs, and the notice requirements of Wis. Stat. § 19.84 apply. *Badke*, 173 Wis. 2d at 579.

E. Voting In An Authorized Closed Session.

The Wisconsin Supreme Court has held that Wis. Stat. § 14.90 (1959), a predecessor to the current open meetings law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in closed session. *Cities S. O. Co.*, 21 Wis. 2d at 538. The Court reasoned that "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process." *Id.* at 539.

In *Schaeve*, 125 Wis. 2d at 53, the Court of Appeals commented on the propriety of voting in closed session under the current open meetings law. The Court indicated that a governmental body must vote in open

[5]For more detailed information on these exemptions, consult the text of Wis. Stat. § 19.85(1), which appears in Appendix A.

session unless an exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session. *Id.* The Court's statement was not essential to its holding and it is unclear whether the Supreme Court would adopt a similar interpretation of the current open meetings law.

Given this uncertainty, the Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session. *Accord, Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided).

None of the exemptions in Wis. Stat. § 19.85(1) authorize a governmental body to consider in closed session the ratification or final approval of a collective bargaining agreement negotiated by or for the body. Wis. Stat. § 19.85(3); 81 Op. Att'y Gen. 139.

F. Reconvening In Open Session.

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within twelve hours after completion of a closed session, unless public notice of the subsequent open session is given "at the same time and in the same manner" as the public notice of the prior open session. Wis. Stat. § 19.85(2). The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public present that the session is open. Claybaugh Correspondence, February 16, 2006.

V. WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?

A. Enforcement.

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1). In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys' familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence. 65 Op. Att'y Gen. Preface, ii. Under certain circumstances, the Attorney General may elect to prosecute complaints involving a matter of statewide concern.

A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney. *See* Wis. Stat. § 19.97(1). Actions to enforce the open meetings law need not be preceded by a notice of claim. *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594-97, 547 N.W.2d 587 (1996). The verified complaint must be signed by the individual and notarized and should include available information that will be helpful to investigators, such as: identifying the governmental body and any members thereof alleged to have violated the law; describing the factual circumstances of the alleged violations; identifying witnesses with relevant evidence; and identifying any relevant documentary evidence.[6] The district attorney has broad discretion to determine whether a verified complaint should be prosecuted. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). An enforcement action brought by a district attorney or by the Attorney General must be commenced within 6 years after the cause of action accrues or be barred. *See* Wis. Stat. § 893.93(1)(a).

[6]A model complaint appears in Appendix B.

Proceedings to enforce the open meetings law are civil actions subject to the rules of civil procedure, rather than criminal procedure, and governed by the ordinary civil standard of proof, rather than a heightened standard of proof such as would apply in a criminal or quasi-criminal proceeding. Accordingly, enforcement of the open meetings law does not involve such practices as arrest, posting bond, entering criminal-type pleas, or any other aspects of criminal procedure. Rather, an open meetings law enforcement action is commenced like any civil action by filing and serving a summons and complaint. In addition, the open meetings law cannot be enforced by the issuance of a citation, in the way that other civil forfeitures are often enforced, because citation procedures are inconsistent with the statutorily-mandated verified complaint procedure. Zwieg Correspondence, March 10, 2005.

If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within twenty days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law. *Lawton*, 278 Wis. 2d 388, ¶ 15. Wis. Stat. § 19.97(4). *See also Fabyan v. Achtenhagen*, 2002 WI App 214, ¶¶ 10-13, 257 Wis. 2d 310, 652 N.W.2d 649 (complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; *i.e.*, the caption must bear the title "State ex rel. . . ," or the court lacks competency to proceed). Although an individual may not bring a private enforcement action prior to the expiration of the district attorney's twenty-day review period, the district attorney may still commence an action even though more than twenty days have passed. It is not uncommon for the review and investigation of open meetings complaints to take longer than twenty days.

Court proceedings brought by private relators to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred. Wis. Stat. § 893.93(2)(a); *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6, 265 Wis. 2d 674, 666 N.W.2d 104. If a private relator brings an enforcement action and prevails, the court is authorized to grant broad relief, including a declaration that the law was violated, civil forfeitures where appropriate, and the award of the actual and necessary costs of prosecution, including reasonable attorney fees. Wis. Stat. § 19.97(4). Attorney fees will be awarded under this provision where such an award will provide an incentive to other private parties to similarly vindicate the public's rights to open government and will deter governmental bodies from skirting the open meetings law. *Buswell*, 301 Wis. 2d 178, ¶ 54.

B. Penalties.

Any member of a governmental body who "knowingly" attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between $25 and $300 for each violation. Wis. Stat. § 19.96. Any forfeiture obtained in an action brought by the district attorney is awarded to the county. Wis. Stat. § 19.97(1). Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state. Wis. Stat. § 19.97(1), (2), and (4).

The Wisconsin Supreme Court has defined "knowingly" as not only positive knowledge of the illegality of a meeting, but also awareness of the high probability of the meeting's illegality or conscious avoidance of awareness of the illegality. *Swanson*, 92 Wis. 2d at 319. The Court also held that knowledge is not required to impose forfeitures on an individual for violating the open meetings law by means other than attending a meeting held in violation of the law. Examples of "other violations" are failing to give the required public notice of a meeting or failing to follow the procedure for closing a session. *Id.* at 321.

A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member's votes on all relevant motions prior to the violation were inconsistent with the cause of the violation. Wis. Stat. § 19.96.

A member who is charged with a violation other than knowingly attending a meeting held in violation of the law may be permitted to raise the additional statutory defense that the member did not act in his or her official capacity. In addition, in *Swanson*, 92 Wis. 2d at 319, and *Hodge*, 180 Wis. 2d at 80, the Supreme Court intimated

that a member of a governmental body can avoid liability if he or she can factually prove that he or she relied, in good faith and in an open and unconcealed manner, on the advice of counsel whose statutory duties include the rendering of legal opinions as to the actions of the body. *See State v. Tereschko*, 2001 WI App 146, ¶¶ 9-10, 246 Wis. 2d 671, 630 N.W.2d 277 (unpublished opinion declining to find a knowing violation where school board members relied on the advice of counsel in going into closed session); *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974) (interpreting Wis. Stat. § 946.13(1) (private interest in public contract)). *Cf. Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 452-55, 521 N.W.2d 165 (Ct. App. 1994) (school board may not avoid duty to provide public records by delegating the creation and custody of the record to its attorneys).

A governmental body may not reimburse a member for a forfeiture incurred as a result of a violation of the law, unless the enforcement action involved a real issue as to the constitutionality of the open meetings law. 66 Op. Att'y Gen. 226 (1977). Although it is not required to do so, a governmental body may reimburse a member for his or her reasonable attorney fees in defending against an enforcement action and for any plaintiff's attorney fees that the member is ordered to pay. The city attorney may represent city officials in open meetings law enforcement actions. 77 Op. Att'y Gen. 177, 180 (1988).

In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action. Thus, in *Hodge*, 180 Wis. 2d at 75-76, the Court voided the town board's denial of a permit, taken after an unauthorized closed session deliberation about whether to grant or deny the permit. *Cf. Epping*, 218 Wis. 2d at 524 n.4 (arguably unlawful closed session deliberation does not provide basis for voiding subsequent open session vote); *State ex rel. Ward v. Town of Nashville*, 2001 WI App 224, ¶ 30, 247 Wis. 2d 988, 635 N.W.2d 26 (unpublished opinion declining to void an agreement made in open session, where the agreement was the product of three years of unlawfully closed meetings). A court may award any other appropriate legal or equitable relief, including declaratory and injunctive relief. Wis. Stat. § 19.97(2).

In enforcement actions seeking forfeitures, the provisions of the open meetings law must be narrowly construed due to the penal nature of forfeiture. In all other actions, the provisions of the law must be liberally construed to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1) and (4). Thus, it is advisable to prosecute forfeiture actions separately from actions seeking other types of relief under the open meetings law.

C. Interpretation by Attorney General.

In addition to the methods of enforcement discussed above, the Attorney General also has express statutory authority to respond to requests for advice from any person as to the applicability of the open meetings and public records laws. Wis. Stat. §§ 19.39 and 19.98. This differs from other areas of law, in which the Attorney General is only authorized to give legal opinions or advice to specified governmental officials and agencies. Because the Legislature has expressly authorized the Attorney General to interpret the open meetings law, the Supreme Court has acknowledged that the Attorney General's opinions in this area should be given substantial weight. *BDADC*, 312 Wis. 2d 84, ¶¶ 37, 44-45.

Citizens with questions about matters outside the scope of the open meetings and public records laws, should seek assistance from a private attorney. Citizens and public officials with questions about the open meetings law or the public records law are advised to first consult the applicable statutes, the corresponding discussions in this Compliance Guide and in the Department of Justice's Public Records Law Compliance Outline, court decisions, and prior Attorney General opinions and to confer with their own private or governmental attorneys. In the rare instances where a question cannot be resolved in this manner, a written request for advice may be made to the Wisconsin Department of Justice. In submitting such requests, it should be remembered that the Department of Justice cannot conduct factual investigations, resolve disputed issues of fact, or make definitive determinations on fact-specific issues. Any response will thus be based solely on the information provided.

APPENDIX A

OPEN MEETINGS LAW

Wis. Stat. §§ 19.81 - 19.98 (2007-08)

(4) NONAPPLICABILITY. This section does not apply to any matching program established between the secretary of transportation and the commissioner of the federal social security administration pursuant to an agreement specified under s. 85.61 (2).

History: 1991 a. 39, 269; 1995 a. 27; 2003 a. 265.

19.71 Sale of names or addresses. An authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. The collection of fees under s. 19.35 (3) is not a sale or rental under this section.

History: 1991 a. 39.

19.77 Summary of case law and attorney general opinions. Annually, the attorney general shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The attorney general shall provide the summary, at no charge, to interested persons.

History: 1991 a. 39.

19.80 Penalties. (2) EMPLOYEE DISCIPLINE. Any person employed by an authority who violates this subchapter may be discharged or suspended without pay.

(3) PENALTIES. (a) Any person who willfully collects, discloses or maintains personally identifiable information in violation of federal or state law may be required to forfeit not more than $500 for each violation.

(b) Any person who willfully requests or obtains personally identifiable information from an authority under false pretenses may be required to forfeit not more than $500 for each violation.

History: 1991 a. 39, 269.

SUBCHAPTER V

OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

(2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This subchapter is discussed. 65 Atty. Gen. preface.

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

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

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

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

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

The application of the open meeting law to the duties of WERC is discussed. 68 Atty. Gen. 171.

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

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

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

Understanding Wisconsin's open meeting law. Harvey, WBB September 1980.

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

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi–governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long–term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.

(2) "Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one–half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any

social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).

(3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

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

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

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

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

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

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

A "private conference" under s. 118.22 (3), on nonrenewal of a teacher's contract is a "meeting" within s. 19.82 (2). 66 Atty. Gen. 211.

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

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

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

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

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

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

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

(a) As required by any other statutes; and

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

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

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

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

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

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

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

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

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

The method of giving notice pursuant to sub. (1) is discussed. 65 Atty. Gen. 250.

The specificity of notice required by a governmental body is discussed. 66 Atty. Gen. 143, 195.

The requirements of notice given to newspapers under this section is discussed. 66 Atty. Gen. 230.

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

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

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

19.85 Exemptions. (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

(a) Deliberating concerning a case which was the subject of any judicial or quasi–judicial trial or hearing before that governmental body.

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

(c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

(d) Except as provided in s. 304.06 (1) (eg) and by rule promulgated under s. 304.06 (1) (em), considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.

(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

(ee) Deliberating by the council on unemployment insurance in a meeting at which all employer members of the council or all employee members of the council are excluded.

(eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.

(em) Deliberating under s. 157.70 if the location of a burial site, as defined in s. 157.70 (1) (b), is a subject of the deliberation and if discussing the location in public would be likely to result in disturbance of the burial site.

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

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

(h) Consideration of requests for confidential written advice from the government accountability board under s. 5.05 (6a), or from any county or municipal ethics board under s. 19.59 (5).

(i) Considering any and all matters related to acts by businesses under s. 560.15 which, if discussed in public, could adversely affect the business, its employees or former employees.

(2) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.

(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV, V, or VI of ch. 111 which has been negotiated by such body or on its behalf.

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

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

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

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

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

The exception under sub. (1) (e) must be strictly construed. A private entity's desire for confidentiality does not permit a closed meeting. A governing body's belief that secret meetings will produce cost savings does not justify closing the door to public scrutiny. Providing contingencies allowing for future public input was insufficient. Because legitimate concerns were present for portions of some of the meetings does not mean the entirety of the meetings fell within the narrow exception under sub. (1) (e). Citizens for Responsible Development v. City of Milton, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640, 06–0427.

Section 19.35 (1) (a) does not mandate that, when a meeting is closed under this section, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeyer,* 2002 WI 84, 254 Wis. 2d 306. Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06–1143.

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

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

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

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

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

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

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

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

"Evidentiary hearing" as used in s. 19.85 (1) (b), means a formal examination of accusations by receiving testimony or other forms of evidence that may be relevant to the dismissal, demotion, licensing, or discipline of any public employee or person covered by that section. A council that considered a mayor's accusations against an employee in closed session without giving the employee prior notice violated the requirement of actual notice to the employee. Campana v. City of Greenfield, 38 F. Supp. 2d 1043 (1999).

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

19.851 Closed sessions by government accountability board. The government accountability board shall hold each meeting of the board for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the ethics and accountability division of the board in closed session under this section. Prior to convening under this section, the government accountability board shall vote to convene in closed session in the manner provided in s. 19.85 (1). No business may be conducted by the government accountability board at any closed session under this section except that which relates to the purposes of the session as authorized in this section or as authorized in s. 19.85 (1).

History: 2007 a. 1.

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

body, notice shall be given by the employer's chief officer or such person's designee.

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

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

(1) Section 19.84 shall not apply to any meeting of the legislature or a subunit thereof called solely for the purpose of scheduling business before the legislative body; or adopting resolutions of which the sole purpose is scheduling business before the senate or the assembly.

(2) No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

(3) No provision of this subchapter shall apply to any partisan caucus of the senate or any partisan caucus of the assembly, except as provided by legislative rule.

(4) Meetings of the senate or assembly committee on organization under s. 71.78 (4) (c) or 77.61 (5) (b) 3. shall be closed to the public.

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

Sub. (3) applied to a closed meeting of the members of one political party on a legislative committee to discuss a bill. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

19.88 Ballots, votes and records. (1) Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting.

(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19.

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

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

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

History: 1975 c. 426.

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

History: 1977 c. 322.

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

History: 1975 c. 426.

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

19.97 Enforcement. (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

(2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

(3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

(4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in the name, and on behalf, of the state. In such actions, the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

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

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

Awards of attorney fees are to be at a rate applicable to private attorneys. A court may review the reasonableness of the hours and hourly rate charged, including the rates for similar services in the area, and may in addition consider the peculiar facts of the case and the responsible party's ability to pay. Hodge v. Town of Turtle Lake, 190 Wis. 2d 181, 526 N.W.2d 784 (Ct. App. 1994).

Actions brought under the open meetings and open records laws are exempt form the notice provisions of s. 893.80 (1). Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94–2809.

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

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

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

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

History: 1975 c. 426.

APPENDIX B

SAMPLE OPEN MEETINGS LAW COMPLAINT FORM

VERIFIED OPEN MEETINGS LAW COMPLAINT

Now comes the complainant _____ and as and for a verified complaint pursuant to Wis. Stat. §§ 19.96 and 19.97, alleges and complains as follows:

1. That he is a resident of the _____ [town, village, city] of _____, Wisconsin, and that his or her Post Office Address is _____ [street, avenue, etc.] _____, Wisconsin _____ [zip].

2. That _____ [name of member or chief presiding officer] whose Post Office Address is _____ [street, avenue, etc.], _____ [city], Wisconsin, was on the _____ day of _____ 200_, a _____ [member or chief presiding officer] of _____ designate official title of governmental body] and that such _____ [board, council, commission or committee] is a governmental body within the meaning of Wis. Stat. § 19.82(1).

3. That _____ [name of member or chief presiding officer] on the _____ day of _____, 200_, at _____ County of _____, Wisconsin, knowingly attended a meeting of said governmental body held in violation of Wis. Stat. § 19.96 and _____ [cite other applicable section(s)], or otherwise violated those sections in that [set out every act or omission constituting the offense charged]:

4. That _____ [name of member or chief presiding officer] is thereby subject to the penalties prescribed in Wis. Stat. § 19.96.

5. That the following witnesses can testify to said acts or omissions:

Name	Address	Telephone

6. That the following documentary evidence of said acts or omissions is available:

7. That this complaint is made to the District Attorney for _____ County under the provisions of Wis. Stat. § 19.97, and that the district attorney may bring an action to recover the forfeiture provided in Wis. Stat. § 19.96.

WHEREFORE, complainant prays that the District Attorney for _____ County, Wisconsin, timely institute an action against _____ [name of member or chief presiding officer] to recover the forfeiture provided in Wis. Stat. § 19.96, together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN)
) ss.
COUNTY OF _____)

_____ being first duly sworn on oath deposes and says that __he is the above-named complainant, that _he has read the foregoing complaint and that, based on his or her knowledge, the contents of the complaint are true.

_____
COMPLAINANT

Subscribed and sworn to before me
this ____ day of _____, 200_.

_____
Notary Public, State of Wisconsin
My Commission: _____

REFERENCE MATERIALS: CASES, OPINIONS, CORRESPONDENCE, AND STATUTES CITED

CASES CITED

State ex rel. Cities S. O. Co. v. Bd. of Appeals,
21 Wis. 2d 516, 124 N.W.2d 809 (1963)

State v. Davis,
63 Wis. 2d 75, 216 N.W.2d 31 (1974)

State ex rel. Lynch v. Dancey,
71 Wis. 2d 287, 238 N.W.2d 81 (1976)

State ex rel. Lynch v. Conta,
71 Wis. 2d 662, 239 N.W.2d 313 (1976)

State v. Swanson,
92 Wis. 2d 310, 284 N.W.2d 655 (1979)

State v. Karpinski,
92 Wis. 2d 599, 285 N.W.2d 729 (1979)

State ex rel. Schaeve v. Van Lare,
125 Wis. 2d 40, 370 N.W.2d 271
(Ct. App. 1985)

Oshkosh Northwestern Co. v. Oshkosh Library Bd.,
125 Wis. 2d 480, 373 N.W.2d 459
(Ct. App. 1985)

State ex rel. Newspapers v. Showers,
135 Wis. 2d 77, 398 N.W.2d 154 (1987)

Paulton v. Volkmann,
141 Wis. 2d 370, 415 N.W.2d 528
(Ct. App. 1987)

Wis. State Journal v. U.W. Platteville,
160 Wis. 2d 31, 465 N.W.2d 266
(Ct. App. 1990)

St. ex rel. Badke v. Greendale Village Bd.,
173 Wis. 2d 553, 494 N.W.2d 408 (1993)

State ex rel. Hodge v. Turtle Lake,
180 Wis. 2d 62, 508 N.W.2d 603 (1993)

Journal/Sentinel v. Shorewood School Bd.,
186 Wis. 2d 443, 521 N.W.2d 165
(Ct. App. 1994)

State ex rel. Auchinleck v. Town of LaGrange,
200 Wis. 2d 585, 547 N.W.2d 587 (1996)

State ex rel. Epping v. City of Neillsville,
218 Wis. 2d 516, 581 N.W.2d 548
(Ct. App. 1998)

State ex rel. H.D. Ent. v. City of Stoughton,
230 Wis. 2d 480, 602 N.W.2d 72
(Ct. App. 1999)

State v. Tereschko,
2001 WI App 146, 246 Wis. 2d 671,
630 N.W.2d 277 (unpublished)

State ex rel. Ward v. Town of Nashville,
2001 WI App 224, 247 Wis. 2d 988,
635 N.W.2d 26 (unpublished)

State ex rel. Olson v. City of Baraboo,
2002 WI App 64, 252 Wis. 2d 628,
643 N.W.2d 796

Fabyan v. Achtenhagen,
2002 WI App 214, 257 Wis. 2d 310,
652 N.W.2d 649

State ex rel. Leung v. City of Lake Geneva,
2003 WI App 129, 265 Wis. 2d 674,
666 N.W.2d 104

State ex rel. Lawton v. Town of Barton,
2005 WI App 16, 278 Wis. 2d 388,
692 N.W.2d 304

Plourde v. Habhegger,
2006 WI App 147, 294 Wis. 2d 746,
720 N.W.2d 130

State ex rel. Citizens for Responsible Development v. City of Milton,
2007 WI App 114, 300 Wis. 2d 649,
731 N.W.2d 640

State ex rel. Buswell v. Tomah Area Sch. Dist.,
2007 WI 71, 301 Wis. 2d 178,
732 N.W.2d 804

State ex rel. Herro v. Village of McFarland,
2007 WI App 172, 303 Wis. 2d 749,
737 N.W.2d 55

State v. Beaver Dam Area Dev. Corp.,
2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295

FORMAL ATTORNEY GENERAL OPINIONS CITED

OAG 67-79 (July 31, 1979)*

57 Op. Att'y Gen. 213 (1968)

63 Op. Att'y Gen. 509 (1974)

65 Op. Att'y Gen. Preface (1976)

65 Op. Att'y Gen. 131 (1976)

65 Op. Att'y Gen. 243 (1976)

65 Op. Att'y Gen. 250 (1976)

66 Op. Att'y Gen. 60 (1977)

66 Op. Att'y Gen. 68 (1977)

66 Op. Att'y Gen. 93 (1977)

66 Op. Att'y Gen. 106 (1977)

66 Op. Att'y Gen. 113 (1977)

66 Op. Att'y Gen. 211 (1977)

66 Op. Att'y Gen. 226 (1977)

66 Op. Att'y Gen. 230 (1977)

66 Op. Att'y Gen. 237 (1977)

66 Op. Att'y Gen. 318 (1977)

67 Op. Att'y Gen. 117 (1978)

67 Op. Att'y Gen. 125 (1978)

67 Op. Att'y Gen. 250 (1978)

68 Op. Att'y Gen. 171 (1979)

69 Op. Att'y Gen. 143 (1980)

69 Op. Att'y Gen. 251 (1980)

73 Op. Att'y Gen. 53 (1984)

74 Op. Att'y Gen. 38 (1985)

74 Op. Att'y Gen. 70 (1985)

76 Op. Att'y Gen. 276 (1987)

77 Op. Att'y Gen. 177 (1988)

77 Op. Att'y Gen. 312 (1988)

78 Op. Att'y Gen. 67 (1989)

80 Op. Att'y Gen. 129 (1991)

80 Op. Att'y Gen. 176 (1992)

81 Op. Att'y Gen. 139 (1994)

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*Unpublished opinion

INFORMAL ATTORNEY GENERAL OPINIONS CITED

I-20-89 (March 8, 1989)

I-95-89 (November 13, 1989)

I-22-90 (April 4, 1990)

I-34-90 (May 25, 1990)

I-29-91 (October 17, 1991)

I-05-93 (April 26, 1993)

I-10-93 (October 15, 1993)

I-02-09 (March 19, 2009)

I-04-09 (September 28, 2009)

I-05-09 (December 17, 2009)

I-01-10 (January 25, 2010)

DEPARTMENT OF JUSTICE CORRESPONDENCE CITED

Miller Correspondence,
May 25, 1977

Snow Correspondence,
June 15, 1977

Heule Correspondence,
June 29, 1977

Gempeler Correspondence,
February 12, 1979

Clifford Correspondence,
December 2, 1980

Staples Correspondence,
February 10, 1981

Caturia Correspondence,
September 20, 1982

Funkhouser Correspondence,
March 17, 1983

Gaylord Correspondence,
June 11, 1984

Clifford Correspondence,
April 28, 1986

Bukowski Correspondence,
May 5, 1986

DuVall Correspondence,
November 6, 1986

Geyer Correspondence,
February 26, 1987

Schuh Correspondence,
December 15, 1988

Henderson Correspondence,
March 24, 1992

Merkel Correspondence,
March 11, 1993

Rappert Correspondence,
April 8, 1993

Peplnjak Correspondence,
June 8, 1998

Godlewski Correspondence,
September 24, 1998

Constantine Correspondence,
February 28, 2000

Krischan Correspondence,
October 3, 2000

Schuh Correspondence,
October 17, 2001

Friedman Correspondence,
March 4, 2003

Haro Correspondence,
June 13, 2003

Reynolds/Kreibich Correspondence,
October 23, 2003

Jacques Correspondence,
January 26, 2004

Rude Correspondence,
March 5, 2004

Benson Correspondence,
March 12, 2004

Thompson Correspondence,
September 3, 2004

Becker Correspondence,
November 30, 2004

O'Connell Correspondence,
December 21, 2004

Zwieg Correspondence,
March 10, 2005

Boyle Correspondence,
May 4, 2005

Perlick Correspondence,
May 12, 2005

Tylka Correspondence,
June 8, 2005

Lichstein Correspondence,
September 20, 2005

Lundquist Correspondence,
October 25, 2005

Brisco Correspondence,
December 13, 2005

Katayama Correspondence,
January 20, 2006

Claybaugh Correspondence,
February 16, 2006

Kowalczyk Correspondence,
March 13, 2006

Peck Correspondence,
April 17, 2006

Zwieg Correspondence,
July 13, 2006

Heupel Correspondence,
August 29, 2006

Kosobucki Correspondence,
September 6, 2006

Chiaverotti Correspondence,
September 19, 2006

Maroney Correspondence,
October 31, 2006

Dziki Correspondence,
December 12, 2006

Weinschenk Correspondence,
December 29, 2006

Anderson Correspondence,
February 13, 2007

Kay Correspondence,
April 25, 2007

Linde Correspondence,
May 4, 2007

Koss Correspondence,
May 30, 2007

Wirth and Lamoreaux Correspondence,
May 30, 2007

Kittleson Correspondence,
June 13, 2007

Musolf Correspondence,
July 13, 2007

Eckert Correspondence,
July 25, 2007

Dieck Correspondence,
September 12, 2007

Caylor Correspondence,
December 6, 2007

Huff Correspondence,
January 15, 2008

Stencil Correspondence,
March 6, 2008

Stalle Correspondence,
April 10, 2008

Huebscher Correspondence,
May 23, 2008

Herbst Correspondence,
July 16, 2008

Karstens Correspondence,
July 31, 2008

Johnson Correspondence,
February 27, 2009

Martinson Correspondence,
March 2, 2009

Skindrud Correspondence,
March 12, 2009

Black Correspondence,
April 22, 2009

Erickson Correspondence,
April 22, 2009

White Correspondence,
May 1, 2009

Penkalski Correspondence,
May 4, 2009

Connors/Haag Correspondence,
May 26, 2009

De Moya Correspondence,
June 17, 2009

STATUTES CITED
(OTHER THAN THE OPEN MEETINGS LAW, WIS. STAT. CH. 19, SUBCH. V)

Wis. Stat. ch. 111

Wis. Stat. ch. 181

Wis. Stat. § 14.90 (1959)

Wis. Stat. § 19.39

Wis. Stat. § 32.08

Wis. Stat. §§ 33.21 to 33.27

Wis. Stat. § 59.071

Wis. Stat. § 59.23(2)(a)

Wis. Stat. § 59.694(1)

Wis. Stat. § 59.694(3)

Wis. Stat. § 59.99(3) (1983)

Wis. Stat. § 60.33(2)(a)

Wis. Stat. § 60.65(5)

Wis. Stat. § 61.25(3)

Wis. Stat. § 62.09(11)(b)

Wis. Stat. § 62.13(5)(i)

Wis. Stat. § 62.23(7)(e)3.

Wis. Stat. § 65.90(4)

Wis. Stat. § 66.46(4)(a)

Wis. Stat. § 66.77(1) (1973)

Wis. Stat. § 66.100(4)(b)

Wis. Stat. § 70.47(2m)

Wis. Stat. § 70.47(7)(bb)

Wis. Stat. § 101.13(1)

Wis. Stat. § 893.93(1)(a)

Wis. Stat. § 893.93(2)(a)

Wis. Stat. § 946.13(1)

Wis. Stat. § 990.001(4)(a)

Up

(1) COLLECTION FROM DATA SUBJECT OR VERIFICATION. An authority that maintains personally identifiable information that may result in an adverse determination about any individual's rights, benefits or privileges shall, to the greatest extent practicable, do at least one of the following:

(a) Collect the information directly from the individual.

(b) Verify the information, if collected from another person.

History: 1991 a. 39.

19.68 Collection of personally identifiable information from Internet users. No state authority that maintains an Internet site may use that site to obtain personally identifiable information from any person who visits that site without the consent of the person from whom the information is obtained. This section does not apply to acquisition of Internet protocol addresses.

History: 2001 a. 16.

19.69 Computer matching.

(1) MATCHING SPECIFICATION. A state authority may not use or allow the use of personally identifiable information maintained by the state authority in a match under a matching program, or provide personally identifiable information for use in a match under a matching program, unless the state authority has specified in writing all of the following for the matching program:

(a) The purpose and legal authority for the matching program.

(b) The justification for the program and the anticipated results, including an estimate of any savings.

(c) A description of the information that will be matched.

(2) COPY TO PUBLIC RECORDS BOARD. A state authority that prepares a written specification of a matching program under sub. (1) shall provide to the public records board a copy of the specification and any subsequent revision of the specification within 30 days after the state authority prepares the specification or the revision.

(3) NOTICE OF ADVERSE ACTION.

(a) Except as provided under par. (b), a state authority may not take an adverse action against an individual as a result of information produced by a matching program until after the state authority has notified the individual, in writing, of the proposed action.

(b) A state authority may grant an exception to par. (a) if it finds that the information in the records series is sufficiently reliable.

(4) NONAPPLICABILITY. This section does not apply to any matching program established between the secretary of transportation and the commissioner of the federal social security administration pursuant to an agreement specified under s. 85.61 (2).

History: 1991 a. 39, 269; 1995 a. 27; 2003 a. 265.

19.71 Sale of names or addresses. An authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. The collection of fees under s. 19.35 (3) is not a sale or rental under this section.

History: 1991 a. 39.

19.77 Summary of case law and attorney general opinions. Annually, the attorney general shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The attorney general shall provide the summary, at no charge, to interested persons.

History: 1991 a. 39.

19.80 Penalties.

(2) EMPLOYEE DISCIPLINE. Any person employed by an authority who violates this subchapter may be discharged or suspended without pay.

(3) PENALTIES.

(a) Any person who willfully collects, discloses or maintains personally identifiable information in violation of federal or state law may be required to forfeit not more than $500 for each violation.

(b) Any person who willfully requests or obtains personally identifiable information from an authority under false pretenses may be required to forfeit not more than $500 for each violation.

History: 1991 a. 39, 269.

SUBCHAPTER V

OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy.

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

(2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

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

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

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

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

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

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

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

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

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

This subchapter is discussed. 65 Atty. Gen. preface.

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

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

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

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

The application of the open meeting law to the duties of WERC is discussed. 68 Atty. Gen. 171.

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

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

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

Understanding Wisconsin's open meeting law. Harvey, WBB September 1980.

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

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, or V of ch. 111.

(2) "Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified

in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).

(3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

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

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

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

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

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

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

A "private conference" under s. 118.22 (3), on nonrenewal of a teacher's contract is a "meeting" within s. 19.82 (2). 66 Atty. Gen. 211.

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

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

19.83 Meetings of governmental bodies.

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

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

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

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is

social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

19.84 Public notice.

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

(a) As required by any other statutes; and

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

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

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

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

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

Down

2011-12 Wisconsin Statutes updated though 2013 Wis. Act 124 and all Supreme Court Orders entered before January 28, 2014. Published and certified under s. 35.18. Changes effective after January 28, 2014 are designated by NOTES. (Published 1-29-14)

Up

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History: 2001 a. 16.

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(a) Except as provided under par. (b), a state authority may not take an adverse action against an individual as a result of information produced by a matching program until after the state authority has notified the individual, in writing, of the proposed action.

(b) A state authority may grant an exception to par. (a) if it finds that the information in the records series is sufficiently reliable.

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

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

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

The application of the open meeting law to the duties of WERC is discussed. 68 Atty. Gen. 171.

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

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

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

Understanding Wisconsin's open meeting law. Harvey, WBB September 1980.

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

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, or V of ch. 111.

(2) "Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified

in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).

(3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

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

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

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

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

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

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

A "private conference" under s. 118.22 (3), on nonrenewal of a teacher's contract is a "meeting" within s. 19.82 (2). 66 Atty. Gen. 211.

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

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

19.83 Meetings of governmental bodies.

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

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

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

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is

social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

19.84 Public notice.

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

(a) As required by any other statutes; and

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

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

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

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

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

Down

2011-12 Wisconsin Statutes updated though 2013 Wis. Act 124 and all Supreme Court Orders entered before January 28, 2014. Published and certified under s. 35.18. Changes effective after January 28, 2014 are designated by NOTES. (Published 1-29-14)

Wisconsin
Public Records Law
Wis. Stat. §§ 19.31-19.39

COMPLIANCE OUTLINE

September 2012

DEPARTMENT OF JUSTICE
ATTORNEY GENERAL J.B. VAN HOLLEN

Attorney General's Message

By Attorney General J.B. Van Hollen

Effective oversight of the workings of government and the official acts of government officers and employees is essential to our system of democratic government—and to our confidence in that government. Meaningful access to public records plays a vital role in facilitating that oversight. Raising awareness, providing information, and promoting compliance with the Wisconsin public records law are top priorities of the Wisconsin Department of Justice.

The Department of Justice publishes this Outline to assist government personnel in complying with their public records obligations, and to assist members of the public in exercising their rights under the public records law. It aims to provide a general understanding of the public records law by explaining fundamental principles, addressing frequent matters of interest, and answering recurring questions. Anyone seeking legal advice about application of the public records law to specific factual situations must contact his or her attorney.

This Outline may be accessed, downloaded, or printed free of charge from the Department of Justice website, *www.doj.state.wi.us*. I encourage you to share this Outline with colleagues who may find it helpful. Anyone seeking brief legal information about the public records law may call the Department of Justice at (608) 266-3952 to speak with one of our public records attorneys. Written inquiries also may be mailed to me at Attorney General J.B. Van Hollen, Wisconsin Department of Justice, Post Office Box 7857, Madison, WI 53707-7857.

As Attorney General, I cannot overstate the importance of full compliance with the public records law. I recognize and thank all the records custodians and other government personnel diligently performing their public records duties, and invite them to contact the Department of Justice whenever we can be of assistance.

WISCONSIN PUBLIC RECORDS LAW
WIS. STAT. §§ 19.31-19.39
COMPLIANCE OUTLINE
(SEPTEMBER 2012)

WISCONSIN DEPARTMENT OF JUSTICE
J.B. VAN HOLLEN, ATTORNEY GENERAL

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I. Introduction.

The Wisconsin public records law authorizes requesters to inspect or obtain copies of "records" maintained by government "authorities." The identity of the requester or the reason why the requester wants particular records generally do not matter for purposes of the public records law. Records are presumed to be open to inspection and copying, but there are some exceptions. Requirements of the public records law apply to records that exist at the time a public records request is made. The public records law does not require authorities to provide requested information if no responsive record exists, and generally does not require authorities to create new records in order to fulfill public records requests. The public records statutes, Wis. Stat. §§ 19.31-19.39, do not address the duty to retain records. This outline is intended to provide general information about the public records law.

II. Public Policy and Purpose.

A. "[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. This is one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist.* ("*Zellner I*"), 2007 WI 53, ¶ 49, 300 Wis. 2d 290, ¶ 49, 731 N.W.2d 240, ¶ 49.

B. Wisconsin legislative policy favors the broadest practical access to government. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 22, 284 Wis. 2d 162, ¶ 22, 699 N.W.2d 551, ¶ 22; *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 15, 305 Wis. 2d 582, ¶ 15, 740 N.W.2d 177, ¶ 15. Providing citizens with information on the affairs of government is:

> [A]n essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Wis. Stat. § 19.31. Courts interpret the public records law in light of this policy declaration, to foster transparent government. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 40, 341 Wis. 2d 607, ¶ 40, 815 N.W.2d 367, ¶ 40 (Abrahamson, C.J., lead opinion).

C. The purpose of the Wisconsin public records law is to shed light on the workings of government and the acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726, 729 (Ct. App. 1998). Its goal is to

provide access to records that assist the public in becoming an informed electorate. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 73, 341 Wis. 2d 607, ¶ 73, 815 N.W.2d 367, ¶ 73 (Roggensack, J., concurring). The public records law therefore serves a basic tenet of our democratic system by providing opportunity for public oversight of government. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 16, 259 Wis. 2d 276, ¶ 16, 655 N.W.2d 510, ¶ 16; *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428, 430 (1996); *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, ¶ 15, 646 N.W.2d 811, ¶ 15.

D. The presumption favoring disclosure is strong, but not absolute. *Hempel*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, ¶ 28, 699 N.W.2d 551, ¶ 28.

E. The general rule is that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a). Any record specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of the record containing public information is open to public inspection. Wis. Stat. § 19.36(1).

III. Sources of Wisconsin Public Records Law.

A. Wisconsin Stat. §§ 19.31-19.39 (the public records statutes). The public records statutes and related Wisconsin statutes can be accessed on the Legislature's website: *www.legis.state.wi.us/rsb* and in Appendix C of this outline.

B. Wisconsin Stat. § 19.85(1) (exemptions to the open meetings law, referred to in the public records law), also accessible at *www.legis.state.wi.us/rsb*.

C. Court decisions.

D. Attorney General opinions and correspondence. Volumes 71-81 of the Attorney General opinions, as well as opinions from 1995-present, can be accessed at *http://docs.legis.wi.gov/misc/oag*. Certain opinions and resources also can be accessed at *http://www.doj.state.wi.us/site/ompr.asp*.

E. Other sources described below in this outline.

F. *Note*: The United States Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, does not apply to states. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428 n.6, 538 N.W.2d 608, 612 n.6 (Ct. App. 1995). Nonetheless, the public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test discussed in Section VIII.F., below. *Linzmeyer*, 2002 WI 84, ¶¶ 32-33, 254 Wis. 2d 306, ¶¶ 32-33, 646 N.W.2d 811, ¶¶ 32-33.

IV. Key Definitions.

A. **"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. Wis. Stat. § 19.32(2).

1. Must be created or kept in connection with official purpose or function of the agency. 72 Op. Att'y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965). Content determines whether a document is a "record," not medium, format, or location. OAG I-06-09 (December 23, 2009), at 2.

2. Not everything a public official or employee creates is a public record. *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, ¶ 45, 680 N.W.2d 792, ¶ 45; OAG I-06-09, at 3 n.1. *But see Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, ¶ 152, 786 N.W.2d 177, ¶ 152 (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting) (personal e-mail sent or received on an authority's computer system is a record).

3. "Record" includes:

   a. Handwritten, typed, or printed documents.

   b. Maps and charts.

   c. Photographs, films, and tape recordings.

   d. Computer tapes and printouts, CDs and optical discs.

   e. Electronic records and communications.

      i. Information regarding government business kept or received by an elected official on her website, "Making Salem Better," more likely than not constitutes a record. OAG I-06-09, at 2-3.

      ii. E-mail sent or received on an authority's computer system is a record. This includes personal e-mail sent by officers or employees of the authority. *Schill*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, ¶ 152, 786 N.W.2d 177, ¶ 152 (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting).

      iii. E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record.

4. "Record" also includes contractors' records. Each authority must make available for inspection and copying 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. Wis. Stat. § 19.36(3).

   a. Access to contractors' records does not extend to information produced or collected under a subcontract to which the authority is not a party, *unless* the information is required by or provided to the authority under the general contract to which the authority is a party. *Bldg. & Constr. Trades Council*, 221 Wis. 2d at 585, 585 N.W.2d at 730.

   b. Interpreting the scope of contractors' records covered by this provision, the Wisconsin Court of Appeals has held that the term "collect" in the Wis. Stat. § 19.36(3) language requiring disclosure of "any record . . . 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" means "to bring together in one place." The court determined that the statute was not written so narrowly as to require that the contract be for the purpose of collecting the records, and could refer to a contract between the authority's contractor and a subcontractor. *Juneau Co. Star-Times v. Juneau Co.*, 2011 WI App 150, ¶¶ 13-30, 337 Wis. 2d 710, ¶¶ 13-30, 807 N.W.2d 655, ¶¶ 13-30 (petition for review granted Feb. 23, 2012). As of

September 2012, this case is before the Wisconsin Supreme Court for review; a decision is expected by mid-July 2013.

c. A governmental entity cannot evade its public records responsibilities by shifting a record's creation or custody to an agent. *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 453, 521 N.W.2d 165, 170 (Ct. App. 1994); *WIREdata, Inc. v. Vill. of Sussex* ("*WIREdata II*"), 2008 WI 69, ¶ 89, 310 Wis. 2d 397, ¶ 89, 751 N.W.2d 736, ¶ 89 (contract assessor records).

5. "Record" does not include:

a. Drafts, notes, preliminary documents, and similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working. Wis. Stat. § 19.32(2); *State v. Panknin*, 217 Wis. 2d 200, 209-10, 579 N.W.2d 52, 56-57 (Ct. App. 1998) (personal notes of sentencing judge are not public records).

i. This exception is generally limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority. 77 Op. Att'y Gen. 100, 102-03 (1988).

ii. A document is not a draft if it is used for the purposes for which it was commissioned. *Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589, 594 (1989); *Journal/Sentinel*, 186 Wis. 2d at 455-56, 521 N.W.2d at 171.

iii. Preventing "final" corrections from being made does not indefinitely qualify a document as a draft. *Fox*, 149 Wis. 2d at 417, 438 N.W.2d at 595.

iv. Nor does labeling each page of the document "draft" indefinitely qualify a document as a draft for public records purposes. *Fox*, 149 Wis. 2d at 417, 438 N.W.2d at 595.

v. This exclusion will be narrowly construed; the burden of proof is on the records custodian. *Fox*, 149 Wis. 2d at 411, 417, 438 N.W.2d at 592-93, 595.

b. Published material available for sale or at the library. Wis. Stat. § 19.32(2).

c. Materials which are purely the personal property of the custodian and have no relation to his or her office. Wis. Stat. § 19.32(2).

i. However, personal e-mail sent or received on an authority's computer system is a record. *Schill*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, ¶ 152, 786 N.W.2d 177, ¶ 152 (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting).

ii. Consequently, the definition of "record" does not exempt purely personal e-mail if it is sent or received on an authority's computer system (although it need not be disclosed if purely personal). This exemption should be narrowly construed. *See* Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at *http://www.doj.state.wi.us/dls/pr_resources.asp.*

d. Material with access limited due to copyright, patent, or bequest. Wis. Stat. § 19.32(2).

The copyright exception may not apply when the "fair use" exception to copyright protection can be asserted. Whether use of a particular copyrighted work is a "fair use" depends on: (1) The purpose and character of the use, including whether the use is for commercial or nonprofit educational purposes; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work. *Zellner I*, 2007 WI 53, ¶ 28, 300 Wis. 2d 290, ¶ 28, 731 N.W.2d 240, ¶ 28.

e. *Note*: Statutory exceptions are instances in derogation of legislative intent and should be narrowly construed. *Zellner I*, 2007 WI 53, ¶ 31, 300 Wis. 2d 290, ¶ 31, 731 N.W.2d 240, ¶ 31 (citing *Fox*, 149 Wis. 2d at 411, 438 N.W.2d at 592-93).

f. "Record" does not include an identical copy of an otherwise available record. *Stone v. Bd. of Regents*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20. An identical copy, for this purpose, is not meaningfully different from an original for purposes of responding to a specific public records request. *Stone*, 2007 WI App 223, ¶ 18, 305 Wis. 2d 679, ¶ 18, 741 N.W.2d 774, ¶ 18. *Cf.* Wis. Stat. § 16.61(2)(b)5.

6. Public records requests and responses are themselves "records" for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.

B. **"Requester."**

1. Generally, any person who requests inspection or a copy of a record. Wis. Stat. § 19.32(3).

2. *Exception*: Any of the following persons are defined as "requesters" only to the extent that the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom the person has not been denied physical placement under Wis. Stat. ch. 767:

a. A person committed under the mental health law, sex crimes law, sex predator law, or found not guilty by reasons of disease or defect, while that person is placed in an inpatient treatment facility. Wis. Stat. § 19.32(1b), (1d), and (3).

b. A person incarcerated in a state prison, county jail, county house of correction or other state, county or municipal correctional detention facility, or who is confined as a condition of probation. Wis. Stat. § 19.32(1c), (1e), and (3).

3. *Note*: There is generally a greater right to obtain records containing personally identifiable information about the requester himself or herself, subject to exceptions specified in Wis. Stat. § 19.35(1)(am). *See* Section VIII.G.7., below.

C. **"Authority."** Defined in Wis. Stat. § 19.32(1) as any of the following having custody of a record, and some others:

1. A state or local office.

a. A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the "authority" for purposes of the public records law. *WIREdata II*, 2008 WI 69, ¶ 75, 310 Wis. 2d 397, ¶ 75, 751 N.W.2d 736, ¶ 75 (municipality's independent contractor assessor not an authority for public records purposes).

b. Only "authorities" are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests. *WIREdata II*, 2008 WI 69, ¶¶ 77-78, 310 Wis. 2d 397, ¶¶ 77-78, 751 N.W.2d 736, ¶¶ 77-78.

2. An elected official.

3. An agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule, or order.

4. A governmental or quasi-governmental corporation.

   a. A corporation is a quasi-governmental corporation for purposes of the public records law "if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 9, 312 Wis. 2d 84, ¶ 9, 752 N.W.2d 295, ¶ 9.

   b. Quasi-governmental corporations are not limited to corporations created by acts of government. *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 44, 312 Wis. 2d 84, ¶ 44, 752 N.W.2d 295, ¶ 44.

   c. Determining whether a corporation is a quasi-governmental corporation requires a case by case analysis. *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶¶ 8-9, 312 Wis. 2d 84, ¶¶ 8-9, 752 N.W.2d 295, ¶¶ 8-9. No one factor is conclusive. The non-exclusive list of factors considered in *Beaver Dam Area Dev. Corp.* fall into five basic categories:

      i. The extent to which the private corporation is supported by public funds;

      ii. Whether the private corporation serves a public function and, if so, whether it also has other, private functions;

      iii. Whether the private corporation appears in its public presentations to be a governmental entity;

      iv. The extent to which the private corporation is subject to governmental control; and

      v. The degree of access that government bodies have to the private corporation's records.

      OAG I-02-09 (March 19, 2009).

5. Any court of law.

6. The state assembly or senate.

7. A nonprofit corporation that receives more than 50% of its funds from a county or municipality and which provides services related to public health or safety to the county or municipality.

8. A formally constituted sub-unit of any of the above.

D. **"Legal custodian."**

1. The legal custodian is vested by the authority with full legal power to render decisions and carry out the authority's statutory public records responsibilities. Wis. Stat. § 19.33(4).

2. Identified in Wis. Stat. § 19.33(1)-(5):

   a. An elected official is the legal custodian of his or her records and the records of his or her office. An elected official may designate an employee to act as the legal custodian.

   b. The chairperson of a committee of elected officials, or the chairperson's designee, is the legal custodian of the records of the committee. Similarly, the co-chairpersons of a joint committee of elected officials, or their designees, are the legal custodians of the records of the committee.

   c. For every other authority, the authority must designate one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part to be its legal custodian and fulfill its duties under the public records law. If no designation is made, the default is the authority's highest ranking officer and its chief administrative officer, if there is such a person.

   d. There are special provisions in Wis. Stat. § 19.33(5) if the members of an authority are appointed by another authority.

3. No elected official is responsible for the records of any other elected official unless he or she has possession of the records of that other elected official. Wis. Stat. § 19.35(6).

4. Special custodial rules apply to the following shared law enforcement records.

   a. Law enforcement investigation information provided by a local law enforcement agency to the Office of Justice Assistance ("OJA") for sharing with other law enforcement agencies and prosecutors.

      i. Applicable definitions.

         (a) "Law enforcement agency" means one of the following:

            (1) A governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority. Wis. Stat. § 16.964(18)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).

            (2) An agency of a tribe that is established for the purpose of preventing and detecting crime on the reservation or trust lands of the tribe and enforcing the tribe's laws or ordinances, that employs full time one or more persons who are granted law enforcement and arrest powers under

Wis. Stat. § 165.92(2)(a), and that was created by a tribe that agrees that its law enforcement agency will perform the duties required of the agency under Wis. Stat. §§ 165.83 and 165.84; or the Great Lakes Indian Fish and Wildlife Commission, if that commission agrees to perform the duties required under Wis. Stat. §§ 165.83 and 165.84. Wis. Stat. § 16.964(18)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(e).

(b) "Law enforcement investigation information" means information that is collected by OJA under Wis. Stat. § 16.964(1m) consisting of arrest reports, incident reports, and other information relating to persons suspected of committing crimes that was created by a law enforcement agency and provided to OJA by that agency for the purpose of sharing with other law enforcement agencies and prosecutors. Wis. Stat. § 16.964(18)(a)2.

ii. Designation of the legal custodian of this law enforcement investigation information, for purposes of response to public records requests:

(a) If OJA has custody of a record containing law enforcement investigation information contained in the record, OJA and any other law enforcement agency with which OJA shares the information are not the legal custodians of the record as it relates to that information. Wis. Stat. § 16.964(18)(b).

(b) The legal custodian of the record as it relates to the law enforcement investigation information is the law enforcement agency that provided the law enforcement information to OJA. Wis. Stat. § 16.964(18)(b).

iii. Denial of misdirected requests. If OJA or another law enforcement agency receives a public records request for access to information in a record containing law enforcement investigation information, OJA or that agency must deny any portion of the request that relates to the law enforcement investigation information. Wis. Stat. § 16.964(18)(b).

b. Law enforcement records in the custody of local information technology authorities for purposes of information storage, information technology processing, or other information technology usage.

i. Applicable definitions.

(a) "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority. Wis. Stat. § 19.35(7)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).

(b) "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services. Wis. Stat. § 19.35(7)(a)2.

(c) "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage. Wis. Stat. § 19.35(7)(a)3.

ii. Legal custodian of these law enforcement records, for purposes of public records requests:

(a) The legal custodian is not the local information technology authority having custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology. Wis. Stat. § 19.35(7)(b).

(b) The legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used. Wis. Stat. § 19.35(7)(b).

iii. Denial of misdirected requests. A local information technology authority that receives a request for access to information in a law enforcement record must deny any portion of the request that relates to information in a local law enforcement record. Wis. Stat. § 16.964(18)(b).

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

F. **"Personally identifiable information."** Information that can be associated with a particular individual through one or more identifiers or other information or circumstances. Wis. Stat. §§ 19.32(1r) and 19.62(5).

G. **"Local public office."** Defined in Wis. Stat. §§ 19.32(1dm) and 19.42(7w). Includes, among others, the following (excluding any office that is a state public office):

1. An elective office of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)).

2. A county administrator or administrative coordinator, or a city or village manager.

3. An appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

4. An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

5. Any appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) 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 Wis. Stat. § 111.70(1)(i)).

6. The statutory definition of "local public office" does not include any position filled by an independent contractor. *WIREdata II*, 2008 WI 69, ¶ 75, 310 Wis. 2d 397, ¶ 75, 751 N.W.2d 736, ¶ 75 (contract assessors).

H. **"State public office."** Defined in Wis. Stat. §§ 19.32(4) and 19.42(13). Includes, among others, the following:

1. State constitutional officers and other elected state officials identified in Wis. Stat. § 20.923(2).

2. Most positions to which individuals are regularly appointed by the Governor.

3. State agency positions identified in Wis. Stat. § 20.923(4).

4. State agency deputies and executive assistants, and Office of Governor staff identified in Wis. Stat. § 20.923(8)-(10).

5. Division administrators of offices created under Wis. Stat. ch. 14, or departments or independent agencies created under Wis. Stat. ch. 15.

6. Legislative staff identified in Wis. Stat. § 20.923(6)(h).

7. Specified University of Wisconsin System executives, and senior executive positions identified in Wis. Stat. § 20.923(4g).

8. Specified technical college district executives and Wisconsin Technical College System senior executive positions identified in Wis. Stat. § 20.923(7).

9. Municipal judges.

V. Before Any Request: Procedures for Authorities.

A. **Records policies.** An authority (except members of the Legislature and members of any local governmental body) must adopt, display, and make available for inspection and copying at its offices information about its public records policies. Wis. Stat. § 19.34(1). The authority's policy must include:

1. A description of the organization.

2. The established times and places at which the public may obtain information and access to records in the organization's custody, or make requests for records, or obtain copies of records.

3. The costs for obtaining records.

4. The identity of the legal custodian(s).

5. The methods for accessing or obtaining copies of records.

6. For authorities that do not have regular office hours, any notice requirement of intent to inspect or copy records.

7. Each position that constitutes a local public office or a state public office.

B. **Hours for access.** There are specific statutory requirements regarding hours of access. Wis. Stat. § 19.34(2).

1. If the authority maintains regular office hours at the location where the records are kept, public access to the records is permitted during those office hours unless otherwise specifically authorized by law.

2. If there are no regular office hours at the location where the records are kept, the authority must:

a. Provide access upon at least 48 hours written or oral notice of intent to inspect or copy a record, or

b. Establish a period of at least 2 consecutive hours per week during which access to records of the authority is permitted. The authority may require 24 hours advance written or oral notice of intent to inspect or copy a record.

C. **Facilities for requesters.** An authority must provide facilities comparable to those used by its employees to inspect, copy, and abstract records. The authority is not required to purchase or lease photocopying or other equipment or provide a separate room. Wis. Stat. § 19.35(2).

D. **Fees for responding**. Wis. Stat. § 19.35(3). For detailed information about permissible fees, see Section XI.C., below.

E. **Records retention policies.** Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. See Wis. Stat. § 16.61 for retention requirements applicable to state authorities and Wis. Stat. § 19.21 for retention requirements applicable to local authorities. ***Caution***: Under the public records law, an authority may not destroy a record after receipt of a request for that record until at least sixty days after denial or until related litigation is completed. Wis. Stat. § 19.35(5). The sixty-day time period excludes Saturdays, Sundays, and legal holidays. *See* Wis. Stat. § 19.345.

1. The records retention provisions of Wis. Stat. § 19.21 are not part of the public records law. *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, ¶ 13, 742 N.W.2d 530, ¶ 13.

2. An authority's alleged failure to keep requested records may not be attacked under the public records law. *Gehl*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, ¶ 13, 742 N.W.2d 530, ¶ 13.

VI. The Request.

A. **Written or oral.** Requests do not have to be in writing. Wis. Stat. § 19.35(1)(h).

B. **Requester identification.** The requester generally does not have to identify himself or herself. Wis. Stat. § 19.35(1)(i). ***Caution***: Certain substantive statutes, such as those concerning student records and health records, may restrict record access to specified persons. When records of that

nature are the subject of a public records request, the records custodian should confirm before releasing the records that the requester is someone statutorily authorized to obtain the requested records. See Wis. Stat. § 19.35(1)(i) for other limited circumstances in which a requester may be required to show identification.

C. **Purpose.** The requester does not need to state the purpose of the request. Wis. Stat. § 19.35(1)(h) and (i).

D. **Reasonable specificity.** The request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h). *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187, 189-90 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific).

1. The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request. *Schopper*, 210 Wis. 2d at 213, 565 N.W.2d at 190; *Gehl*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, ¶ 17, 742 N.W.2d 530, ¶ 17.

2. The public records law will not be interpreted to impose such a burden upon a records custodian that normal functioning of the office would be severely impaired. *Schopper*, 210 Wis. 2d at 213, 565 N.W.2d at 190.

3. A records custodian should not have to guess at what records a requester desires. *Seifert*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, ¶ 42, 740 N.W.2d 177, ¶ 42.

4. A records custodian may not deny a request solely because the records custodian believes that the request could be narrowed. *Gehl*, 2007 WI App 238, ¶ 20, 306 Wis. 2d 247, ¶ 20, 742 N.W.2d 530, ¶ 20.

5. The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited. *Gehl*, 2007 WI App 238, ¶ 23, 306 Wis. 2d 247, ¶ 23, 742 N.W.2d 530, ¶ 23.

   a. At some point, an overly broad request becomes sufficiently excessive to warrant rejection pursuant to Wis. Stat. § 19.35(1)(h). *Gehl*, 2007 WI App 238, ¶ 24, 306 Wis. 2d 247, ¶ 24, 742 N.W.2d 530, ¶ 24.

   b. The public records law does not impose unlimited burdens on authorities and records custodians. *Gehl*, 2007 WI App 238, ¶ 23, 306 Wis. 2d 247, ¶ 23, 742 N.W.2d 530, ¶ 23 (request too burdensome when it would have required production of voluminous records relating to virtually all county zoning matters over a two-year period, without regard to the parties involved or whether the matters implicated requester's interests in any way).

6. A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request. These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed. Records custodians making these courtesy contacts should take care not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the public records law.

E. **Format.**

1. "Magic words" are not required. A request which reasonably describes the information or record requested is sufficient. Wis. Stat. § 19.35(1)(h).

2. A request, reasonably construed, triggers the statutory requirement to respond. For example, a request made under the "Freedom of Information Act" should be interpreted as being made under the Wisconsin public records law. *See ECO, Inc.*, 2002 WI App 302, ¶ 23, 259 Wis. 2d 276, ¶ 23, 655 N.W.2d 510, ¶ 23.

3. A request is sufficient if it is directed at an authority and reasonably describes the records or information requested. *Seifert*, 2007 WI App 207, ¶ 39, 305 Wis. 2d 582, ¶ 39, 740 N.W.2d 177, ¶ 39 (request for records created during investigation or relate to disposition of investigation not construed to include billing records of attorneys involved in investigation).

4. No specific form is required by the public records law.

F. **Ongoing requests.** "Continuing" requests are not contemplated by the public records law. "The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made." 73 Op. Att'y Gen. 37, 44 (1984).

G. **Requests are records.** Public records requests received by an authority are themselves "records" for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.

VII. The Response to the Request.

A. **Mandatory.** The records custodian must respond to a public records request. *ECO, Inc.*, 2002 WI App 302, ¶¶ 13-14, 259 Wis. 2d 276, ¶¶ 13-14, 655 N.W.2d 510, ¶¶ 13-14.

B. **Timing.** Response must be provided "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

1. The public records law does not require response within any specific time, such as "two weeks" or "48 hours."

2. DOJ policy is that ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location, review or redaction of many documents, a reasonable time for responding may be longer. However, if a response cannot be provided within ten working days, it is DOJ's practice to send a communication indicating that a response is being prepared.

3. An authority is not obligated to respond within a timeframe unilaterally identified by a requester, such as: "I will consider my request denied if no response is received by Friday and will seek all available legal relief." To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.

4. What constitutes a reasonable time for a response to any specific request 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 related considerations. Whether an authority is acting with reasonable diligence in responding to a particular request will depend on the totality of circumstances surrounding that request. *WIREdata II*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, ¶ 56, 751 N.W.2d 736, ¶ 56.

5. Requests for public records should be given high priority.

6. Compliance at some unspecified future time is not authorized by the public records law. The records custodian has two choices: comply or deny. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457-58, 555 N.W.2d 140, 142 (Ct. App. 1996).

7. 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. *WIREdata II*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, ¶ 56, 751 N.W.2d 736, ¶ 56.

8. An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a $1,000.00 forfeiture. Wis. Stat. § 19.37. *See* Section XIII., below.

C. **Format.** If the request is in writing, a denial or partial denial of access also must be in writing. Wis. Stat. § 19.35(4)(b).

D. **Content of denials.** Reasons for denial must be *specific* and *sufficient*. *Cf. Hempel*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, ¶¶ 25-26, 699 N.W.2d 551, ¶¶ 25-26.

1. A records custodian need not provide facts supporting the reasons it identifies for denying a public records request, but must provide specific reasons for the denial. *Hempel*, 2005 WI 120, ¶ 79, 284 Wis. 2d 162, ¶ 79, 699 N.W.2d 551, ¶ 79.

2. Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.

   a. If confidentiality of requested records is guaranteed by statute, citation to that statute is sufficient.

   b. If further discussion is needed, a records custodian's denial of access to a public record must be accompanied by a statement of the specific public policy reasons for refusal. *Chvala v. Bubolz*, 204 Wis. 2d 82, 86-87, 552 N.W.2d 892, 894 (Ct. App. 1996).

      i. The records custodian must give a public policy reason why the record warrants confidentiality, but need not provide a detailed analysis of the record and why public policy directs that it be withheld. *Portage Daily Register v. Columbia County Sheriff's Dep't*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.

      ii. The specificity requirement is not met by mere citation to the open meetings exemption statute, or bald assertion that release is not in the public interest. *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772, 774 (Ct. App. 1988). *But see State ex rel. Blum v. Bd. of Educ.*, 209 Wis. 2d 377, 386-88, 565 N.W.2d 140, 144-45 (Ct. App. 1997) (failure to cite statutory section that warrants

withholding requested records does not mandate that court order access). For further information about how public policies underlying open meetings law exemptions may be considered in the public records balancing test, see Section VIII.F.2.b., below.

c. Need to restrict access still must exist at the time the request is made for the record. Reason to close a meeting under Wis. Stat. § 19.85 is not sufficient reason alone to subsequently deny access to a record of the meeting. Wis. Stat. § 19.35(1)(a).

3. The purpose of the specificity requirement is to give adequate notice of the basis for denial, and to ensure that the records custodian has exercised judgment. *Journal/Sentinel*, 145 Wis. 2d at 824, 429 N.W.2d at 774.

4. The specificity requirement provides a means of preventing records custodians from arbitrarily denying access to public records without weighing the relative harm of non-disclosure against the public interest in disclosure. *Portage Daily Register*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.

5. The sufficiency requirement provides the requester with sufficient notice of the reasons for denial to enable him or her to prepare a challenge, and provides a basis for review in the event of a court action. *Portage Daily Register*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.

6. An offer of compliance, but conditioned on unauthorized costs and terms, constitutes a denial. *WIREdata, Inc. v. Vill. of Sussex* ("*WIREdata I*"), 2007 WI App 22, ¶ 57, 298 Wis. 2d 743, ¶ 57, 729 N.W.2d 757, ¶ 57.

7. If no responsive records exist, the authority should say so in its response. An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test. Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as "social security numbers" or "purely personal e-mails sent or received by employees that evince no violation of law or policy."

8. Denial of a written request must inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General. Wis. Stat. § 19.35(4)(b).

9. The adequacy of a custodian's asserted reasons for withholding requested records, or redacting portions of the records before release, may be challenged by filing a court action called a petition for writ of mandamus. See Section XIII.A., below, for more information about filing a mandamus action.

10. If denial of a public records request is challenged in a mandamus proceeding, the court will examine the sufficiency of the reasons stated for denying the request.

a. On review, it is not the court's role to hypothesize or consider reasons not asserted by the records custodian's response. If the custodian fails to state sufficient reasons for denying the request, the court will issue a writ of mandamus compelling disclosure of the requested records. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, ¶ 16, 647 N.W.2d 158, ¶ 16; *accord Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501, 503 (1967) (court may order mandamus even if sound, but unstated, reasons exist or can be

conceived of by the court); *Kroeplin v. Wis. Dep't of Natural Res.*, 2006 WI App 227, ¶ 45, 297 Wis. 2d 254, ¶ 45, 725 N.W.2d 286, ¶ 45. *Cf. Blum*, 209 Wis. 2d at 388-91, 565 N.W.2d at 145-46 (an authority's failure to cite specific *statutory* exemption justifying nondisclosure does not preclude the court from considering statutory exemption).

b. The reviewing court is free to evaluate the strength of the records custodian's reasoning, in the absence of facts. But factual support for the records custodian's reasoning in the statement of denial likely will strengthen the custodian's case before the reviewing court. *Hempel*, 2005 WI 120, ¶ 80, 284 Wis. 2d 162, ¶ 80, 699 N.W.2d 551, ¶ 80.

E. **Redaction.** If part of the record is disclosable, that part must be disclosed. Wis. Stat. § 19.36(6).

1. An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome. *Osborn*, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, ¶ 46, 647 N.W.2d 158, ¶ 46.

2. However, an authority does not have to extract information from existing records and compile it in a new format. Wis. Stat. § 19.35(1)(L); *WIREdata I*, 2007 WI App 22, ¶ 36, 298 Wis. 2d 743, ¶ 36, 729 N.W.2d 757, ¶ 36.

F. **Motive and context.** A requester need not state or provide a reason for his or her request. Wis. Stat. § 19.35(1)(i). When performing the balancing test described below in Section VIII.F., however, a record custodian "almost inevitably must evaluate context to some degree." *Hempel*, 2005 WI 120, ¶ 66, 284 Wis. 2d 162, ¶ 66, 699 N.W.2d 557, ¶ 66.

G. **Obligation to preserve responsive records.** When a public records request is made, the authority is obligated to preserve responsive records for certain periods of time.

1. After receiving a request for inspection or copying of a record, the authority may not destroy the record until after the request is granted or until at least sixty days after the request is denied (ninety days if the requester is a committed or incarcerated person). Wis. Stat. § 19.35(5). These time periods exclude Saturdays, Sundays, and legal holidays. *See* Wis. Stat. § 19.345.

2. If the authority receives written notice that a mandamus action relating to a record has been commenced under Wis. Stat. § 19.37 (an action to enforce the public records law), the record may not be destroyed until after the order of the court relating to that record is issued and the deadline for appealing that order has passed. Wis. Stat. § 19.35(5).

3. If the court order in a mandamus action is appealed, the record may not be destroyed until the court order resolving the appeal is issued. Wis. Stat. § 19.35(5).

4. If the court orders production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying has been granted. Wis. Stat. § 19.35(5).

5. An authority or custodian does not violate Wis. Stat. § 19.35(5) by destroying an identical copy of an otherwise available record. *Stone*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20.

H. **Responses are records.** Responses to public records requests are themselves "records" for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.

I. **Access to information vs. participation in electronic forum.** The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself. OAG I-06-09, at 3-4.

J. **Certain shared law enforcement records.** See Section IV.D.4., above, for special rules governing response to requests for certain shared law enforcement records.

VIII. Analyzing the Request.

A. **Access presumed.** The public records law presumes complete public access to public records, but there are some restrictions and exceptions. Wis. Stat. § 19.31; *Youmans*, 28 Wis. 2d at 683, 137 N.W.2d at 475.

1. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by balancing test. *Hathaway v. Joint Sch. Dist. No. 1, Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682, 686-87 (1984).

2. If neither a statute nor case law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This "balancing test," described more fully in Section VIII.F., below, determines whether the presumption of openness is overcome by another public policy concern. *Hempel*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, ¶ 4, 699 N.W.2d 551, ¶ 4.

3. Unless a statutory or court-created exception makes a record confidential, each public records request requires a fact-specific analysis. "The custodian, mindful of the strong presumption of openness, must perform the [public] records analysis on a case-by-case basis." *Hempel*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, ¶ 62, 699 N.W.2d 551, ¶ 62.

4. The Legislature has entrusted records custodians with substantial discretion. *Hempel*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, ¶ 62, 699 N.W.2d 551, ¶ 62.

5. However, an authority or a records custodian cannot unilaterally implement a policy creating a "blanket exemption" from the public records law. *Hempel*, 2005 WI 120, ¶ 69, 284 Wis. 2d 162, ¶ 69, 699 N.W.2d 551, ¶ 69.

6. ***Caution***: Wisconsin Stat. § 19.35(1)(am) gives a person greater rights of access than the general public to records containing personally identifiable information about that person. *See* Section VIII.G.7., below.

7. ***Caution***: An agreement to keep certain records confidential will not necessarily override disclosure requirements of the public records law. *See* Section VIII.G.5., below.

B. **Suggested four-step approach.** Additional information about each step is explained in Sections VIII.C.-F., below.

1. *Step One*: Is there such a record?

   a. If yes, proceed to Step Two.

b. If no, analysis stops—no record access.

2. *Step Two*: Is the requester entitled to access the record pursuant to statute or court decision?

   a. If yes, record access is permitted.

   b. If no, proceed to Step Three.

3. *Step Three*: Is the requester prohibited from accessing the record pursuant to statute or court decision?

   a. If yes, analysis stops—no record access.

   b. If no, proceed to Step Four.

4. *Step Four*: Does the balancing test compel access to the record?

   a. If yes, record access is permitted.

   b. If no, analysis stops—no record access.

C. ***Step One*: Is there such a record?**

1. The public records law provides access to existing records maintained by authorities.

2. The public records law does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.

3. An authority is not required to create a new record by extracting and compiling information from existing records in a new format. *See* Wis. Stat. § 19.35(1)(L). *See also George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460, 462 (Ct. App. 1992).

4. If no responsive record exists, the records custodian should inform the requester. *Cf. State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988).

5. The purpose of the public records law is to provide access to recorded information in records. Granting access to just one of two or more identical records fulfills this purpose. *Stone*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20.

D. ***Step Two*: Is the requester entitled to access the record pursuant to statute or court decision?**

1. By statute expressly requiring access. *Youmans*, 28 Wis. 2d at 685, 137 N.W.2d at 476-77. For example:

   a. Uniform traffic accident reports. Wis. Stat. § 346.70(4)(f); *see also State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 290-91, 477 N.W.2d 340, 346 (Ct. App. 1991).

   b. Books and papers that are "required to be kept" by the sheriff, clerk of circuit court, register of deeds, county treasurer, register of probate, county clerk, and county surveyor. Wis. Stat. § 59.20(3)(a).

i. The burden is on the requester to show that the requested record is one that is "required to be kept." *See State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 110, 483 N.W.2d 238, 242 (Ct. App. 1992) (discusses when records are "required to be kept" under predecessor statute, Wis. Stat. § 59.14); *see also State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 307, 168 N.W.2d 836, 840 (1969) (statute compels court clerk to disclose memorandum decision impounded by judge because it is a paper "required to be kept in his office").

ii. ***Caution***: Even statutory rights to access that appear absolute can be limited if another statute allows the records to be sealed, if disclosure infringes on a constitutional right, or if the administration of justice requires limiting access to judicial records. *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 554-56, 334 N.W.2d 252, 260-61 (1983); *Schultz*, 168 Wis. 2d at 108, 483 N.W.2d at 240; *In re John Doe Proceeding*, 2003 WI 30, ¶¶ 59-72, 260 Wis. 2d 653, ¶¶ 59-72, 660 N.W.2d 260, ¶¶ 59-72; *State v. Stanley*, 2012 WI App 42, ¶¶ 60-64, 340 Wis. 2d 663, ¶¶ 60-64, 814 N.W.2d 867, ¶¶ 60-64 (petition for review filed April 14, 2012).

2. By court decision expressly requiring access. For example:

a. Daily arrest logs or police "blotters" at police departments. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179, 190 (1979).

b. Faculty outside income reports. *Capital Times v. Bock*, Case No. 164-312 (Dane Co., April 12, 1983).

c. In these cases, the courts concluded that case-by-case determination of public access would impose excessive and unwarranted administrative burdens.

E. ***Step Three*: Is the requester prohibited from accessing the record pursuant to statute or court decision?**

1. Wisconsin Stat. § 19.36(2)-(13) lists records specifically exempt from disclosure pursuant to the public records statute itself. Other state and federal statutes, and court decisions, also require that certain types of records remain confidential.

a. "Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure [under the public records law]." Wis. Stat. § 19.36(1).

b. Many of these exceptions are discussed elsewhere in this outline, but some key examples are set forth below in Sections VIII.E.2.-5.

c. An agency cannot create an exception to Wis. Stat. §§ 19.31 and 19.35 by adopting an administrative rule inconsistent with the public records law. *Chvala*, 204 Wis. 2d at 91, 552 N.W.2d at 896.

d. Legislative ratification of a collective bargaining agreement, without enacting companion legislation expressly amending the public records law, does not create an exception to the public records law. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 3, 319 Wis. 2d 439, ¶ 3, 768 N.W.2d 700, ¶ 3. The public's rights under the public records law may not be contracted away through the collective bargaining process. *Id.*, ¶ 53.

e. ***Caution***: Statutory exemptions are narrowly construed. *Chvala*, 204 Wis. 2d at 88, 552 N.W.2d at 895; *Hathaway*, 116 Wis. 2d at 397, 342 N.W.2d at 686-87.

2. Exempt from disclosure by the public records statutes. For example:

a. Information maintained, prepared, or provided by an employer concerning the home address, home e-mail address, home telephone number, or social security number of an employee. Wis. Stat. § 19.36(10)(a).

b. Information maintained, prepared, or provided by an employer concerning the home address, home e-mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office.

Exception: The home address of an individual holding an elective public office or the home address of an individual who, as a condition of employment, is required to live in a specific location may be disclosed. Wis. Stat. § 19.36(11).

c. Information related to a current investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation. Wis. Stat. § 19.36(10)(b).

i. ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. *See* Wis. Stat. § 19.32(1bg).

ii. An "investigation" reaches its final "disposition" when the public employer has completed the investigation, and acts to impose discipline. A post-investigation grievance filed pursuant to a collective bargaining agreement does not extend the "investigation" for purposes of the statute. *See Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶¶ 12, 15, 277 Wis. 2d 208, ¶¶ 12, 15, 689 N.W.2d 644, ¶¶ 12, 15; *Zellner I*, 2007 WI 53, ¶¶ 33-38, 300 Wis. 2d 290, ¶¶ 33-38, 731 N.W.2d 240, ¶¶ 33-38.

iii. This exception codifies common law standards and continues the tradition of keeping records related to misconduct investigations closed while those investigations are ongoing, but providing public oversight over the investigations after they have concluded. *Kroeplin*, 2006 WI App 227, ¶ 31, 297 Wis. 2d 254, ¶ 31, 725 N.W.2d 286, ¶ 31.

d. Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited. Wis. Stat. § 19.36(10)(c).

i. ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. *See* Wis. Stat. § 19.32(1bg).

ii. *See also* Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are or may be closed to the public).

e. Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance

evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees. Wis. Stat. § 19.36(10)(d).

i. ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. *See* Wis. Stat. § 19.32(1bg).

ii. Wisconsin Stat. § 19.36(10)(d) does not apply to records of investigations into alleged employee misconduct, and does not create a blanket exemption for disciplinary and misconduct investigation records. *Kroeplin*, 2006 WI App 227, ¶¶ 20, 32, 297 Wis. 2d 254, ¶¶ 20, 32, 725 N.W.2d 286, ¶¶ 20, 32.

iii. *See also* Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are closed to the public).

f. Investigative information obtained for law enforcement purposes, when required by federal law or regulation to be kept confidential, or when confidentiality is required as a condition to receipt of state aids. Wis. Stat. § 19.36(2).

g. Computer programs (but the material input and the material produced as the product of a computer program is subject to the right of inspection and copying). Wis. Stat. § 19.36(4).

h. Trade secrets. Wis. Stat. § 19.36(5); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 83, 308 Wis. 2d 357, ¶ 83, 752 N.W.2d 295, ¶ 83.

i. Identities of certain applicants for public positions. See Wis. Stat. § 19.36(7) for further information.

j. Identities of law enforcement informants. See Wis. Stat. § 19.36(8) and Section VIII.G.3.d., below, for further information.

k. Plans or specifications for state buildings. Wis. Stat. § 19.36(9).

l. Prevailing wage information. Wis. Stat. § 19.36(12).

m. An individual's account or customer numbers with a financial institution. Wis. Stat. § 19.36(13).

3. Exempt from disclosure by other state statutes (unless authorized by an exception or other provision in the statutes themselves). For example:

a. Pupil records. Wis. Stat. § 118.125(1)(d).

b. Patient health care records. Wis. Stat. § 146.82.

i. "Patient health care records" means, with certain statutory exceptions, all records related to the health of a patient prepared by or under the supervision of a health care provider; and records made by ambulance service providers, EMTs, or first responders in administering emergency care, handling, and transporting sick, disabled, or injured individuals. Wis. Stat. §§ 146.81(4) and 256.15(2)(a).

ii. Various statutory provisions allow disclosure to specified persons with or without the patient's consent. *See* Wis. Stat. § 146.82.

iii. Wisconsin Stat. § 256.15(12)(b) provides a limited disclosure exception for ambulance service providers who also are "authorities" under the public records law: information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call, dispatch and response times; reason for the dispatch; location to which the ambulance was dispatched; destination of any transport by the ambulance; and name, age, and gender of the patient. Disclosure of this information is subject to the usual case-by-case, totality of circumstances public records balancing test. 78 Op. Att'y Gen. 71, 76 (1989); OAG I-03-07 (September 27, 2007), at 6-8.

c. Mental health registration and treatment records. Wis. Stat. § 51.30(1)(am), (1)(b), and (4). These include duplicate copies of statements of emergency detention in the possession of a police department, absent written informed consent or a court order for disclosure. *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, ¶ 30, 751 N.W.2d 369, ¶ 30.

d. Law enforcement, court, and agency records involving children and juveniles.

i. Law enforcement officers' records of children and juveniles. Wis. Stat. §§ 48.396(1)-(1d), (5)-(6), and 938.396(1), (1j), and (10). *See also* Section VIII.G.4.a.

(a) Exceptions include news reporters who wish to obtain information for the purpose of reporting news without revealing the identity of the child or juvenile. Wis. Stat. §§ 48.396(1) and 938.396(1)(b)1.

(b) Certain exceptions also apply to motor vehicle operation records and operating privilege records. Wis. Stat. § 938.396(3)-(4).

(c) See Wis. Stat. §§ 48.396(1)-(1d), (5), and (6), and 938.396(1)-(1j) and (10) for other exceptions.

ii. Records of courts exercising jurisdiction over children and juveniles pursuant to Wis. Stat. chs. 48 and 938. Wis. Stat. §§ 48.396(2), (6), and 938.396(2), (2g), (2m), and (10).

(a) Exception for review of Chapter 48 court records by a court of criminal jurisdiction for purpose of conducting or preparing for a proceeding in that court, and for review by a district attorney for the purpose of performing official duties in a court of criminal jurisdiction. Wis. Stat. § 48.396(2)(e).

(b) Exception for information contained in the electronic records of a Chapter 48 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; or the Department of Children and Families. Wis. Stat. § 48.396(3)(b)1. Exception excludes information relating to the physical or mental

health of an individual or that deals with any other sensitive personal matter of an individual. Wis. Stat. § 48.396(3)(b)2.

(c) Exception for review of Chapter 938 court records by law enforcement agency for the purpose of investigating a crime or alleged criminal activity that may result in a court exercising certain jurisdiction under certain provisions of Chapter 938. Wis. Stat. § 938.396(2g)(c).

(d) Exception for review of Chapter 938 court records upon request of a court of criminal jurisdiction to review court records for the purpose of conducting or preparing for a proceeding in that court, upon request of a district attorney to review court records for the purpose of performing official duties in a court of criminal jurisdiction, or upon request of a court of civil jurisdiction or the attorney for a party to a proceeding in that court for the purpose of impeaching a witness. Wis. Stat. § 938.396(2g)(d).

(e) Exception for information contained in the electronic records of a Chapter 938 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; a law enforcement agency; or the Department of Corrections. Wis. Stat. § 938.396(2m)(b)1. Exception excludes information relating to the physical or mental health of an individual or that deals with any other sensitive personal matter of an individual. Wis. Stat. § 938.396(2m)(b)2.

(f) Certain exceptions apply to motor vehicle operation records and operating privilege records. Wis. Stat. § 938.396(3)-(4).

(g) See Wis. Stat. §§ 48.396(2) and 938.396(2g)-(2m) for other exceptions.

iii. Agency records regarding children in the agency's care or legal custody pursuant to Wis. Stat. ch. 48, the Children's Code. Wis. Stat. § 48.78. *See* Section VIII.G.4.c.i. Agency records regarding a juvenile who is or was in the agency's care or legal custody pursuant to Wis. Stat. ch. 938, the Juvenile Justice Code. Wis. Stat. § 938.78. *See* Section VIII.G.4.c.ii. See also Wis. Stat. §§ 48.78(2) and 938.78(2) and (3) for other exceptions.

e. Dozens of additional exemptions are embedded in substantive provisions of the Wisconsin Statutes. A comprehensive list of those exemptions is beyond the scope of this outline, but some examples include:

i. Plans and specifications of state-owned or state-leased buildings. Wis. Stat. § 16.851.

ii. Information which likely would result in the disturbance of an archaeological site. Wis. Stat. § 44.02(23).

iii. Estate tax returns and related documents. Wis. Stat. § 72.06.

iv. Information concerning livestock infected with paratuberculosis. Wis. Stat. § 95.232.

v. The state's "no-call" list, except for disclosure to telephone solicitors. Wis. Stat. § 100.52(2)(c).

vi. Records of a publicly supported library or library system indicating the identity of any individual who borrows or uses the library's documents, materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in administration of the library or library system, persons authorized by the individual to inspect the records, custodial parents or guardians of children under the age of 16, specified other libraries, or to law enforcement officers under limited circumstances pursuant to Wis. Stat. § 43.30(1m)-(5).

f. Records custodians, officers, and employees of public records authorities should learn the exemption statutes applicable to their own agencies.

g. Additional exemptions can be located by reviewing the index to the Wisconsin Statutes under both "public records" and the specific subject.

4. Exempt from disclosure by federal statutes (unless authorized by an exception or other provision in the statutes themselves). For example:

a. Social security numbers obtained or maintained by an authority pursuant to a provision of law enacted after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I).

b. Personally identifiable information contained in student records (applicable to school districts receiving federal funds, with certain exceptions). *See* the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.

But note: Students and parents (unless parental rights have been legally revoked) are allowed access to the student's own records and may allow access to third parties by written consent. *Osborn*, 2002 WI 83, ¶ 27, 254 Wis. 2d 266, ¶ 27, 647 N.W.2d 158, ¶ 27.

c. Many patient health care records, pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* 42 U.S.C. § 1320d-2, 45 C.F.R. pts. 160 and 164.

d. The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, provides that any public official or employee served with a search warrant under the Act "shall [not] disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section." 50 U.S.C. § 1861(d). Further, the Act provides that "information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply . . . ." 6 U.S.C. § 482.

e. Personal information in state motor vehicle ("DMV") records. *See* the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-25.

i. It is a permissible use under the DPPA for a DMV to disclose personal information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1).

ii. In the course of carrying out its functions, including responding to public records requests, an authority may disclose personal information obtained from a DMV that is held by the authority. Depending on the totality of circumstances related to a particular public records request, non-DPPA statutory, common law, or balancing test considerations may warrant redaction of certain personal information pursuant to the usual public records law analysis. OAG I-02-08 (April 29, 2008), at 2.

5. Exempt from disclosure by state court decisions. "Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." Wis. Stat. § 19.35(1)(a). For example:

a. District attorney prosecution files. *See State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608, 611 (1991) ("common law limitation does exist against access to prosecutor's files under the public records law").

i. ***Caution***: When a requester asked to inspect all public records requests received by the district attorney's office since a certain date, the Wisconsin Supreme Court held that *Foust* did not apply. It is the nature of the documents and not their location that determines their status under the public records statute. *Nichols*, 199 Wis. 2d at 274, 544 N.W.2d at 430-31.

ii. When a public records request is directed to a law enforcement agency, rather than a district attorney, the *Foust* exception does not apply. The law enforcement agency and the district attorney are separate authorities for purposes of the public records law. If the law enforcement agency has forwarded a copy of its investigative report to the district attorney, the district attorney may deny access to the report in its possession if the district attorney receives a public records request for the report. If the law enforcement agency receives a public records request for a copy of the same report and the report remains in the law enforcement agency's possession, the law enforcement agency may not rely on *Foust* to deny access to the report. The law enforcement agency instead must perform the usual public records analysis. *Portage Daily Register*, 2008 WI App 30, ¶¶ 15-22, 308 Wis. 2d 357, ¶¶ 15-22, 746 N.W.2d 525, ¶¶ 15-22. See Section VIII.G.3. for further information about requests to law enforcement agencies.

b. Executive privilege. 63 Op. Att'y Gen. 400, 410-14 (1974) (origins and scope discussed).

c. Records rendered confidential by the attorney-client privilege. *See George*, 169 Wis. 2d at 582, 485 N.W.2d at 464; *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143, 148-49 (1996); *see also* Section VIII.F.2.a.iv., below.

d. Records consisting of attorney work product, including the material, information, mental impressions, and strategies an attorney compiles in preparation for litigation. *Seifert*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, ¶ 28, 740 N.W.2d 177, ¶ 28.

e. Purely personal e-mails sent or received by employees or officers on an authority's computer system that evince no violation of law or policy. *Schill*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, ¶ 9 & n.4, 786 N.W.2d 177, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

i. The authority—not the employee or officer who sent or received a particular e-mail—is responsible for determining whether an e-mail on its computer system is purely personal, and applying the regular public records analysis to those that are not.

ii. The authority's records custodian therefore should identify and screen all e-mails claimed to be purely personal, and that evince no violation of law or policy.

iii. Whether an e-mail is "purely personal" should be narrowly construed. Any content related to official duties, the affairs of government, and the official acts of the authority's officers and employees is not purely personal.

iv. Some e-mails may contain some content that is purely personal, such as family news, and other content that relates to official functions and responsibilities. The purely personal content should be redacted; the remaining content should be subject to regular public records analysis.

v. For additional information, see Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at *http://www.doj.state.wi.us/dls/pr_resources.asp*.

6. *Note:* There is no blanket exemption for all personnel records of public employees. *Wis. Newspress*, 199 Wis. 2d at 775-82, 546 N.W.2d at 145-48. As discussed above, certain types of personnel records may be exempt from disclosure by specific statutory provisions. The balancing test, in certain circumstances, also may weigh against disclosure of other personnel records. *See* Section VIII.G.6.

F. ***Step Four*: Does the balancing test compel access to the record?**

1. The balancing test explained.

a. The records custodian must balance the strong *public interest in disclosure of the record against the public interest favoring nondisclosure. Journal Co.*, 43 Wis. 2d at 305, 168 N.W.2d at 839.

i. The custodian must identify potential reasons for denial, based on public policy considerations indicating that denying access is or may be appropriate.

ii. Those factors must be weighed against public interest in disclosure.

iii. Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538, 543-44 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579, 581 (Ct. App. 1991).

iv. Generally, there are no blanket exemptions from release, and the balancing test must be applied with respect to each individual record. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, ¶ 56, 768 N.W.2d 700, ¶ 56.

v. The records custodian must consider all relevant factors to determine whether permitting record access would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing access. Wis. Stat. § 19.35(1)(a).

vi. The balancing test is a fact-intensive inquiry that must be performed on a case-by-case basis. *Kroeplin*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, ¶ 37, 725 N.W.2d 286, ¶ 37.

vii. A records custodian is not expected to examine a public records request "in a vacuum." *Seifert*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, ¶ 31, 740 N.W.2d 177, ¶ 31. The public records law contemplates examination of all relevant factors, considered in the context of the particular circumstances. *Id.*

b. In other words, the records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness. *Hempel*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, ¶ 63, 699 N.W.2d 551, ¶ 63.

> An "exceptional case" exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding the strong presumption favoring disclosure*. *Hempel*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, ¶ 63, 699 N.W.2d 551, ¶ 63.

c. The identity of the requester and the purpose of the request are *not* part of the balancing test. *See Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75, 83 (Ct. App. 1999).

d. The *private interest* of a person mentioned or identified in the record is not a proper element of the balancing test, except indirectly.

i. If there is a *public interest* in protecting an individual's privacy or reputational interest as a general matter (for example, to insure that citizens will be willing to take jobs as police, fire, or correctional officers), there is a *public interest* favoring the protection of the individual's privacy interest. *See Linzmeyer*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, ¶ 31, 646 N.W.2d 811, ¶ 31.

ii. Without more, potential for embarrassment is not a sufficient basis for withholding a record. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, ¶ 62, 768 N.W.2d 700, ¶ 62.

e. Existing public availability of the information contained in a record weakens any argument for withholding the same information pursuant to the balancing test. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 61, 319 Wis. 2d 439, ¶ 61, 768 N.W.2d 700, ¶ 61 (union member names sought to be withheld were already publicly available in a staff directory).

2. Public policies that may be weighed in the balancing test can be identified through their expression in other areas of the law. Relevant public policies also may be practical or common

sense reasons applicable in the totality of circumstances presented by a particular public records request. For example:

a. Policies expressed through recognized evidentiary privileges.

   i. Wisconsin Stat. ch. 905 enumerates a dozen different evidentiary privileges, such as lawyer-client, health care provider-patient, husband-wife, clergy-penitent, and others.

   ii. Evidentiary privileges do not by themselves provide sufficient justification for denying access. *See, e.g.*, 1975 Judicial Council note to Wis. Stat. § 905.09. However, they may be considered to reflect public policies in favor of protecting the confidentiality of certain kinds of information.

   iii. The balancing test weight accorded to public policies expressed in evidentiary privileges should be greater where other expressions of the same public policy also support denial of access. For example, weight of the physician-patient privilege is reinforced by Wis. Stat. § 146.82 (Wisconsin patient health care records confidentiality statute), HIPAA, and Wis. Admin. Code § Med 10.02(2)(n) ("unprofessional conduct" includes divulging patient confidences).

   iv. ***Caution***: Unlike the other privileges, the attorney-client privilege (Wis. Stat. § 905.03) does provide sufficient grounds to deny access without resorting to the balancing test. *George*, 169 Wis. 2d at 582, 485 N.W.2d at 464; *Wis. Newspress*, 199 Wis. 2d at 782-83, 546 N.W.2d at 148-49. See Sections VIII.E.5.c.-d.

   This is because the attorney-client privilege "is no mere evidentiary rule. It restricts professional conduct." *Armada Broad., Inc. v. Stirn*, 177 Wis. 2d 272, 279 n.3, 501 N.W.2d 889, 893 n.3 (Ct. App. 1993), *rev'd on other grounds*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994); *see also* SCR 20:1.6(a).

   v. Wisconsin law does not recognize a deliberative process privilege. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶ 60-70, 312 Wis. 2d 1, ¶¶ 60-70, 754 N.W.2d 439, ¶¶ 60-70.

b. Policies expressed through exemptions to the open meetings law (Wis. Stat. § 19.85). *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82, 312 Wis. 2d 84, ¶ 82, 752 N.W.2d 295, ¶ 82.

   i. Exemptions to the open meetings law that allow an authority to meet in closed session, "are indicative of public policy" and can be considered as balancing factors favoring non-disclosure. Wis. Stat. § 19.35(1)(a); 73 Op. Att'y Gen. 20, 22 (1984).

   ii. ***Caution***: If a records custodian relies upon the public policy expressed in an open meetings exception to withhold a record, the custodian must make "a specific demonstration that there was a need to restrict public access *at the time that the request* to inspect or copy the record *was made*." Wis. Stat. § 19.35(1)(a).

      (a) A records custodian denying access to records on the basis of public policy expressed by one of the Wis. Stat. § 19.85(1) open meetings exceptions must do more than identify the exception under which the meeting was closed and assert that the reasons for closing the meeting still exist and therefore justify denying access to

the requested records. *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 463 (Ct. App. 1985).

(b) The records custodian instead must state specific public policy reasons for the denial, as evidenced by existence of the related open meetings exception. *Oshkosh Nw.*, 125 Wis. 2d at 485, 373 N.W.2d at 463.

iii. Examples of exemptions from the open meetings law:

(a) Quasi-judicial deliberations. Wis. Stat. § 19.85(1)(a).

(b) Personnel matters. Wis. Stat. § 19.85(1)(b), (c), and (f).

In the employment context, reliance on public policies expressed in various Wis. Stat. § 19.85 exceptions has been examined in many cases. *See, e.g., Wis. Newspress*, 199 Wis. 2d at 784-88, 546 N.W.2d at 149-51 (balancing test weighed in favor of disclosure of completed disciplinary investigation); *Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 40-42, 465 N.W.2d 266, 269-70 (Ct. App. 1990) (same).

(c) Considering specific applications of probation, extended supervision or parole, or considering strategies for crime detection or prevention. Wis. Stat. § 19.85(1)(d).

(d) Public business involving investments, competitive factors, or negotiations. Wis. Stat. § 19.85(1)(e). *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 81 n.18, 312 Wis. 2d 84, ¶ 81 n.18, 752 N.W.2d 295, ¶ 81 n.18.

(e) Consideration or investigation into sensitive or private matters, "which, if discussed in public, would be likely to have a *substantial* adverse effect upon the reputation of any person referred to." *See* Wis. Stat. § 19.85(1)(f).

(f) Legal advice as to pending or probable litigation. Wis. Stat. § 19.85(1)(g).

(g) Proper closing of a meeting under one of the Wis. Stat. § 19.85(1) exemptions is not in and of itself sufficient reason to deny access to records considered or distributed during the closed session, or to minutes of the closed session. *See Oshkosh Nw.*, 125 Wis. 2d at 485, 373 N.W.2d at 462-63.

c. Policies reflected in exceptions to disclosure under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See Linzmeyer*, 2002 WI 84, ¶ 32, 254 Wis. 2d 306, ¶ 32, 646 N.W.2d 811, ¶ 32.

d. Various other policies that, depending on the circumstances of an individual request, would be relevant in performing the balancing test. For example,

i. Evidence of official cover-up is a potent reason for disclosing records. Citizens have a very strong public interest in being informed about public officials who have been derelict in their duties. *Hempel*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, ¶ 68, 699 N.W.2d 557, ¶ 68.

ii. Potential loss of morale if public employees' personnel files are readily disclosed weighs against public access. *Hempel*, 2005 WI 120, ¶ 74, 284 Wis. 2d 162, ¶ 74, 699 N.W.2d 551, ¶ 74.

iii. However, there is a public interest in disciplinary actions taken against public officials and employees—especially those employed in law enforcement. *Kroeplin*, 2006 WI App 227, ¶ 22, 297 Wis. 2d 253, ¶ 22, 725 N.W.2d 286, ¶ 22. The courts repeatedly have recognized the great importance of disclosing disciplinary records of public officials and employees when their conduct violates the law or significant work rules. *Id.*, ¶ 28.

iv. Potential difficulty attracting quality candidates for public employment if there is a perception that public personnel files are regularly open for review is a public interest in non-disclosure. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75.

v. Potential chilling of candid employee assessment in personnel records also weighs against disclosure. *Hempel*, 2005 WI 120, ¶ 77, 284 Wis. 2d 162, ¶ 77, 699 N.W. 2d 551, ¶ 77.

vi. Broadly sweeping, generalized assertions that records must be withheld to protect the safety of public employees are not sufficient. "Nearly all public officials, due to their profiles as agents of the State, have the potential to incur the wrath of disgruntled members of the public, and may be expected to face heightened public scrutiny; that is simply the nature of public employment." *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 63, 319 Wis. 2d 439, ¶ 63, 768 N.W.2d 700, ¶ 63. Safety concerns should be particularized when offered to justify withholding or redaction of records. Statutory provisions such as Wis. Stat. § 19.35(1)(am)2.b. (disclosure of records containing personally identifiable information pertaining to requester would endanger an individual's life or safety) and 19.35(1)(am)2.c. (disclosure of records containing personally identifiable information pertaining to requester would endanger safety of correctional officers) may be considered as indicative of public policy recognizing safety concerns properly considered in the balancing test. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 65 n.19, 319 Wis. 2d 439, ¶ 65 n.19, 768 N.W.2d 700, ¶ 65 n.19.

vii. Policies expressed in the Wis. Stat. § 19.35(1)(am) exemptions to disclosure of records containing personally identifiable information pertaining to a requester who specifically indicates that the purpose of his or her request is to inspect or copy records containing personally identifiable information about the requester. *Seifert*, 2007 WI App 207, ¶¶ 23, 32-34, 305 Wis. 2d 582, ¶¶ 23, 32-34, 740 N.W.2d 177, ¶¶ 23, 32-34.

G. **Special issues.**

1. Privacy and reputational interests.

a. Numerous statutes and court decisions recognize the importance of an individual's interest in his or her privacy and reputation as a matter of public policy. For example:

i. Wis. Stat. § 995.50 (recognizing "right of privacy").

ii. Wis. Stat. § 19.85(1)(f) (open meetings law exemption, *see* Section VIII.F.2.b.iii.(e)).

iii. Wis. Stat. § 230.13 (certain state employee personnel records).

iv. *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d 699, 704-06 (1996), *superseded by* Wis. Stat. §§ 19.356 and 19.36(10)-(12).

b. The privacy statute provides that "[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record." Wis. Stat. § 995.50(2)(c).

c. Moreover, the public interest in protecting the privacy and reputational interest of an individual is not equivalent to the individual's personal interest in protecting his or her own character and reputation. *Zellner I*, 2007 WI 53, ¶ 50, 300 Wis. 2d 290, ¶ 50, 731 N.W.2d 240, ¶ 50.

i. The concern is not personal embarrassment and damage to reputation, but whether disclosure would affect any public interest. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52.

ii. After an individual has died, the relevant privacy interests are not those of the deceased individual but instead those of the individual's survivors. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (family had privacy interest in preventing disclosure of death scene photographs of deceased family member).

d. Privacy-related concerns may outweigh the public interest in disclosure if disclosure would threaten both personal privacy and safety, or if other privacy protections have been established by law (for example, attorney-client privilege). *Kroeplin*, 2006 WI App 227, ¶ 46, 297 Wis. 2d 254, ¶ 46, 725 N.W.2d 286, ¶ 46.

e. The public interest in protecting an individual's reputation is significantly diminished when damaging information about the individual already has been made public. *Kroeplin*, 2006 WI App 227, ¶ 47, 297 Wis. 2d 254, ¶ 47, 725 N.W.2d 286, ¶ 47.

f. In many cases, public interests in confidentiality, privacy, and reputation have been found to outweigh the public interest in disclosure. For example:

i. In *Village of Butler*, 163 Wis. 2d at 831, 472 N.W.2d at 584, the court held that the balance weighed in favor of the public's interest in keeping police personnel records private: "disclosure of the requested records likely would inhibit a reviewer from making candid assessments of their employees in the future . . . . [And] opening these records likely would have the effect of inhibiting an officer's desire or ability to testify in court because he or she would face cross-examination as to embarrassing personal matters. A foreseeable result is that fewer qualified people would accept employment in a position where they could expect that their right to privacy regularly would be abridged."

ii. In *Kraemer Brothers*, 229 Wis. 2d at 92-104, 599 N.W.2d at 79-84, the court held that the privacy interests of employees of private companies contracting with a public entity outweighed public interest in disclosure.

iii. In *Hempel*, 2005 WI 120, ¶¶ 71-73, 284 Wis. 2d 162, ¶¶ 71-73, 699 N.W.2d 551, ¶¶ 71-73, the court held that it was appropriate to consider the confidentiality concerns

of witnesses and complainants, and the possible chilling effects on potential future witnesses and complainants, when performing the balancing test.

g. In many other cases, however, the public interest in disclosure has been found to outweigh any public interest in privacy and reputation. For example:

   i. In *Local 2489*, 2004 WI App 210, ¶¶ 21, 26, 277 Wis. 2d 208, ¶¶ 21, 26, 689 N.W.2d 644, ¶¶ 21, 26, the court held that the balancing test tipped in favor of public access to a completed investigation of public employee wrongdoing.

   ii. In *Jensen v. School District of Rhinelander*, 2002 WI App 78, ¶¶ 22-24, 251 Wis. 2d 676, ¶¶ 22-24, 642 N.W.2d 638, ¶¶ 22-24, the court held that the public interest in disclosure of a school superintendent's performance evaluation outweighed his reputational interest because a public official has a lower expectation of employment privacy and because prior media reports had already compromised the superintendent's reputational interest.

   iii. In *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670, 677 (Ct. App. 1996), the court held that police officers have a lower expectation of privacy. The public interest in being informed of alleged misconduct by law enforcement officers and the extent to which those allegations were properly investigated is particularly compelling. *Kroeplin*, 2006 WI App 227, ¶ 46, 297 Wis. 2d 254, ¶ 46, 725 N.W.2d 286, ¶ 46.

   iv. In *Zellner I*, 2007 WI 53, ¶ 53, 300 Wis. 2d 290, ¶ 53, 731 N.W.2d 240, ¶ 53, the court held that the public has a significant interest in knowing about allegations of public schoolteacher misconduct and how they are handled, because teachers are entrusted with the significant responsibility of teaching children.

   v. In *Breier*, 89 Wis. 2d at 440, 279 N.W.2d at 190, the court held that public interest in disclosure of arrest records outweighed any public interest in the privacy and reputational interests of arrestees.

   vi. In *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 9-26, 249 Wis. 2d 242, ¶¶ 9-26, 638 N.W.2d 625, ¶¶ 9-26, the court held that the public interest in disclosure of the names and commercial license numbers of school bus drivers outweighed a slight privacy intrusion

h. Privacy interests may be given greater weight where personal safety is also at issue. See *Klein v. Wis. Res. Ctr.*, 218 Wis. 2d 487, 496-97, 582 N.W.2d 44, 47-48 (Ct. App. 1998); *State ex rel. Morke v. Record Custodian*, 159 Wis. 2d 722, 726, 465 N.W.2d 235, 236-37 (Ct. App. 1990).

i. Access to FBI rap sheets has been held to be an unwarranted invasion of privacy, categorically. *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-71 (1989). *But see* Letter from James E. Doyle, Wisconsin Attorney General, to Philip Arreola, City of Milwaukee Police Chief (March 21, 1991) (rap sheets are available under Wisconsin law).

j. Prominent public officials must have a lower expectation of personal privacy than regular public employees; greater scrutiny of public employees than their private sector

counterparts comes with the territory of public employment. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75; *Kroeplin*, 2006 WI App 227, ¶ 49, 297 Wis. 2d 254, ¶ 49, 725 N.W.2d 286, ¶ 49. There is a particularly strong public interest in being informed about public officials who have been derelict in their duties. *Id.*, ¶ 52.

2. Crime victims and their families.

   a. State and federal law recognizes rights of privacy and dignity for crime victims and their families.

   b. The Wisconsin Constitution, art. I, § 9m, states that crime victims should be treated with "fairness, dignity, and respect for their privacy." Wisconsin Stat. § 950.04(1v)(ag), (1v)(dr), and (2w)(dm) further emphasize the importance of the privacy rights of victims and witnesses.

   c. The Wisconsin Statutes recognize that this state constitutional right must be honored vigorously by law enforcement agencies. The statutes further recognize that crime victims include both persons against whom crimes have been committed and a deceased victim's family members. Wis. Stat. §§ 950.01 and 950.02(4)(a).

   d. The Wisconsin Supreme Court, speaking of both Wis. Const. art. I, § 9, and related statutes concerning the rights of crime victims, has instructed that "justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims." *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, ¶ 26, 692 N.W.2d 623, ¶ 26.

   e. Federal courts, including the United States Supreme Court, also have recognized that family members of a deceased person have personal rights of privacy—in addition to those of the deceased—under both traditional common law and federal statutory law. "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Favish*, 541 U.S. at 168; *see also Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (finding that parent had constitutionally protected right to privacy over child's autopsy photos).

   f. 2011 Wisconsin Act 283 created three new statutory provisions, Wis. Stat. §§ 950.04(1v)(ag), (1v)(dr), and (2w)(dm), related to disclosure of personally identifying information of victims and witnesses by public officials, employees or agencies, which were intended to protect victims and witnesses from inappropriate and unauthorized use of their personal information. These new statutes are not intended to and do not prohibit law enforcement agencies or other public entities from disclosing the personal identities of crime victims and witnesses in response to public records requests, although those public records duties should continue to be performed with due regard for the privacy, confidentiality, and safety of crime victims and witnesses. *See* Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (April 27, 2012), available online at *http://www.doj.state.wi.us/dls/pr_resources.asp*.

3. Law enforcement records.

   a. Public policies favor public safety and effective law enforcement. *See Linzmeyer*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, ¶ 30, 646 N.W.2d 811, ¶ 30.

   b. Police reports of closed investigations.

      i. No blanket rule—balancing test must be done on a case-by-case basis. *Linzmeyer*, 2002 WI 84, ¶ 42, 254 Wis. 2d 306, ¶ 42, 646 N.W.2d 811, ¶ 42.

      ii. Policy interests against disclosure: interference with police business, privacy and reputation, uncertain reliability of "raw investigative data," revelation of law enforcement techniques, danger to persons named in report.

      iii. Policy interests favoring disclosure: public oversight of police and prosecutorial actions, reliability of corroborated evidence, degree to which sensitive information already has been made public.

   c. Police reports of ongoing investigations.

      i. Subject to the balancing test, but policy interests against disclosure most likely will outweigh interests in favor of release. *See Linzmeyer*, 2002 WI 84, ¶¶ 15-18, 254 Wis. 2d 306, ¶¶ 15-18, 646 N.W.2d 811, ¶¶ 15-18.

      ii. Access to an autopsy report was properly denied when a murder investigation was still open. *Journal/Sentinel*, 145 Wis. 2d at 824-27, 429 N.W.2d at 774-76; *see also Favish*, 541 U.S. at 167.

      iii. Fact that a police investigation is open and has been referred to the district attorney's office is not a public policy reason sufficient for the police department to deny access to its investigative report. One or more public policy reasons applicable to the circumstances of the case must be identified in order to deny access, such as protection of crime detection strategy or prevention of prejudice to the ongoing investigation. *Portage Daily Register*, 2008 WI App 30, ¶¶ 23-26, 308 Wis. 2d 357, ¶¶ 23-26, 746 N.W.2d 525, ¶¶ 23-26.

   d. Confidential informants.

      i. In a reverse of the usual analysis, records custodians must withhold access to records involving confidential informants unless the balancing test requires otherwise. Wis. Stat. § 19.36(8)(b).

      ii. "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied." Wis. Stat. § 19.36(8)(a)1.

      iii. If a record is opened for inspection, the records custodian must delete any information that would identify the informant. Wis. Stat. § 19.36(8)(b).

      iv. Confidential informants outside the law enforcement context: If an authority must promise confidentiality to an informant in order to investigate a civil law violation, the resulting record *may* be protected from disclosure under the balancing

test. *See Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164-68, 469 N.W.2d 638, 646-48 (1991) (tax investigation).

(a) The test for establishing a valid pledge of confidentiality is demanding. *See* 74 Op. Att'y Gen. 14 (1985); 60 Op. Att'y Gen. 284 (1971).

(b) For this kind of confidentiality agreement to override the public records law, the agreement must meet a four-factor test adopted in *Mayfair Chrysler-Plymouth*, 162 Wis. 2d at 168, 469 N.W.2d at 648:

(1) There must have been a clear pledge of confidentiality;

(2) The pledge must have been made in order to obtain the information;

(3) The pledge must have been necessary to obtain the information; and

(4) Even if the first three factors are met, the records custodian must determine that the harm to the public interest in permitting inspection outweighs the great public interest in full inspection of public records.

e. Special custodial and disclosure rules govern public records requests for certain shared law enforcement records. *See* Section IV.D.4., above.

4. Children and juveniles. Many, but not all, records related to children or juveniles have special statutory confidentiality protections.

a. Law enforcement records.

i. Except as provided in Wis. Stat. § 48.396(1)-(1d), (5), and (6), law enforcement officers' records of children who are the subjects of investigations or other proceedings pursuant to Wis. Stat. ch. 48 are confidential. Subjects covered by Chapter 48 include children in need of protection and services ("CHIPS"), foster care, and other child welfare services. *See also* Section VIII.E.3.d.i.

ii. Except as provided in Wis. Stat. § 938.396(1), (1j), and (10), law enforcement officers' records of juveniles who are the subjects of proceedings under the juvenile justice provisions of Wis. Stat. ch. 938, including matters which would be prosecuted as crimes if committed by an adult. *See also* Section VIII.E.3.d.i.

iii. Other law enforcement records regarding or mentioning children are not subject to the confidentiality provisions of Wis. Stat. §§ 48.396 or 938.396. These records might involve children who witness crimes, are the victims of crimes that do not lead to Chapters 48 or 938 proceedings, or are mentioned in law enforcement reports for other reasons: for example, a child who happens to witness a bank robbery or be the victim of a hit and run automobile accident.

(a) Access to these records should be resolved by application of general public records rules.

(b) Balancing test consideration may be given to public policy concerns arising from the ages of the children mentioned, such as whether release of unredacted records

would likely subject a child mentioned to bullying at school, further victimization, or some neighborhood retaliation. In such cases, redaction of identifying information about children mentioned may be warranted under the balancing test.

b. Court records. Records of courts exercising jurisdiction over children pursuant to Chapter 48 or juveniles pursuant to Chapter 938 are subject to the respective confidentiality restrictions of Wis. Stat. §§ 48.396(2), (6), and 938.396(2), (2g), (2m), and (10). Certain exceptions apply to motor vehicle operation records and operating privilege records pursuant to Wis. Stat. § 938.396(3)-(4), and for certain uses described in Section VIII.E.4.d.ii. above. See Wis. Stat. §§ 48.396(2), (3), (5), and (6), and 938.396(2g), (2m), and (10) for other exceptions.

c. Child protective services and similar agency records.

i. Except as provided in Wis. Stat. § 48.78, the Department of Children and Family Services, a county department of social services, a county department of human services, a licensed child welfare agency or a licensed day care center may not make available for inspection or disclose the contents of any record kept or information received about a child in its care or legal custody.

ii. Except as provided in Wis. Stat. § 938.78, the Department of Corrections, a county department of social services, a county department of human services, or a licensed child welfare agency may not make available for inspection or disclose the contents of any record kept or information received about a juvenile who is or was in its care or legal custody.

d. Student records. Pupil records of elementary and high school students are subject to the confidentiality provisions of Wis. Stat. § 118.125. The Wisconsin Department of Public Instruction provides comprehensive guidance about confidentiality and student records at *http://dpi.wi.gov/sspw/pdf/srconfid.pdf.*

5. Confidentiality agreements. Lawsuit settlement agreements providing that the terms and conditions of the settlement will remain confidential are public records subject to the balancing test.

a. This applies to settlements formally approved by a court. *See In re Estates of Zimmer*, 151 Wis. 2d 122, 131-37, 442 N.W.2d 578, 582-85 (Ct. App. 1989).

b. This also applies to settlements not filed with or submitted to a court. *See Journal/Sentinel*, 186 Wis. 2d at 451-55, 521 N.W.2d at 169-71; 74 Op. Att'y Gen. 14.

c. Settlement of litigation is in the public interest, and certain parties are more likely to settle their claims if they are guaranteed confidentiality—so there is some public interest in keeping settlement agreements confidential. When applying the balancing test, however, Wisconsin courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential. *See Journal/Sentinel*, 186 Wis. 2d at 458-59, 521 N.W.2d at 172; *Zimmer*, 151 Wis. 2d at 133-35, 442 N.W.2d at 583-84; *C.L. v. Edson*, 140 Wis. 2d 168, 184-86, 409 N.W.2d 417, 423 (Ct. App. 1987).

d. "[A] generalized interest in encouraging settlement of litigation does not override the public's interest in access to the records of its courts." *Zimmer*, 151 Wis. 2d at 135, 442 N.W.2d at 584.

e. If an authority enters into a confidentiality agreement, it may later find itself in "a no-win" situation where it must choose between violating the agreement or violating the public records law. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918, 921 (Ct. App. 1993).

6. Personnel records and other employment-related records.

a. General concepts applicable to personnel records and the balancing test.

i. The records custodian almost invariably must evaluate context to some degree. *Hempel*, 2005 WI 120, ¶ 66, 284 Wis. 2d 162, ¶ 66, 699 N.W.2d 551, ¶ 66.

ii. The public interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling and would not, by itself, override the strong public interest in obtaining information regarding their activities while on duty. *Local 2489*, 2004 WI App 210, ¶ 27, 277 Wis. 2d 208, ¶ 27, 689 N.W.2d 644, ¶ 27.

iii. Public employees who serve in a position of trust, such as law enforcement, should expect closer public scrutiny. *Kroeplin*, 2006 WI App 227, ¶ 44, 297 Wis. 2d 254, ¶ 44, 725 N.W.2d 286, ¶ 44; *Local 2489*, 2004 WI App 210, ¶ 26, 277 Wis. 2d 208, ¶ 26, 689 N.W.2d 644, ¶ 26.

iv. Public employees have no expectation of privacy in records demonstrating potentially illegal conduct even if disclosure would dilute their effectiveness at their jobs. *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130, 133 (Ct. App. 1995).

v. Persons of public prominence have little expectation of privacy regarding professional conduct, even if allegations against them were disproven. *Wis. State Journal*, 160 Wis. 2d at 41-42, 465 N.W.2d at 270.

vi. Embarrassing computer use records do not change character as public records under the balancing test even if presented to an employee at a closed and confidential meeting. *Zellner I*, 2007 WI 53, ¶ 54, 300 Wis. 2d 290, ¶ 54, 731 N.W.2d 240, ¶ 54.

b. Factors weighing in favor of disclosure of personnel records.

i. Records contain or dispel evidence of an official cover-up. *Hempel*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, ¶ 68, 699 N.W.2d 551, ¶ 68.

ii. Records contain evidence/information regarding a school teacher's inappropriate comments toward students, *Linzmeyer*, 2002 WI 84, ¶¶ 4, 25, 254 Wis. 2d 306, ¶¶ 4, 25, 646 N.W.2d 811, ¶¶ 4, 25, or viewing pornography on a school computer. *Zellner I*, 2007 WI 53, ¶ 53, 300 Wis. 2d 290, ¶ 53, 731 N.W.2d 240, ¶ 53.

iii. The information that would pose the most potential reputational harm already is available in the public domain. *Kroeplin*, 2006 WI App 227, ¶ 47, 297 Wis. 2d 254, ¶ 47, 725 N.W.2d 286, ¶ 47; *Kailin v. Rainwater*, 226 Wis. 2d 134, 148, 593 N.W.2d 865, 871 (Ct. App. 1999) (concluding that courts "cannot un-ring the bell").

iv. Employee has other available avenues of recourse, such as the ability to file a response to an inaccurate or misleading fact disclosure. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16, 251 Wis. 2d 676, ¶ 16, 642 N.W.2d 638, ¶ 16). *See* Section XII., below.

c. Factors weighing against disclosure of personnel records.

i. The increased level of embarrassment would have a chilling effect on future witnesses or victims coming forward—especially in sexual harassment case. *Hempel* 2005 WI 120, ¶ 73, 284 Wis. 2d 162, ¶ 73, 699 N.W.2d 551, ¶ 73; *Local 2489*, 2004 WI App 210, ¶ 9, 277 Wis. 2d 208, ¶ 9, 689 N.W.2d 644, ¶ 9.

ii. Loss of morale if employees believed their personnel files were readily available to the public. However, the court called this argument only "plausible" and did not "fully endorse" it. *Hempel*, 2005 WI 120, ¶ 74, 284 Wis. 2d 162, ¶ 74, 699 N.W.2d 551, ¶ 74.

iii. The scrutiny of rank-and-file employees in the records extends so far such that it may discourage qualified candidates from entering the workforce. However, the court found this factor to weigh only "slightly" in favor of non-disclosure. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75.

iv. Information gleaned from the investigation could be factually inaccurate and cause unfair damage to the employee's reputation. *Hempel*, 2005 WI 120, ¶ 76, 284 Wis. 2d 162, ¶ 76, 699 N.W.2d 551, ¶ 76. However, the employee should provide facts establishing that the record contains inaccurate, misleading, and unauthenticated data. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16, 251 Wis. 2d 676, ¶ 16, 642 N.W.2d 638, ¶ 16).

v. Disclosure could inhibit future candid assessments of employees in personnel records. *Hempel*, 2005 WI 120, ¶ 77, 284 Wis. 2d 162, ¶ 77, 699 N.W.2d 551, ¶ 77 (citing *Vill. of Butler*, 163 Wis. 2d 819, 828 n.3, 472 N.W.2d 579, 583 n.3 (Ct. App. 1991)).

vi. Release would jeopardize *both* the personal privacy and safety of an employee. *Local 2489*, 2004 WI App 210, ¶ 28, 277 Wis. 2d 208, ¶ 28, 689 N.W.2d 644, ¶ 28 (citing *Ledford*, 195 Wis. 2d at 250-51, 536 N.W.2d at 132).

d. Personal e-mails.

i. Purely personal e-mails sent or received by employees or officers on an authority's computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request. *Schill*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, ¶ 9 & n.4, 786 N.W.2d 177, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

ii. Personal e-mails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the e-mails and a government function, such as a personnel investigation. *Schill*, 2010 WI 86, ¶ 23, 327 Wis. 2d 572, ¶ 23, 786 N.W.2d 177, ¶ 23 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 166 (Bradley, J., concurring); *Id.*, ¶ 180 (Gableman, J., concurring).

iii. *Schill* does not prevent requesters interested in how an authority's employees and officers are using e-mail accounts on the authority's computer system from obtaining access to records other than purely personal e-mails. A requester seeking this kind of information could request records showing the number of e-mails sent or received by a particular employee or officer during a specified time period, for example, and the times and dates of those e-mails.

iv. Like other reasons asserted by a records custodian for withholding or redacting requested records, a response asserting that responsive records consist of purely personal e-mails that will not be disclosed may be challenged by filing a petition for writ of mandamus. See Section XIII.A., below, for more information about mandamus actions.

v. For additional information, see Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at *http://www.doj.state.wi.us/dls/pr_resources.asp.*

e. Other personnel records cross-references in this outline.

i. Section VIII.E.2.: Exempt from disclosure by public records statutes.

ii. Section VIII.E.2.e.: Information relating to staff management planning.

iii. Section VIII.E.6.: No blanket exemption for all personnel records of public employees.

iv. Section VIII.F.2.b.iii.: Open meetings law exemptions.

v. Section VIII.G.1.: Privacy-related concerns may outweigh the public interest in disclosure.

vi. Section VIII.G.7.c.vii.(a)(2): Personnel investigation prepared by an attorney may be withheld if performed after threat of litigation.

7. Records about the requester.

a. The fact that a particular record is about the requester generally does not determine who is entitled to access that record. *See* Wis. Stat. § 19.35(1)(a) ("*any requester* has the right to inspect *any record*").

b. A requester does have a greater right of access than the general public to "any record containing *personally identifiable information* pertaining to the individual." Wis. Stat. § 19.35(1)(am).

i. This is because an individual requester asking to inspect or copy records pertaining to himself or herself is considered to be substantially different from a requester, "be it a private citizen or a news reporter," who seeks access to records about government activities or other people. *Hempel*, 2005 WI 120, ¶ 34, 284 Wis. 2d 162, ¶ 34, 699 N.W.2d 551, ¶ 34.

ii. The purpose of giving an individual greater access to records under Wis. Stat. § 19.35(1)(am) is so that the individual can determine what information is being maintained, and whether that information is accurate. *Hempel*, 2005 WI 120, ¶ 55, 284 Wis. 2d 162, ¶ 55, 699 N.W.2d 551, ¶ 55.

iii. When it applies, the Wis. Stat. § 19.35(1)(am) right of access to records containing individually identifiable information about the requester is more potent than the general Wis. Stat. § 19.35(1)(a) right of access. The Wis. Stat. § 19.35(1)(am) right is more unqualified. *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 10, 287 Wis. 2d 795, ¶ 10, 706 N.W.2d 161, ¶ 10.

c. When a person or the person's authorized representative makes a public records request under Wis. Stat. § 19.35(1)(a) or (am) and states that the purpose of the request is to inspect or copy records containing personally identifiable information about the person, the following procedure is required by Wis. Stat. § 19.35(4)(c)1. and 3. *Hempel*, 2005 WI 120, ¶ 29, 284 Wis. 2d 162, ¶ 29, 699 N.W.2d 551, ¶ 29. A general public records request, not indicating that the purpose of the request is to inspect or copy records containing personally identifiable information pertaining to the requester, does not trigger the following procedure. *Seifert*, 2007 WI App 207, ¶ 21, 305 Wis. 2d 582, ¶ 21, 740 N.W.2d 177, ¶ 21.

i. The records custodian determines if the requester has a right to inspect or copy the records under Wis. Stat. § 19.35(1)(a), the statute creating general public access rights.

ii. If the records custodian determines that the requester does not have a right to inspect or copy the record under Wis. Stat. § 19.35(1)(a), the records custodian then must determine if the requester has a right to inspect or copy the record under Wis. Stat. § 19.35(1)(am).

iii. Under Wis. Stat. § 19.35(1)(am), the person is entitled to inspect or receive copies of the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to Wis. Stat. § 19.35(1)(am).

iv. These requests are not subject to the balancing test, because the Legislature already has done the necessary balancing by enacting exceptions to the Wis. Stat. § 19.35(1)(am) disclosure requirements. *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56, 284 Wis. 2d 162, ¶¶ 3, 27, 56, 699 N.W.2d 557, ¶¶ 3, 27, 56.

v. The Wis. Stat. § 19.35(1)(am) exceptions mainly protect the integrity of ongoing investigations, the safety of individuals (especially informants), institutional security, and the rehabilitation of incarcerated persons.

vi. These Wis. Stat. § 19.35(1)(am) exceptions are not to be narrowly construed. *Hempel*, 2005 WI 120, ¶ 56, 284 Wis. 2d 162, ¶ 56, 699 N.W.2d 551, ¶ 56.

vii. Wisconsin Stat. § 19.35(1)(am) exceptions include the following:

(a) Any record containing personally identifiable information collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding. Wis. Stat. § 19.35(1)(am)1.

(1) Wisconsin Stat. § 19.35(1)(am) contains no requirement that the investigation be current. *Seifert*, 2007 WI App 207, ¶ 36, 305 Wis. 2d 582, ¶ 36, 740 N.W.2d 177, ¶ 36.

(2) This section allows a custodian to deny access to a requester who is, in effect, a potential adversary in litigation or another proceeding unless or until required to do so under the rules of discovery in actual litigation. *Seifert*, 2007 WI App 207, ¶ 32, 305 Wis. 2d 582, ¶ 32, 740 N.W.2d 177, ¶ 32 (personnel investigation prepared by an attorney may be withheld if performed after threat of litigation).

(b) Any record containing personally identifiable information that would do any of the following if disclosed:

(1) Endanger an individual's life or safety. Wis. Stat. § 19.35(1)(am)2.a.

(2) Identify a confidential informant. Wis. Stat. § 19.35(1)(am)2.b.

(3) Endanger the security—including security of population or staff—of any state prison, jail, secured correctional facility, secured child caring institution, secured group home, mental health institute, center for the developmentally disabled, or facility for the institutional care of sexually violent persons. Wis. Stat. § 19.35(1)(am)2.c.

(4) Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in Wis. Stat. § 19.35(1)(am)2.c. and d.

(c) Any record that is part of a record series, as defined in Wis. Stat. § 19.62(7), that is not indexed, arranged, or automated in a way that the record can be retrieved by the authority maintaining the record series by use of an individual's name, address, or other identifier. Wis. Stat. § 19.35(1)(am)3.

d. Student and pupil records. Although these are generally exempt from disclosure, they are open to students and their parents (except for those legally denied parental rights). *See* FERPA, 20 U.S.C. § 1232g(a)(1); Wis. Stat. § 118.125(2).

e. A patient's access to his or her own mental health treatment records may be restricted by the director of the treatment facility during the course of treatment. Wis. Stat. § 51.30(4)(d)1. However, after discharge, such records are available to the patient. Wis. Stat. § 51.30(4)(d)2.-3.; *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 840-44, 586 N.W.2d 36, 39-40 (Ct. App. 1998).

f. After sentencing, a criminal defendant generally is not entitled to access his or her presentence investigation without a court order. Wis. Stat. § 972.15(4); *Hill*, 196 Wis. 2d at 425-28, 538 N.W.2d at 611-12. A criminal defendant not represented by counsel may view his or her presentence investigation report, but may not keep a copy. Wis. Stat. § 972.15(4m).

g. Other statutes may impose other restrictions on a requester's ability to obtain particular kinds of records about himself or herself.

h. Wisconsin Stat. § 19.365(1) provides a procedure for an individual or a person authorized by the individual to challenge the accuracy of a record containing personally identifying information about that individual. *See* Section XII., below.

IX. Limited Duty to Notify Persons Named in Records Identified for Release.

A. **Background.** Beginning with *Woznicki*, the Wisconsin Supreme Court recognized that when a records custodian's decision to release records implicates the reputational or privacy interests of an individual, the records custodian must notify the subject of the intent to release, and allow a reasonable time for the subject of the record to appeal the records custodian's decision to circuit court. Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees. *Klein*, 218 Wis. 2d 487, 582 N.W.2d 44; *Milwaukee Teachers' Educ. Ass'n v. Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

B. **Notice and judicial review procedures.** Wisconsin Stat. § 19.356 now codifies and clarifies pre-release notice requirements and judicial review procedures.

Note: Wisconsin Stat. § 19.356 establishes short time periods, specified in days, during which certain actions must occur. All time periods established in Wis. Stat. §§ 19.31-19.39 exclude Saturdays, Sundays, and legal holidays. Wis. Stat. § 19.345. A time period of a certain number of days specified in Wis. Stat. § 19.356 therefore means that number of business days.

C. **Records regarding which notice is required and pre-release court review may be sought.**

1. First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.

2. Limited to three categories of records by Wis. Stat. § 19.356, created in 2003 Wisconsin Act 47.

3. These three categories are:

a. Records containing information relating to an employee created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer. Wis. Stat. § 19.356(2)(a)1.

b. Records obtained by the authority through a subpoena or search warrant. Wis. Stat. § 19.356(2)(a)2.

c. Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access. Wis. Stat. § 19.356(2)(a)3. The Attorney General has opined that Wis. Stat. § 19.356(2)(a)3. does not allow release of the information without obtaining authorization from the individual employee. OAG 01-06 (August 3, 2006), at 4-5.

4. Notice must be provided to "any record subject to whom the record pertains." Wis. Stat. § 19.356(2)(a).

   a. See Sections IV.E. and IV.F., above, for the definitions of "record subject" and "personally identifiable information."

   b. This does not mean that every person mentioned in a record must receive notice. Instead, the record subject must—in some direct way—be a focus or target of the requested record. OAG 01-06, at 2-3.

5. Limited exceptions to the notice requirement apply to access by the affected employee, for purposes of collective bargaining, for investigation of discrimination complaints, or when a record is transferred from the administrator of an educational agency to the state superintendent of public instruction. Wis. Stat. § 19.356(2)(b)-(d).

6. Written notice is required. Wis. Stat. § 19.356(2)(a).

7. Notice must be served before permitting access to the record and within three business days after making the decision to permit access. Wis. Stat. §§ 19.345 and 19.356(2)(a).

8. Notice must be served personally or by certified mail. Wis. Stat. § 19.356(2)(a).

9. The notice must briefly describe the requested record and include a description of the record subject's rights under Wis. Stat. § 19.356(3) and (4) to seek a court order restraining access of the record. Wis. Stat. § 19.356(2)(a). It may be helpful to include copies of the records identified for release and a copy of Wis. Stat. § 19.356.

10. Explaining in the notice what, if any, information the authority intends to redact before permitting access may prevent efforts to obtain a court order restraining release. Enclosing copies of the records as redacted for intended release serves the same purpose.

11. An expedited procedure for seeking court review after receipt of a notice is set forth in Wis. Stat. § 19.356(3)-(8). Strict timelines apply to the notice and judicial review requirements. Courts must give priority to these judicial reviews. *See* Wis. Stat. § 19.356(3)-(8). *See generally Local 2489*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644. Appeal of a circuit court order on judicial review pursuant to Wis. Stat. § 19.356(4)-(7) must be filed within twenty business days of entry of the circuit court order. *Zellner v. Herrick* ("*Zellner II*"), 2009 WI 80, ¶ 27, 319 Wis. 2d 532, ¶ 27, 770 N.W.2d 305, ¶ 27.

12. The authority may not provide access to a requested record within twelve business days of sending the notice. If a judicial review action is commenced, access may not be provided until that review action concludes. Wis. Stat. §§ 19.345 and 19.356(5).

13. A notice may include information beyond what the statute requires in order to assist the recipient in understanding why the notice is being provided.

D. **Records regarding which notice is required and supplementation of the record is authorized.**

1. A different kind of notice is required if an authority decides to permit access to a record containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office. Wis. Stat. § 19.356(9)(a).

2. Again, first perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.

3. See Sections IV.E., IV.H., and IV.G., above, for the definitions of "record subject, "state public office" and "local public office."

4. Notice must be served on the record subject personally or by certified mail within three business days of making the decision to permit access to the records, and before releasing the records. Wis. Stat. §§ 19.345 and 19.356(9)(a).

5. The notice must briefly describe the requested records and describe the record subject's right to augment the records as provided in Wis. Stat. § 19.356(9)(b). Wis. Stat. § 19.356(9)(a).

6. Within five business days after receipt of a notice pursuant to Wis. Stat. § 19.356(9)(a), the record subject may augment the record with written comments and documents of the record subject's choosing. Wis. Stat. §§ 19.345 and 19.356(9)(b).

7. The authority must release the record as augmented by the record subject, except as otherwise authorized or required by statute. Wis. Stat. § 19.356(9)(b).

E. **Courtesy notice.**

1. Written or verbal notice of anticipated public records releases may be provided as a courtesy to persons not entitled to receive Wis. Stat. § 19.356 notices, such as crime victims or public information officers.

2. Courtesy notices are not required by law. They can be used to provide affected persons with some advance notice of public records releases related to those persons.

3. The first step is to perform the usual public records analysis. There is no need to consider whether courtesy notice should be provided if no records are going to be released.

4. Courtesy notices should not suggest that the recipient is entitled to seek pre-release court review.

5. Courtesy notice procedures should not unduly delay related records releases.

X. Electronic Records.

A. **Introduction.** The same general principles apply to records in electronic format, but unique or unresolved problems relating to storage, retention, and access abound.

1. The public records law defines the term "record" broadly to include "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." Wis. Stat. § 19.32(2). *See* Section IV.A., above.

2. Because the content or substance of information contained in a document determines whether it is a "record" or not, information concerning public access set forth in the remainder of this outline generally applies. OAG I-06-09, at 2. However, many questions unique to electronic records have not yet been addressed by the public records statute itself, by published court decisions, or by opinions of the Attorney General.

B. **Record identification.**

1. Electronically stored information generally constitutes a "record" within the meaning of the public records law so long as the recorded information is created or kept in connection with official business. The substance, not the format, controls whether it is a record or not. *Youmans*, 28 Wis. 2d at 679, 137 N.W.2d at 473.

   a. E-mails and other records created or maintained on a personal computer or mobile device, or from a personal e-mail account, constitute records if they relate to government business. *See* Section IV.A.3.e., above.

   b. Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include word processing documents, database files, e-mail correspondence, web-based information, PowerPoint presentations, and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions. *See* Section VIII.E., above.

   c. Electronic records include content posted by or on behalf of authorities to social media sites, such as Facebook and Twitter, to the extent that the content relates to government business. If an authority uses social media, the content must be produced if it is responsive to a public records request. This includes not only currently "live" content, but also past content.

   d. Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes "electronically formatted documents" in its definition of public records.

   e. If an authority makes use of social media, or if employees use mobile devices to conduct government business (whether the device is personal or provided by the authority), the authority should adopt procedures to retain and preserve all such records consistent with Wis. Stat. § 16.61 (state authorities), Wis. Stat. § 19.21 (local authorities), and applicable records disposition authorizations.

   f. Information regarding government business kept or received by an elected official on her personal website, "Making Salem Better," more likely than not constituted a record. OAG I-06-09, at 2-3.

2. Drafts, notes, and personal use exceptions to the definition of "record" apply to electronic information. Electronic information may fall into these exceptions to the definition of "record," based on application of the general concepts set out in Section IV.A.5.a., above.

a. As with paper documents, whether electronic information fits within the "draft" or "notes" exceptions requires consideration of how the information has been used and the individuals to whom the information has been circulated. *See* Section IV.A.5.a., above.

b. Personal e-mails.

i. Purely personal e-mails sent or received by employees or officers on an authority's computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request. *Schill*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, ¶ 9 & n.4, 786 N.W.2d 177, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

ii. Personal e-mails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the e-mails and a government function, such as a personnel investigation. *Schill*, 2010 WI 86, ¶ 23, 327 Wis. 2d 572, ¶ 23, 786 N.W.2d 177, ¶ 23 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 166 (Bradley, J., concurring); *Id.*, ¶ 180 (Gableman, J., concurring). For additional information, see Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at *http://www.doj.state.wi.us/dls/pr_resources.asp.*

3. Electronic documents may contain contextual information and file history preserved only when viewed in certain formats, such as data generated automatically by computer operating systems or software programs. Whether this information is considered a "record" subject to public access is largely unanswered.

a. Metadata. Literally defined as "data about data," metadata has different meanings, depending on context. In the context of word processing documents, metadata is information that may be hidden from view on the computer screen and on a paper copy, but, when displayed, may reveal important information about the document.

i. No controlling Wisconsin precedent addresses the application of the public records law to such data, although a circuit court has held that metadata is not part of the public record because it includes drafts, notes, preliminary computations, and editing information. *McKellar v. Prijic*, Case No. 09-CV-61 (Outagamie Co., July 29, 2009).

ii. Legal commentary and federal cases addressing the treatment of metadata during litigation and civil discovery also are helpful for understanding access and retention issues related to metadata. See, e.g., selected publications from The Sedona Conference and its various working groups, including *The Sedona Guidelines: Best Practice Guidelines for Managing Information & Records in the Electronic Age* (Sept. 2005), and *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed., June 2007), available online at *http://www.thesedonaconference.org/content/miscFiles/publications_html*; *see also Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008).

iii. Courts in some other jurisdictions interpreting their freedom of information laws (which may differ significantly from the Wisconsin public records law), have held that metadata is part of electronic records and must be disclosed in response to a freedom of

information request for those records. *E.g.*, *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (subsequently withdrawn due to incomplete factual record); *Irwin v. Onondaga Cnty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 319 (N.Y. App. Div. 2010); *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1152 (Wash. 2010); *Lake v. City of Phoenix*, 218 P.3d 1004, 1007-08 (Ariz. 2009).

b. E-mail messages may contain transmission information in the original format that does not appear on a printed copy or when stored electronically. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), held that when e-mails are requested under a FOIA request, the electronic version rather than a paper print-out must be provided. In 1999, the same court upheld a federal rule that permitted paper copies to be the only archived public record of e-mails. *Pub. Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999). Central to the *Public Citizen* decision was the existence of the newly-adopted federal rule requiring that paper print-outs of e-mails must include the sender, recipient, date, and receipt data. The federal court reasoned that if paper print-outs of e-mails include this fundamental contextual information, they satisfy federal public records laws.

c. Computers contain "cookies," temporary internet files, deleted files, and other files that are not consciously created or kept by the user, but are instead generated or stored automatically. In addition, although a user may delete files, deleted materials remain on the computer until overwritten, unlike conventional documents discarded and destroyed as trash. Some of these materials are akin to drafts or materials prepared for personal use, or are simply not materials created or kept in connection with official business. Nonetheless, when such materials are collected, organized, and kept for an official purpose, they may constitute a record accessible under the public records statute. *See, e.g., Zellner I*, 2007 WI 53, ¶¶ 22-31, 300 Wis. 2d 290, ¶¶ 22-31, 731 N.W.2d 240, ¶¶ 22-31 (holding that a CD-ROM containing adult images and internet searches compiled in the course of an employee disciplinary action was not within the copyright exception to the definition of a public record; assuming without discussion that the material was a record based on its use by the school district).

C. **Access.** If electronically stored material is a record, the records custodian must determine whether the public records law requires access. Recurring issues relating to access include the following.

1. Sufficiency of requests. Under Wis. Stat. § 19.35(1)(h), a request must be reasonably limited "as to subject matter or length of time represented by the record." *See* Section VI.D.; *Schopper*, 210 Wis. 2d at 212-13, 565 N.W.2d at 189-90. Record requests describing only the format requested ("all e-mails") without reasonable limitations as to time and subject matter are often not legally sufficient. If so, the custodian may insist that the requester reasonably describe the records being requested. Even if a requester appears to limit a request by specifying the time period or particular search terms or individual electronic mail boxes to be searched, such requests for voluminous electronic records have been held to be insufficient and unreasonably burdensome. *Gehl*, 2007 WI App 238, ¶¶ 23-24, 306 Wis. 2d 247, ¶¶ 23-24, 742 N.W.2d 530, ¶¶ 23-24 (search requests for all e-mails exchanged by numerous individuals without specifying any subject matter, and for searches based on numerous broad search terms, were properly denied as insufficient).

2. Manner of access.

a. Wisconsin Stat. § 19.35(1)(k) permits an authority to impose reasonable restrictions on the manner of access to original records if they are irreplaceable or easily damaged. Concerns

for protecting the integrity of original records may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security concerns may also justify such a restriction. *See WIREdata II*, 2008 WI 69, ¶¶ 97-98, 310 Wis. 2d 397, ¶¶ 97-98, 751 N.W.2d 736, ¶¶ 97-98 (*reversing* court of appeals decision allowing requesters direct access to an authority's electronic database; recognizing that "such direct access . . . would pose substantial risks"). Provision of a copy of the requested data "in an appropriate format"—in this case, as portable document files ("PDFs")—was sufficient. *Id.*, ¶ 97.

b. Records posted on the internet. The Attorney General has advised that agencies may not use online record posting as a substitute for their public records responsibilities; and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in Wis. Stat. § 19.32(2) or 19.35(1)(g). Letter from James E. Doyle, Wisconsin Attorney General, to John Muench (July 24, 1998). Nonetheless, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters.

c. The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself. OAG I-06-09, at 3-4.

3. Must the authority provide a record in the format in which the requester asks for it?

a. Wisconsin Stat. § 19.35(1)(b), (c), and (d) require that copies of written documents be "substantially as readable," audiotapes be "substantially as audible," and copies of videotapes be "substantially as good" as the originals.

b. By analogy, providing a copy of an electronic document that is "substantially as good" as the original is a sufficient response where the requester does not specifically request access in the original format. *See WIREdata II*, 2008 WI 69, ¶¶ 97-98, 310 Wis. 2d 397, ¶¶ 97-98, 751 N.W.2d 736, ¶¶ 97-98 (provision of records in PDF format satisfied requests for records in "electronic, digital" format); *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶ 10, 237 Wis. 2d 840, ¶ 10, 615 N.W.2d 190, ¶ 10 (holding that provision of an analog copy of a digital audio tape ("DAT") complied with Wis. Stat. § 19.35(1)(c) by providing a recording that was "substantially as audible" as the original). *See also Autotech Techs.*, 248 F.R.D. at 558 (where litigant did not specify a format for production during civil discovery, responding party had option of providing documents in the "form ordinarily maintained or in a reasonably usable form").

c. Wisconsin Stat. § 19.36(4) provides, however, that material used as input for or produced as the output of a computer is subject to examination and copying. *Jones* ultimately held that, when a requester specifically asked for the original DAT recording of a 911 call, the custodian did not fulfill the requirements of Wis. Stat. § 19.36(4) by providing only the analog copy. *Jones*, 2000 WI App 146, ¶ 17, 237 Wis. 2d 840, ¶ 17, 615 N.W.2d 190, ¶ 17. In *WIREdata II*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, the Wisconsin Supreme Court declined to address the issue of whether the provision of documents in PDF format would have satisfied a subsequent request specifying in detail that the data should be produced in a particular format which included fixed length, pipe delimited, or comma-quote

outputs, *id.*, ¶¶ 8 n.7, 93, and 96, leaving questions concerning the degree to which a requester can specify the precise electronic format that will satisfy a record request to be answered in subsequent cases. Thus, it behooves the records custodian who denies a request that records be provided in a particular electronic format to state a legally sufficient reason for denying access to a copy of a record in the particular format requested.

d. Computer programs are expressly protected from examination or copying even though material used as computer input or produced as output may be subject to examination and copying unless otherwise exempt from public access. Wis. Stat. § 19.36(4). For the definition of "computer program," see Wis. Stat. § 16.971(4)(c).

e. There is a right to a copy of a computer tape, and a right to have the information on the tape printed out in a readable format. Wis. Stat. § 19.35(1)(e); 75 Op. Att'y Gen. 133, 145 (1986).

f. Wisconsin Stat. § 19.35(1)(e) gives requesters a right to receive a written copy of any public record that is not in readily comprehensible form. A requester who prefers paper copies of electronic records may not be able to insist on them, however. If the requester does not have access to a machine that will translate the information into a comprehensible form, the agency can fulfill its duties under the public records law by providing the requester with access to such a machine. *See* 75 Op. Att'y Gen. at 145.

g. With limited exceptions, Wis. Stat. § 19.35(1)(L) provides that a records custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format. *George*, 169 Wis. 2d 573, 485 N.W.2d 460. Under Wis. Stat. § 19.36(6), however, the records custodian is required to delete or redact confidential information contained in a record before providing access to the parts of a record that are subject to disclosure.

   i. When records are stored electronically, the distinction between redaction of existing records and the creation of an entirely new record can become difficult to discern. *See Osborn*, 2002 WI 83, ¶¶ 41-46, 254 Wis. 2d 266, ¶¶ 41-46, 647 N.W.2d 158, ¶¶ 41-46.

   ii. The Attorney General has advised that where information is stored in a database a person can "within reasonable limits" request a data run to obtain the requested information. 68 Op. Att'y Gen. 231, 232 (1979). Use a rule of reason to determine whether retrieving electronically stored data entails the creation of a new record. Consider the time, expense, and difficulty of extracting the data requested, and whether the agency itself ever looks at the data in the format requested. *Cf. N.Y. Pub. Interest Research Group v. Cohen*, 729 N.Y.S.2d 379, 382-83 (N.Y. Sup. Ct. 2001) (where a "few hours" of computer programming would produce records that would otherwise require weeks or months to redact manually, the court concluded that requiring the necessary programming did not violate the New York statutory prohibition against creation of a new record).

h. A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law. Wis. Stat. § 66.1102(4).

i. "Political subdivision" means any city, village, town, or county. Wis. Stat. § 66.1102(1)(b).

ii. "Land information" means any physical, legal, economic or environmental information, or characteristics concerning land, water, groundwater, subsurface resources, or air in Wisconsin. It includes information relating to topography, soil, soil erosion, geology, minerals, vegetation, land cover, wildlife, associated natural resources, land ownership, land use, land use controls and restriction, jurisdictional boundaries, tax assessment, land value, land survey records and references, geodetic control networks, aerial photographs, maps, planimetric data, remote sensing data, historic and prehistoric sites, and economic projections. Wis. Stat. § 66.1102(1)(a), incorporating by reference Wis. Stat. § 59.72(1)(a).

i. Wisconsin Stat. § 19.35(1)(a) provides that "any requester has a right to inspect any *record*." Compare this to the language of the federal Freedom of Information Act, 5 U.S.C. § 552, which requires that "public information" be made available. Cases in other jurisdictions have found this distinction significant in deciding whether information must be provided in a particular format. *Cf. AFSCME v. County of Cook*, 555 N.E.2d 361, 366 (Ill. 1990); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. Ct. App. 1995).

4. Role of the records custodian. Under Wis. Stat. § 19.34(2), the records custodian is legally responsible for providing access to public records.

a. The records custodian must protect the right of public access to electronic records stored on individual employees' computers, such as e-mail, even though the individual employee may act as the *de facto* records custodian of such records. Related problems arise when individual employees or elected officials use personal e-mail accounts to correspond concerning official business.

b. Shared-access databases involving multiple agencies.

i. Information of common use or interest increasingly is shared electronically by multiple agencies. To prevent confusion among participating agencies and unnecessary delays in responding to requests for records, establishment of such a database should be accompanied by detailed rules identifying who may enter information and who is responsible for responding to requests for particular records.

ii. Special custodial and disclosure rules govern public records requests for certain shared law enforcement records. *See* Section IV.D.4., above.

c. Government data collected and processed by independent contractors. A government entity may not avoid its responsibilities under the public records law by contracting with an independent contractor for the collection and maintenance of government records and then simply directing requesters to the independent contractor for handling of public records requests. The government entity remains the "authority" responsible for complying with the law and is liable for a contractor's failure to comply. *WIREdata II*, 2008 WI 69, ¶¶ 82-89, 310 Wis. 2d 397, ¶¶ 82-89, 751 N.W.2d 736, ¶¶ 82-89.

D. **Retention and storage.**

1. The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is made. *See Gehl*, 2007 WI App 238, ¶ 15 n.4, 306 Wis. 2d 247, ¶ 15 n.4, 742 N.W.2d 530, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)).

2. Issues related to record retention that are exclusive to electronic records often derive from their relative fragility, susceptibility to damage or loss, and difficulties in insuring their authenticity and accessibility.

   a. The Wisconsin Department of Administration ("DOA") has statutory rule-making authority to prescribe standards for storage of optical disks and electronic records. Wis. Stat. §§ 16.611 and 16.612. DOA has promulgated Wis. Admin. Code ch. Adm 12 which governs the management of records stored exclusively in electronic format by state and local agencies, but does not require an agency to maintain records in electronic format. Wisconsin Admin. Code ch. Adm 12 defines terms of art relating to electronic records, establishes requirements for accessibility of electronic records from creation through use, management, preservation, and disposition, and requires that state and local agencies must also comply with the statutes and rules relating to retention of non-electronic records. Wisconsin Admin. Code ch. Adm 12 can be found at *http://www.legis.state.wi.us/rsb/code/adm/adm012.pdf*. A primer on Wis. Admin. Code ch. Adm 12 can be found at *http://publicrecordsboard.wi.gov/docs_all.asp?locid=165*, under Reference Materials.

   b. Beyond Wis. Admin. Code ch. Adm 12, the Wisconsin Public Records Board has published *Guidelines for the Management and Retention of Public Record E-Mail*, located at *http://publicrecordsboard.wi.gov/docs_all.asp?locid=165*, under Reference Materials.

   c. Documents posted online. In recent years, agencies have frequently taken advantage of the ease of posting public records on government websites. State agencies are required by law, Wis. Stat. § 35.81, *et seq.*, to provide copies of agency publications to the Wisconsin Reference and Loan Library for distribution to public libraries through the Wisconsin Document Depository Program. The Wisconsin Digital Archives has been established to preserve state agency web content for access and use in the future, and to provide a way for state agencies to fulfill their statutory obligation to participate in the Document Depository Program with materials in electronic formats. For more information about this program, see *http://dpi.wi.gov/rll/pdf/state_agency_digital_archives_guidelines.pdf*.

XI. Inspection, Copies, and Fees.

A. **Inspection.**

1. A requester generally may choose to inspect a record and/or to obtain a copy of the record. "Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form." Wis. Stat. § 19.35(1)(b).

2. A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority's employees. Wis. Stat. § 19.35(2).

3. A records custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Wis. Stat. § 19.35(1)(k).

4. For unique issues concerning inspection and copying of electronic records, see Section X.C.2.-3., above.

B. **Copies.**

1. A requester is entitled to a copy of a record, including copies of audiotapes and videotapes. Wis. Stat. § 19.35(1). The records custodian must provide a copy if requested. *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 525-27, 549 N.W.2d 253, 254-55 (Ct. App. 1996).

   a. If requested by the requester, the authority may provide a transcript of an audiotape recording instead of a copy of the audiotape. Wis. Stat. § 19.35(1)(c).

   b. If an authority receives a request to inspect or copy a handwritten record or a voice recording that the authority is required to protect because the handwriting or recorded voice would identify an informant, the authority must provide—upon request by the requester—a transcript of the record or the information contained in the record if the record or information is otherwise subject to copying or inspection under the public records law. Wis. Stat. § 19.35(1)(em).

   c. Except as otherwise provided by law, a requester has a right to inspect records, the form of which does not permit copying (other than written record, audio tapes, video tapes, and records not in readily comprehensible form). Wis. Stat. § 19.35(1)(f).

      i. The authority may permit the requester to photograph the record.

      ii. The authority must provide a good quality photograph of a record, the form of which does not permit copying, if the requester asks that a photograph be provided.

2. The requester has a right to a copy of the original record, *i.e.*, "source" material.

   a. A request for a copy of a 911 call in its original digital form was not met by providing an analog copy. *Jones*, 2000 WI App 146, ¶¶ 10-19, 237 Wis. 2d 840, ¶¶ 10-19, 615 N.W.2d 190, ¶¶ 10-19. *See* Section X.C.3.

   b. A request for an "electronic/digital" copy was satisfied by provision of a PDF document containing the requested information, even though the PDF did not have all of the characteristics the requester might have wished. *WIREdata II*, 2008 WI 69, ¶ 96, 310 Wis. 2d 397, ¶ 96, 751 N.W.2d 736, ¶ 96.

   c. A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law. Wis. Stat. § 66.1102(4). *See* Section X.C.3.h., above.

3. The requester does not have a right to make requested copies. If the requester appears in person to request a copy of a record that permits photocopying, the records custodian may decide whether to make copies for the requester or let the requester make them, and how the records

will be copied. Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, ¶¶ 1, 9, 12-13, 624 N.W.2d 892, ¶¶ 1, 9, 12-13 (2000) (requester was not entitled to make copies on requester's own portable copying machine).

C. **Fees.**

1. An authority may charge a requester only for the specific tasks identified by the Legislature in the fee provisions of Wis. Stat. § 19.35(3), unless otherwise provided by law. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 50, 341 Wis. 2d 607, ¶ 50, 815 N.W.2d 367, ¶ 50 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring). *See* Sections XI.C.2.-5., below.

2. *Copy and transcription fees* may be charged.

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

   b. "Reproduction" means the act, condition, or process of producing a counterpart, image, or copy. Reproduction is a rote, ministerial task that does not alter a record or change the content of the record. It instead involves only copying the record—for example, by printing out a record that is stored electronically or making a photocopy of a paper record. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 31, 341 Wis. 2d 607, ¶ 31, 815 N.W.2d 367, ¶ 31 (Abrahamson, C.J., lead opinion).

   c. DOJ's policy is that photocopy fees should be around $.15 cents per page, and that anything in excess of $.25 cents may be suspect.

   d. *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, 310 Wis. 2d 397, ¶ 107, 751 N.W.2d 736, ¶ 107.

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

3. *Photography and photographic reproduction fees* may be charged if the authority provides a photograph of a record, the form of which does not permit copying, but are limited to the "actual, necessary and direct" costs. Wis. Stat. § 19.35(3)(b).

4. *Location costs*. Costs associated with locating records may be charged if they total $50.00 or more. "Locating" a record means to find it by searching, examining, or experimenting. Subsequent review and redaction of the record are separate processes, not included in location of the record, for which a requester may not be charged. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 29, 341 Wis. 2d 607, ¶ 29, 815 N.W.2d 367, ¶ 29 (Abrahamson, C.J., lead opinion). Only actual, necessary, and direct location costs are permitted. Wis. Stat. § 19.35(3)(c).

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

6. An authority may not charge a requester for the costs of deleting, or "redacting," nondisclosable information included in responsive records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58, 341 Wis. 2d 607, ¶¶ 1 & n.4, 6, 58, 815 N.W.2d 367, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring).

7. If a record is produced or collected by a person who is not an authority pursuant to a contract with the authority, *i.e.*, a contractor, the fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record by the person who makes the reproduction or transcription, unless another fee is established or authorized by law. Wis. Stat. § 19.35(3)(g).

8. An authority may require prepayment of any fees if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). The authority may refuse to make copies until payment is received. *Hill*, 196 Wis. 2d at 429-30, 538 N.W.2d at 613. Except for prisoners, the statute does not authorize a requirement for prepayment based on the requester's failure to pay fees for a prior request.

9. An authority has discretion to provide requested records for free or at a reduced charge. Wis. Stat. § 19.35(3)(e).

10. An authority may not make a profit on its response to a public records request. *WIREdata II*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, ¶¶ 103, 107, 751 N.W.2d 736, ¶¶ 103, 107.

11. Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task.

12. Specific statutes may establish express exceptions to the general fee provisions of Wis. Stat. § 19.35(3). Examples include Wis. Stat. § 814.61(10)(a) (court records), Wis. Stat. § 59.43(2)(b) (land records recorded by registers of deeds), and Wis. Stat. § 6.36(6) (authorizing fees for copies of the official statewide voter registration list).

XII. Right to Challenge Accuracy of a Record.

A. An individual authorized to inspect a record under Wis. Stat. § 19.35(1)(a) or (am), or a person authorized by that individual, may challenge the accuracy of a record containing personally identifiable information pertaining to that individual. Wis. Stat. § 19.365(1).

B. *Exceptions.* This right does not apply if the record has been transferred to an archival repository, or if the record pertains to an individual and a specific state statute or federal law governs challenges to the accuracy of that record. Wis. Stat. § 19.365(2).

C. The challenger must notify the authority, in writing, of the challenge. Wis. Stat. § 19.365(1).

D. The authority then may:

1. Concur and correct the information; or

2. Deny the challenge, notify the challenger of the denial, and allow the challenger to file a concise statement of reasons for the individual's disagreement with the disputed portions of the record. A state authority must also notify the challenger of the reasons for the denial. *See* Wis. Stat. § 19.365(1)(a) and (b).

XIII. Enforcement and Penalties.

A. **Mandamus.** The public records law encourages assertion of the right to access.

1. If an authority withholds a record or part of a record, or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may:

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

   b. Submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that an action for mandamus be brought asking the court to order release of the record to the requester.

   Wis. Stat. § 19.37(1).

2. Mandamus procedures are set forth in Chapters 781 and 783 of the Wisconsin Statutes.

3. Mandamus is the exclusive remedy provided by the Legislature to enforce the public records law and obtain the remedies specified in Wis. Stat. § 19.37. *Stanley*, 2012 WI App 42, ¶¶ 60-64, 340 Wis. 2d 663, ¶¶ 60-64, 814 N.W.2d 867, ¶¶ 60-64 (cannot be enforced by supervisory writ) (petition for review filed April 14, 2012); *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶¶ 4-6, 337 Wis. 2d 544, ¶¶ 4-6, 807 N.W.2d 666, ¶¶ 4-6; *State v. Zien*, 2008 WI App 153, ¶¶ 34-35, 314 Wis. 2d 340, ¶¶ 34-35, 761 N.W.2d 15, ¶¶ 34-35.

4. A request must be made in writing before a mandamus action to enforce the request is commenced. Wis. Stat. § 19.35(1)(h).

5. In a mandamus action, the court must decide whether the records custodian gave sufficiently specific reasons for denying an otherwise proper public records request. If the records custodian's reasons for denying the request were sufficiently specific, the court must decide whether the records custodian's reasons are based on a statutory or judicial exception or are sufficient to outweigh the strong public policy favoring disclosure. Ordinarily the court examines the record to which access is requested *in camera*. *Youmans*, 28 Wis. 2d at 682-83, 137 N.W.2d at 475; *George*, 169 Wis. 2d at 578, 582-83, 485 N.W.2d at 462, 464.

   a. To obtain a writ of mandamus, the requester must establish four things. *Watton*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, ¶ 8, 751 N.W.2d 369, ¶ 8.

      i. The requester has a clear right to the records sought.

      ii. The authority has a plain legal duty to disclose the records.

      iii. Substantial damage would result if the petition for mandamus was denied.

      iv. The requester has no other adequate remedy at law.

   b. A records custodian who has denied access to requested records defeats the issuance of a writ of mandamus compelling their production by establishing, for example, that the requester does not have a clear right to the records. *Watton*, 2008 WI 74, ¶ 8 n.9, 311 Wis. 2d 52, ¶ 8 n.9, 751 N.W.2d 369, ¶ 8, n.9.

6. The court may allow the parties or their attorneys limited access to the requested record for the purpose of presenting their mandamus cases, under such protective orders or other restrictions as the court deems appropriate. Wis. Stat. § 19.37(1)(a); *Appleton Post-Crescent v. Janssen*, 149 Wis. 2d 294, 298-305, 441 N.W.2d 255, 256-59 (Ct. App. 1989) (allowing limited attorney access only for purposes of case preparation).

7. Statutes of limitation.

   a. Except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced with three years after the cause of action accrues. Wis. Stat. § 893.90(2).

   b. A committed or incarcerated person must bring an action for mandamus challenging denial of a request for access to a record within ninety days after the request is denied by the authority. Wis. Stat. § 19.37(1m). The ninety-day time period excludes Saturdays, Sundays, and legal holidays. *See* Wis. Stat. § 19.345.

B. **Penalties available on mandamus.**

1. Attorneys' fees, damages of not less than $100.00, and other actual costs shall be awarded to a requester who prevails in whole or in substantial part in a mandamus action concerning access to a record under Wis. Stat. § 19.35(1)(a). Wis. Stat. § 19.37(2)(a).

   a. The purpose of Wis. Stat. § 19.37(2) is to encourage voluntary compliance, so a judgment or order favorable in whole or in part in a mandamus action is not a necessary condition precedent to finding that a party prevailed against an authority under Wis. Stat. § 19.37(2). *Eau Claire Press Co.*, 176 Wis. 2d at 159-60, 499 N.W.2d at 920.

   b. ***Caution***: Damages may be awarded if the prevailing requester is a committed or incarcerated person, but that requester is not entitled to any minimum amount of damages. Wis. Stat. § 19.37(2)(a).

   c. ***Caution***: For an attorney fee award to be made, there must be an attorney-client relationship. *Young*, 165 Wis. 2d at 294-97, 477 N.W. 2d at 347-48 (no attorney fees for *pro se* litigant).

   d. ***Caution***: Costs and fees are only available to a party that has filed, or has requested a district attorney or DOJ to file, an original mandamus action. *Stanley*, 2012 WI App 42, ¶¶ 60-64, 340 Wis. 2d 663, ¶¶ 60-64, 814 N.W.2d 867, ¶¶ 60-64 (petition for review filed April 14, 2012).

   e. To establish that he or she has "prevailed," the requester must show that the prosecution of the mandamus action could "reasonably be regarded as necessary to obtain the information" and that a "causal nexus" exists between the legal action and the records custodian's disclosure of the requested information. *Eau Claire Press Co.*, 176 Wis. 2d at 160, 499 N.W.2d at 920.

   f. Cases discussing recovery of attorney fees where plaintiff "substantially prevails" and recovering fees and costs after the case is dismissed for being moot: *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326-30, 385 N.W.2d 510, 512-14 (Ct. App. 1986); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 522-25, 427 N.W.2d 414, 416-17 (Ct. App. 1988); *Eau Claire Press Co.*, 176 Wis. 2d at 159-60, 499 N.W.2d at 920.

g. Actual damages shall be awarded to a requester who files a mandamus action under Wis. Stat. § 19.35(1)(am), relating to access to a record containing personally identifiable information, if the court finds that the authority acted in a willful or intentional manner. Wis. Stat. § 19.37(2)(b). There are no automatic damages in this type of mandamus case nor is there statutory authority for the court to award attorney fees and costs.

2. Punitive damages may be awarded to a requester if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excess fees. Wis. Stat. § 19.37(3). However, a requester cannot obtain punitive damages unless it timely files a mandamus action and actual damages are ordered. *Capital Times Co.*, 2011 WI App 137, ¶¶ 6, 11, 337 Wis. 2d 544, ¶¶ 6, 11, 807 N.W.2d 666, ¶¶ 6, 11.

3. A civil forfeiture of not more than $1,000.00 may be imposed against an authority or legal custodian who arbitrarily or capriciously denies or delays response to a request or charges excessive fees. Wis. Stat. § 19.37(4).

C. **Related criminal offenses.** In addition to the mandamus relief provided by the public records law, criminal penalties are available for:

1. Destruction, damage, removal, or concealment of public records with intent to injure or defraud. Wis. Stat. § 946.72.

2. Alteration or falsification of public records. Wis. Stat. § 943.38.

D. **Miscellaneous enforcement issues.**

1. A requester cannot seek relief under the public records law for alleged violations of record retention statutes when the non-retention or destruction predates submission of the public records request. *Cf.* Wis. Stat. § 19.35(5). *Gehl*, 2007 WI App 238, ¶¶ 13-15, 306 Wis. 2d 247, ¶¶ 13-15, 742 N.W.2d 530, ¶¶ 13-15.

2. An authority may not avoid liability under the public records law by contracting with an independent contractor for the collection, maintenance, and custody of its records, and by then directing any requester of those records to the independent contractor. *WIREdata II*, 2008 WI 69, ¶ 89, 310 Wis. 2d 397, ¶ 89, 751 N.W.2d 736, ¶ 89.

3. If requested records are released before a mandamus action is filed, the plaintiff has no viable claim for mandamus and therefore no right to seek the other remedies provided in Wis. Stat. § 19.37. *Capital Times Co.*, 2011 WI App 137, ¶¶ 12-15, 337 Wis. 2d 544, ¶¶ 12-15, 807 N.W.2d 666, ¶¶ 12-15.

4. A small claims action is not the proper way to secure production of public records, and one attempt to do so was found to be frivolous. *Knuth v. Town of Cedarburg*, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551, 2010 WL 174141 (January 20, 2010) (unpublished). [1]

[1]Unpublished opinions issued on or after July 1, 2009, by the Wisconsin Court of Appeals may be cited for their persuasive value. *See* Wis. Stat. § 809.23(3).

APPENDIX A

CASES CITED

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Juneau Co. Star-Times v. Juneau Co.,
2011 WI App 150, 337 Wis. 2d 710,
807 N.W.2d 655 (petition for review
granted Feb. 23, 2012)

Kailin v. Rainwater,
226 Wis. 2d 134, 593 N.W.2d 865 (Ct. App. 1999)

Klein v. Wis. Res. Ctr.,
218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998)

Knuth v. Town of Cedarburg,
2010 WI App 33, 323 Wis. 2d 824,
781 N.W.2d 551, 2010 WL 174141
(January 20, 2010) (unpublished)

Kraemer Bros., Inc. v. Dane County,
229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999)

Kroeplin v. Wis. Dep't of Natural Res.,
2006 WI App 227, 297 Wis. 2d 254,
725 N.W.2d 286

Lake v. City of Phoenix,
218 P.3d 1004 (Ariz. 2009)

Linzmeyer v. Forcey,
2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811

Local 2489, AFSCME, AFL-CIO v. Rock County,
2004 WI App 210, 277 Wis. 2d 208,
689 N.W.2d 644

Marsh v. County of San Diego,
680 F.3d 1148 (9th Cir. 2012)

Mayfair Chrysler-Plymouth, Inc. v. Baldarotta,
162 Wis. 2d 142, 469 N.W.2d 638 (1991)

McKellar v. Prijic,
Case No. 09-CV-61 (Outagamie Co., July 29, 2009)

Milwaukee Journal Sentinel v. City of Milwaukee,
2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367

Milwaukee Journal Sentinel v.
Wisconsin Dep't of Admin.,
2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700

Milwaukee Teachers' Educ. Ass'n v.
Milwaukee Bd. of Sch. Dirs.,
227 Wis. 2d 779, 596 N.W.2d 403 (1999)

Nat'l Archives & Records Admin. v. Favish,
541 U.S. 157 (2004)

Nat'l Day Laborer Org. Network v. U.S.
Immigration and Customs Enforcement Agency,
2011 WL 381625 (S.D.N.Y. Feb. 7, 2011)

Newspapers, Inc. v. Breier,
89 Wis. 2d 417, 279 N.W.2d 179 (1979)

Nichols v. Bennett,
199 Wis. 2d 268, 544 N.W.2d 428 (1996)

N.Y. Pub. Interest Research Group v. Cohen,
729 N.Y.S.2d 379 (N.Y. Sup. Ct. 2001)

O'Neill v. City of Shoreline,
240 P.3d 1149 (Wash. 2010)

Osborn v. Bd. of Regents,
2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158

Oshkosh Nw. Co. v. Oshkosh Library Bd.,
125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985)

Pangman & Assocs. v. Zellmer,
163 Wis. 2d 1070, 473 N.W.2d 538 (Ct. App. 1991)

Portage Daily Register v.
Columbia County Sheriff's Dep't,
2008 WI App 30, 308 Wis. 2d 357,
746 N.W.2d 525

Pub. Citizen v. Carlin,
184 F.3d 900 (D.C. Cir. 1999)

Racine Educ. Ass'n v.
Bd. of Educ. for Racine Unified Sch. Dist.,
129 Wis. 2d 319, 385 N.W.2d 510 (Ct. App. 1986)

Racine Educ. Ass'n v.
Bd. of Educ. for Racine Unified Sch. Dist.,
145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988)

Sands v. Whitnall Sch. Dist.,
2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439

Schill v. Wisconsin Rapids Sch. Dist.,
2010 WI 86, 327 Wis. 2d 572, 768 N.W.2d 177

Schilling v. Crime Victims Rights Bd.,
2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623

Schopper v. Gehring,
210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997)

Seifert v. Sch. Dist. of Sheboygan Falls,
2007 WI App 207, 305 Wis. 2d 582,
740 N.W.2d 177

State v. Beaver Dam Area Dev. Corp.,
2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295

State v. Panknin,
217 Wis. 2d 200, 579 N.W.2d 52 (Ct. App. 1998)

State v. Schaefer,
2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457

State v. Stanley,
2012 WI App 42, 340 Wis. 2d 663,
814 N.W.2d 867
(petition for review filed Apr. 14, 2012)

State v. Zien,
2008 WI App 153, 314 Wis. 2d 340,
761 N.W.2d 15

State ex rel. Bilder v. Twp. of Delavan,
112 Wis. 2d 539, 334 N.W.2d 252 (1983)

State ex rel. Blum v. Bd. of Educ.,
209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997)

State ex rel. Borzych v. Paluszcyk,
201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996)

State ex rel. Gehl v. Connors,
2007 WI App 238, 306 Wis. 2d 247,
742 N.W.2d 530

State ex rel. Greer v. Stahowiak,
2005 WI App 219, 287 Wis. 2d 795,
706 N.W.2d 161

State ex rel. Hill v. Zimmerman,
196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995)

State ex rel. Journal Co. v. County Court,
43 Wis. 2d 297, 168 N.W.2d 836 (1969)

State ex rel. Journal/Sentinel, Inc. v. Arreola,
207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996)

State ex rel. Ledford v. Turcotte,
195 Wis. 2d 244, 536 N.W.2d 130 (Ct. App. 1995)

State ex rel. Milwaukee Police Ass'n v. Jones,
2000 WI App 146, 237 Wis. 2d 840,
615 N.W.2d 190

State ex rel. Morke v. Record Custodian,
159 Wis. 2d 722, 465 N.W.2d 235 (Ct. App. 1990)

State ex rel. Richards v. Foust,
165 Wis. 2d 429, 477 N.W.2d 608 (1991)

State ex rel. Savinski v. Kimble,
221 Wis. 2d 833, 586 N.W.2d 36 (Ct. App. 1998)

State ex rel. Schultz v. Bruendl,
168 Wis. 2d 101, 483 N.W.2d 238 (Ct. App. 1992)

State ex rel. Youmans v. Owens,
28 Wis. 2d 672, 137 N.W.2d 470 (1965)

State ex rel. Young v. Shaw,
165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991)

State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol,
146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988)

Stone v. Bd. of Regents,
2007 WI App 223, 305 Wis. 2d 679,
741 N.W.2d 774

U. S. Dep't of Justice v.
Reporters Comm. for Freedom of the Press,
489 U.S. 749 (1989)

Vill. of Butler v. Cohen,
163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991)

Watton v. Hegerty,
2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369

Williams v. Sprint/United Mgmt. Co.,
230 F.R.D. 640 (D. Kan. 2005)

WIREdata, Inc. v. Vill. of Sussex ("*WIREdata II*"),
2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736

WIREdata, Inc. v. Vill. of Sussex ("*WIREdata I*"),
2007 WI App 22, 298 Wis. 2d 743,
729 N.W.2d 757

Wis. Newspress, Inc. v.
Sch. Dist. of Sheboygan Falls,
199 Wis. 2d 768, 546 N.W.2d 143 (1996)

Wis. State Journal v. Univ. of Wis-Platteville,
160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990)

Woznicki v. Erickson,
202 Wis. 2d 178, 549 N.W.2d 699 (1996)

WTMJ, Inc. v. Sullivan,
204 Wis. 2d 452, 555 N.W.2d 140
(Ct. App. 1996)

Zellner v. Cedarburg Sch. Dist. ("*Zellner I*"),
2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240

Zellner v. Herrick ("*Zellner II*"),
2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305

APPENDIX B

WISCONSIN DEPARTMENT OF JUSTICE

PUBLIC RECORDS NOTICE

WISCONSIN DEPARTMENT OF JUSTICE
PUBLIC RECORDS NOTICE

The Wisconsin Department of Justice provides legal services, criminal investigative assistance, crime victim services, and other law enforcement services to state and local government, and in certain matters, directly to state citizens. Within the Department, the Office of Crime Victim Services and the Divisions of Legal Services, Law Enforcement Services, Criminal Investigation, and Management Services are responsible for administering agency programs and services. Several positions within the Department constitute state public offices for purposes of the Wisconsin public records laws, including the positions of Attorney General, Deputy Attorney General, the Division Administrators, and the Director of the Office of Crime Victim Services.

The Department has designated a Custodian of Public Records for the Department and Deputy Custodians for each Division in order to meet its obligations under State public records laws. Members of the public may obtain access to the Department's public records, or obtain copies of these records, by making a request to the Department's Custodian of Public Records during the Department's office hours of Monday through Friday, 8:00 a.m. to 4:30 p.m. Such requests should be made to:

Mr. Kevin C. Potter
Office of the Attorney General
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857

The Department may bill requestors $0.15 per photocopied page provided. The Department may bill $0.14 per page for content scanned and provided on a CD or DVD. If pre-existing files need only be copied onto CDs or DVDs, $1.00 per CD or DVD may be charged. If content must be converted from one electronic format to another, $1.00 per CD or DVD may be charged plus staff time and other actual costs to the Department. The actual cost of postage, courier, or delivery services may be charged. There will be an additional charge for criminal history searches, and for specialized documents and photographs. The cost of locating responsive records may be charged if it exceeds $50.00 and will be calculated as hourly pay rate (including fringe benefits) of person locating records multiplied by actual time expended to locate records, plus other actual costs. Requests which exceed a total cost of $5.00 may require prepayment. Requesters appearing in person may be asked to make their own copies, or the Department may make copies for requesters at its discretion. All requests will be processed as soon as practicable and without delay.

Below you will find a brief description of the services provided by each Division of the Department.

Division of Legal Services
This Division is responsible for providing legal advice and counsel to state and local agencies as well as to citizens in certain matters. The Division is comprised of seven units specializing in different practice areas including Criminal Appeals; Civil Litigation; State Programs, Administration, and Revenue (SPAR); Environmental Protection; Medicaid Fraud Control; Criminal Litigation and Public Integrity; and Consumer Protection and Antitrust.

Division of Criminal Investigation
This Division is responsible for investigating, either independently or in conjunction with local law enforcement agencies, certain criminal cases which are of statewide influence and importance. The Division is organized into the Field Operations Bureau, Eastern Region; Field Operations Bureau, Western Region; Special Operations Bureau; and Support Services.

Division of Law Enforcement Services
This Division provides technical and scientific assistance to local law enforcement agencies and establishes training standards for law enforcement officers. The Division is comprised of the Crime Information Bureau, the Training and Standards Bureau, and the State Crime Laboratories.

Division of Management Services
This Division provides basic staff support services to the other Divisions within the Department in the areas of budget preparation, fiscal control, personnel management, payroll, training, facilities, and information technology.

Office of Crime Victims Services
The Office of Crime Victims Services provides assistance to crime victims and witnesses. It operates the crime victim compensation program, provides funding to counties for services to victims and witnesses, and administers federal funding for local victim service providers.

J.B. Van Hollen, Attorney General **(Revised July 2012)**

APPENDIX C

WIS. STAT. §§ 19.31-19.39 (2009-10)
(updated through 2011 Wisconsin Act 286)

(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.

(8) Any metropolitan sewerage commission created under ss. 200.21 to 200.65 may provide for the destruction of obsolete commission records. No record of the metropolitan sewerage district may be destroyed except by action of the commission specifically authorizing the destruction of that record. Prior to any destruction of records under this subsection, the commission shall give at least 60 days' prior notice of the proposed destruction to the state historical society, which may preserve records it determines to be of historical interest. Upon the application of the commission, the state historical society may waive this notice. Except as provided under sub. (7), the commission may only destroy a record under this subsection after 7 years elapse from the date of the record's creation, unless a shorter period is fixed by the public records board under s. 16.61 (3) (e).

History: 1971 c. 215; 1975 c. 41 s. 52; 1977 c. 202; 1979 c. 35, 221; 1981 c. 191, 282, 335; 1981 c. 350 s. 13; 1981 c. 391; 1983 a. 532; 1985 a. 180 ss. 22, 30m; 1985 a. 225; 1985 a. 332 s. 251 (1); Sup. Ct. Order, 136 Wis. 2d xi (1987); 1987 a. 147 ss. 20, 25; 1989 a. 248; 1991 a. 39, 185, 316; 1993 a. 27, 60, 172; 1995 a. 27, 201; 1999 a. 150 s. 672.

Sub. (1) provides that a police chief, as an officer of a municipality, is the legal custodian of all records of that officer's department. Town of LaGrange v. Auchinleck, 216 Wis. 2d 84, 573 N.W.2d 232 (Ct. App. 1997), 96−3313.

This section relates to records retention and is not a part of the public records law. An agency's alleged failure to keep sought−after records may not be attacked under the public records law. Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06−2455.

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

A county with a population under 500,000 may by ordinance under s. 19.21 (6), [now s. 19.21 (5)] provide for the destruction of obsolete case records maintained by the county social services agency under s. 48.59 (1). 70 Atty. Gen. 196.

A VTAE (technical college) district is a "school district" under s. 19.21 (7) [now s. 19.21 (6)]. 71 Atty. Gen. 9.

19.22 Proceedings to compel the delivery of official property. (1) If any public officer refuses or neglects to deliver to his or her successor any official property or things as required in s. 19.21, or if the property or things shall come to the hands of any other person who refuses or neglects, on demand, to deliver them to the successor in the office, the successor may make complaint to any circuit judge for the county where the person refusing or neglecting resides. If the judge is satisfied by the oath of the complainant and other testimony as may be offered that the property or things are withheld, the judge shall grant an order directing the person so refusing to show cause, within some short and reasonable time, why the person should not be compelled to deliver the property or things.

(2) At the time appointed, or at any other time to which the matter may be adjourned, upon due proof of service of the order issued under sub. (1), if the person complained against makes affidavit before the judge that the person has delivered to the person's successor all of the official property and things in the person's custody or possession pertaining to the office, within the person's knowledge, the person complained against shall be discharged and all further proceedings in the matter before the judge shall cease.

(3) If the person complained against does not make such affidavit the matter shall proceed as follows:

(a) The judge shall inquire further into the matters set forth in the complaint, and if it appears that any such property or things are withheld by the person complained against the judge shall by warrant commit the person complained against to the county jail, there to remain until the delivery of such property and things to the complainant or until the person complained against be otherwise discharged according to law.

(b) If required by the complainant the judge shall also issue a warrant, directed to the sheriff or any constable of the county, commanding the sheriff or constable in the daytime to search such places as shall be designated in such warrant for such official property and things as were in the custody of the officer whose term of office expired or whose office became vacant, or of which the officer was the legal custodian, and seize and bring them before the judge issuing such warrant.

(c) When any such property or things are brought before the judge by virtue of such warrant, the judge shall inquire whether the same pertain to such office, and if it thereupon appears that the property or things pertain thereto the judge shall order the delivery of the property or things to the complainant.

History: 1977 c. 449; 1991 a. 316; 1993 a. 213.

19.23 Transfer of records or materials to historical society. (1) Any public records, in any state office, that are not required for current use may, in the discretion of the public records board, be transferred into the custody of the historical society, as provided in s. 16.61.

(2) The proper officer of any county, city, village, town, school district or other local governmental unit, may under s. 44.09 (1) offer title and transfer custody to the historical society of any records deemed by the society to be of permanent historical importance.

(3) The proper officer of any court may, on order of the judge of that court, transfer to the historical society title to such court records as have been photographed or microphotographed or which have been on file for at least 75 years, and which are deemed by the society to be of permanent historical value.

(4) Any other articles or materials which are of historic value and are not required for current use may, in the discretion of the department or agency where such articles or materials are located, be transferred into the custody of the historical society as trustee for the state, and shall thereupon become part of the permanent collections of said society.

History: 1975 c. 41 s. 52; 1981 c. 350 s. 13; 1985 a. 180 s. 30m; 1987 a. 147 s. 25; 1991 a. 226; 1995 a. 27.

19.24 Refusal to deliver money, etc., to successor. Any public officer whatever, in this state, who shall, at the expiration of the officer's term of office, refuse or willfully neglect to deliver, on demand, to the officer's successor in office, after such successor shall have been duly qualified and be entitled to said office according to law, all moneys, records, books, papers or other property belonging to the office and in the officer's hands or under the officer's control by virtue thereof, shall be imprisoned not more than 6 months or fined not more than $100.

History: 1991 a. 316.

19.25 State officers may require searches, etc., without fees. The secretary of state, treasurer and attorney general, respectively, are authorized to require searches in the respective offices of each other and in the offices of the clerk of the supreme court, of the court of appeals, of the circuit courts, of the registers of deeds for any papers, records or documents necessary to the discharge of the duties of their respective offices, and to require copies thereof and extracts therefrom without the payment of any fee or charge whatever.

History: 1977 c. 187, 449.

19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, con-

sistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

History: 1981 c. 335, 391.

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

Although the requester referred to the federal freedom information act, a letter that clearly described open records and had all the earmarkings of an open records request was in fact an open records request and triggered, at minimum, a duty to respond. ECO, Inc. v. City of Elkhorn, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510, 02–0216.

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

The Wisconsin public records law. 67 MLR 65 (1983).

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

The public records law and the Wisconsin department of revenue. Boykoff. WBB Dec. 1983.

The Wis. open records act: an update on issues. Trubek and Foley. WBB Aug. 1986.

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

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

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

19.32 Definitions. As used in ss. 19.33 to 19.39:

(1) "Authority" means 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 except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long–term care district under s. 46.2895; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; or a formally constituted subunit of any of the foregoing.

(1b) "Committed person" means a person who is committed under ch. 51, 971, 975 or 980 and who is placed in an inpatient treatment facility, during the period that the person's placement in the inpatient treatment facility continues.

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

(1c) "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. 973.09 (4) as a condition of placement, during the period of confinement for which the person has been sentenced.

(1d) "Inpatient treatment facility" means any of the following:

(a) A mental health institute, as defined in s. 51.01 (12).

(c) A facility or unit for the institutional care of sexually violent persons specified under s. 980.065.

(d) The Milwaukee County mental health complex established under s. 51.08.

(1de) "Local governmental unit" has the meaning given in s. 19.42 (7u).

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

(1e) "Penal facility" means a state prison under s. 302.01, county jail, county house of correction or other state, county or municipal correctional or detention facility.

(1m) "Person authorized by the individual" means the parent, guardian, as defined in s. 48.02 (8), or legal custodian, as defined in s. 48.02 (11), of a child, as defined in s. 48.02 (2), the guardian of an individual adjudicated incompetent in this state, the personal representative or spouse of an individual who is deceased, or any person authorized, in writing, by the individual to exercise the rights granted under this section.

(1r) "Personally identifiable information" has the meaning specified in s. 19.62 (5).

(2) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information 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. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

(2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.

(3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

(4) "State public office" has the meaning given in s. 19.42 (13), but does not include a position identified in s. 20.923 (6) (f) to (gm).

History: 1981 c. 335; 1985 a. 26, 29, 332; 1987 a. 305; 1991 a. 39, 1991 a. 269 ss. 26pd, 33b; 1993 a. 215, 263, 491; 1995 a. 158; 1997 a. 79, 94; 1999 a. 9; 2001 a. 16; 2003 a. 47; 2005 a. 387; 2007 a. 20.

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

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

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

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

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

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

"Record" in sub. (2) and s. 19.35 (5) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. Stone v. Board of Regents of the University of Wisconsin, 2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d 774, 06–2537.

A municipality's independent contractor assessor was not an authority under sub. (1) and was not a proper recipient of an open records request. In this case, only the municipalities themselves were the "authorities" for purposes of the open records

law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

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

In determining whether a document is a record under sub. (2), the focus is on the content of the document. To be a record, the content of the document must have a connection to a government function. In this case, the contents of teachers' personal e–mails had no connection to a government function and therefore are not records under sub. (2). The contents of personal e–mails could, however, be records under the public records law under certain circumstances. Schill v. Wisconsin Rapids School District, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, 08–0967.

"Records" must have some relation to the functions of the agency. 72 Atty. Gen. 99.

The treatment of drafts under the public records law is discussed. 77 Atty. Gen. 100.

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

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

(2) The chairperson of a committee of elected officials, or the designee of the chairperson, is the legal custodian of the records of the committee.

(3) The cochairpersons of a joint committee of elected officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.

(4) Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employees of the authority entrusted with records subject to the legal custodian's supervision.

(5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.

(6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.

(7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.

(8) No elected official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee's records by rule or by law.

History: 1981 c. 335.

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

19.34 Procedural information. (1) Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the authority that constitutes a local public office or a state public office. This subsection does not apply to members of the legislature or to members of any local governmental body.

(2) (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.

(b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:

1. Permit access to its records upon at least 48 hours' written or oral notice of intent to inspect or copy a record; or

2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

(c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.

(d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day's notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

History: 1981 c. 335; 2003 a. 47.

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

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

History: 2003 a. 47.

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

19.35 Access to records; fees. (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual, has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy a record under this paragraph does not apply to any of the following:

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

court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

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

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85 (2) (bg), juvenile correctional facility, as defined in s. 938.02 (10p), secured residential care center for children and youth, as defined in s. 938.02 (15g), mental health institute, as defined in s. 51.01 (12), center for the developmentally disabled, as defined in s. 51.01 (3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

3. Any record that is part of a records series, as defined in s. 19.62 (7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(b) Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits photocopying, the authority having custody of the record may, at its option, permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio tape recording a copy of the tape recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video tape recording a copy of the tape recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36 (8) (b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Notwithstanding par. (b) and except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (c) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) FEES. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds $5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.

(g) Notwithstanding par. (a), if a record is produced or collected by a person who is not an authority pursuant to a contract entered into by that person with an authority, the authorized fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the

record incurred by the person who makes the reproduction or transcription, unless a fee is otherwise established or authorized to be established by law.

(4) TIME FOR COMPLIANCE AND PROCEDURES. (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37 (1) or upon application to the attorney general or a district attorney.

(c) If an authority receives a request under sub. (1) (a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1) (a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1) (a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1) (a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1) (am) and grant or deny the request accordingly.

(5) RECORD DESTRUCTION. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under s. 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

(6) ELECTED OFFICIAL RESPONSIBILITIES. No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official.

(7) LOCAL INFORMATION TECHNOLOGY AUTHORITY RESPONSIBILITY FOR LAW ENFORCEMENT RECORDS. (a) In this subsection:

1. "Law enforcement agency" has the meaning given s. 165.83 (1) (b).

2. "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.

3. "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.

(b) For purposes of requests for access to records under sub. (1), a local information technology authority that has custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology usage is not the legal custodian of the record. For such purposes, the legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.

(c) A local information technology authority that receives a request under sub. (1) for access to information in a law enforcement record shall deny any portion of the request that relates to information in a local law enforcement record.

History: 1981 c. 335, 391; 1991 a. 39, 1991 a. 269 ss. 34am, 40am; 1993 a. 93; 1995 a. 77, 158; 1997 a. 94, 133; 1999 a. 9; 2001 a. 16; 2005 a. 344; 2009 a. 259, 370.

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

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

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

This section is a statement of the common law rule that public records are open to public inspection subject to common law limitations. Section 59.14 [now 59.20 (3)] is a legislative declaration granting persons who come under its coverage an absolute right of inspection subject only to reasonable administrative regulations. State ex rel. Bilder v. Town of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

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

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

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

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

The right to inspection and copying of public records in decentralized offices is discussed. 61 Atty. Gen. 12.

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

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

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

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

The scope of the duty of the governor to allow members of the public to examine and copy public records in his custody is discussed. 63 Atty. Gen. 400.

The public's right to inspect land acquisition files of the department of natural resources is discussed. 63 Atty. Gen. 573.

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

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

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

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

The right to examine and copy computer−stored information is discussed. 68 Atty. Gen. 231.

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

NOTE: The following annotations relate to s. 19.35.

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

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

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

To upheld a custodian's denial of access, an appellate court will inquire whether the trial court made a factual determination supported by the record of whether docu-

ments implicate a secrecy interest, and, if so, whether the secrecy interest outweighs the interests favoring release. Milwaukee Journal v. Call, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

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

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

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

Records relating to pending claims against the state under s. 893.82 need not be disclosed under s. 19.35. Records of non−pending claims must be disclosed unless an *in camera* inspection reveals that the attorney−client privilege would be violated. George v. Record Custodian, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

The public records law confers no exemption as of right on indigents from payment of fees under (3). George v. Record Custodian, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access under sub. (3). Journal/Sentinel v. School District of Shorewood, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio−economic background was not a request for personally identifiable information, and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). Osborn v. Board of Regents of the University of Wisconsin System, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00−2861.

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

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

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

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

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

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

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

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

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

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

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

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

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

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

Information that is otherwise accessible under the public records law may be redacted if it is attorney−client privileged. An authority seeking to redact information from records that are otherwise accessible under the public records law has the burden to show that the redactions are justified. Billing records are communications from the attorney to the client and revealing the records may violate the attorney−client privilege, but only if the records would directly or indirectly reveal the substance of the client's confidential communications to the lawyer. Juneau County Star−Times v. Juneau County, 2011 WI App 150, 337 Wis. 2d 710, 807 N.W.2d 655, 10−2313.

Under sub. (3) the legislature provided four tasks for which an authority may impose fees on a requester: "reproduction and transcription," "photographing and photographic processing," "locating," and "mailing or shipping." For each task, an

authority is permitted to impose a fee that does not exceed the "actual, necessary and direct" cost of the task. The process of redacting information from a record does not fit into any of the four statutory tasks. Milwaukee Journal Sentinel v. City of Milwaukee, 2012 WI 65, ___ Wis. 2d ___, 815 N.W.2d 367, 11−1112.

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

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

The fee for copying public records is discussed. 72 Atty. Gen. 150.

Public records relating to employee grievances are not generally exempt from disclosure. Nondisclosure must be justified on a case−by−case basis. 73 Atty. Gen. 20.

The disclosure of an employee's birthdate, sex, ethnic heritage, and handicapped status is discussed. 73 Atty. Gen. 26.

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

Prosecutors' case files are exempt from disclosure. 74 Atty. Gen. 4.

The relationship between the public records law and pledges of confidentiality in settlement agreements is discussed. 74 Atty. Gen. 14.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

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

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

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

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

19.356 Notice to record subject; right of action. **(1)** Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

(2) (a) Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:

1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment−related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

(b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. 111.

(c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. 106.54 or 230.45 or subch. II of ch. 111 if the record is provided by an authority having responsibility for that function.

(d) Paragraph (a) does not apply to the transfer of a record by the administrator of an educational agency to the state superintendent of public instruction under s. 115.31 (3) (a).

(3) Within 5 days after receipt of a notice under sub. (2) (a), a record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the requested record.

(4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2) (a). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.

(6) The court, in an action commenced under sub. (4), may restrain the authority from providing access to the requested record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.

(7) The court, in an action commenced under sub. (4), shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

(8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law. An appeal shall be taken within the time period specified in s. 808.04 (1m).

(9) (a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

(b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

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

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

The right of a public employee to obtain de novo judicial review of an authority's decision to allow public access to certain records granted by this section is no broader than the common law right previously recognized. It is not a right to prevent disclo-

sure solely on the basis of a public employee's privacy and reputational interests. The public's interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling. Local 2489 v. Rock County, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03–3101.

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

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

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

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

19.36 Limitations upon access and withholding.

(1) APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

(2) LAW ENFORCEMENT RECORDS. Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

(3) CONTRACTORS' RECORDS. Subject to sub. (12), each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

(4) COMPUTER PROGRAMS AND DATA. A computer program, as defined in s. 16.971 (4) (c), is not subject to examination or copying under s. 19.35 (1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

(5) TRADE SECRETS. An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90 (1) (c).

(6) SEPARATION OF INFORMATION. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS. (a) In this section, "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 to an authority for appointment to any state position, except a position in the classified service, or to any local public office. "Final candidate" includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the office or position by an authority, and whenever there are less than 5 candidates for an office or position, each such candidate. Whenever an appointment is to be made from a group of more than 5 candidates, "final candidate" also includes each candidate in the group.

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

(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS. (a) In this subsection:

1. "Informant" means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:

a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.

b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.

2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b), and includes the department of corrections.

(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

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

(10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

(a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

(d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjust-

ments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records, except to an individual to the extent required under s. 103.13, containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

(12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority shall not provide access to a record prepared or provided by an employer performing work on a project to which s. 66.0903, 103.49, or 103.50 applies, or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, "personally identifiable information" does not include an employee's work classification, hours of work, or wage or benefit payments received for work on such a project.

(13) FINANCIAL IDENTIFYING INFORMATION. An authority shall not provide access to personally identifiable data that contains an individual's account or customer number with a financial institution, as defined in s. 134.97 (1) (b), including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

History: 1981 c. 335; 1985 a. 236; 1991 a. 39, 269, 317; 1993 a. 93; 1995 a. 27; 2001 a. 16; 2003 a. 33, 47; 2005 a. 59, 253; 2007 a. 97; 2009 a. 28; 2011 a. 32.

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

Sub. (2) does not require providing access to payroll records of subcontractors of a prime contractor of a public construction project. Building and Construction Trades Council v. Waunakee Community School District, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1999), 97−3282.

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

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio−economic background was not a request for personally identifiable information and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under under s. 19.35 (1) (L). Osborn v. Board of Regents of the University of Wisconsin System, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00−2861.

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

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

Invoices generated by a county's insurance defense counsel were "collected under" the insurance contract by the insurer as that term is used in sub. (3). There is no reasonable argument that under the terms of the insurance contract the parties did not anticipate the insurer's collection of invoices from a law firm in the event that a defense was necessary. Juneau County Star−Times v. Juneau County, 2011 WI App 150, 337 Wis. 2d 710, 807 N.W.2d 655, 10−2313.

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

Separation costs must be borne by the agency. 72 Atty. Gen. 99.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

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

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

Public access to law enforcement records. Fitzgerald. 68 MLR 705 (1985).

19.365 Rights of data subject to challenge; authority corrections. (1) Except as provided under sub. (2), an individual or person authorized by the individual may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if the individual is authorized to inspect the record under s. 19.35 (1) (a) or (am) and the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

History: 1991 a. 269 ss. 27d, 27e, 35am, 37am, 39am.

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(1m) TIME FOR COMMENCING ACTION. No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

(1n) NOTICE OF CLAIM. Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds

that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

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

History: 1981 c. 335, 391; 1991 a. 269 s. 43d; 1995 a. 158; 1997 a. 94.

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. State ex rel. Vaughan v. Faust, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs under sub. (2). Racine Education Association. v. Racine Board of Education, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988).

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

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

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

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2). A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

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

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

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

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

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

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

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

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

History: 1981 c. 335.

SUBCHAPTER III

CODE OF ETHICS FOR PUBLIC OFFICIALS AND EMPLOYEES

19.41 Declaration of policy. (1) It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

(2) It is the intent of the legislature that in its operations the board shall protect to the fullest extent possible the rights of individuals affected.

History: 1973 c. 90; Stats. 1973 s. 11.01; 1973 c. 334 s. 33; Stats. 1973 s. 19.41; 1977 c. 277.

19.42 Definitions. In this subchapter:

(1) "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

(3) "Board" means the government accountability board.

(3m) "Candidate," except as otherwise provided, has the meaning given in s. 11.01 (1).

(3s) "Candidate for local public office" means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a local public official or any individual who is nominated for the purpose of appearing on the ballot for election as a local public official through the write–in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4) "Candidate for state public office" means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a state public official or any individual who is nominated for the purpose of appearing on the ballot for election as a state public official through the write–in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4g) "Clearly identified," when used in reference to a communication containing a reference to a person, means one of the following:

(a) The person's name appears.

(b) A photograph or drawing of the person appears.

(c) The identity of the person is apparent by unambiguous reference.