2017 LEGAL UPDATE

WISCONSIN COUNTIES ASSOCIATION

WERC UPDATE

&

PUBLIC RECORDS AND OPEN MEETINGS

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I. WERC UPDATE AND RECENT LABOR RELATIONS DECISIONS

A. State Budget Proposed Changes

1. Reduction of Staff

2. Changes to the Commission

B. **HEALTH INSURANCE PLAN DESIGN.** ***CITY OF MONONA*** – WERC Decision No. 36748 (11/2016)

1. **Background:** In the wake of Act 10, the ability to bargain over health insurance issues in public safety units was limited by 2011 Act 32. That law provided that bargaining over the design and selection of health care coverage plans and the impact of the design and selection of the health care coverage plans on wages hours and conditions was a ***prohibited subject of bargaining.***

2. Litigation followed in various forums between municipal employers and unions over what constitutes plan design. For example, in one case, the WERC determined that caps on ***deductibles*** related to plan design, but the Wisconsin Court of Appeals reversed. See *WPPA v. WERC,* 352 Wis.2d. 218; 841 N.W.2d 839.

3. With the continuing litigation over the plan design issues, the Wisconsin legislature sought to clarify the original language regarding the negotiations of health insurance issues. Section 111.70(4)(mc), with the exception of ***employee premium contributions,*** now prohibits the parties from bargaining (1) all costs and payments associated with health care coverage plans (2) the design and selection of health care coverage plans and (3) the impact of such.

4. **Facts:** The City of Monona and its Firefighter unit were bargaining for a successor agreement to their 2015-2016 Agreement. The existing contract had language that provided payment by the City in the amount of the cost of the single health insurance premium into a deferred compensation account for those employees who ***opted out*** of taking health insurance. The union proposed a modification to the opt out payment amount. The City filed a Petition for Declaratory Ruling with the WERC to determine whether or not both the existing opt out language and the proposed opt language were prohibited subjects of bargaining.

5. **Decision:** The WERC found in favor of the City. The WERC found that the opt out payment was prohibited by all three of the prohibitions set forth under the revised statute.

C. **INVESTIGATION AND DISCIPLINE OF THE UNION LEADERSHIP. *CLARK COUNTY-*** WERC Dec. No. 35793-B (08/2016)

1. **Background**: R. Faude was employed by the County from 2006 until she was terminated on November 16, 2014. In her capacity as union steward, Ms. Faude met with the County's Health Care Center Administrator to discuss grievances and employee concerns for greater than three years prior to Faude's termination. The frequency of the meetings increased following the enactment of Act 10. With the changes from Act 10, the union remained certified and was limited to bargaining base wages. Ms. Faude was terminated for workplace misconduct on November 16, 2014 stemming from various incidents in June and July, 2014. Ms. Faude filed a prohibited practice complaint alleging her termination was retaliation for her role as a union steward.

2. **Facts:** Ms. Faude was found to be an aggressive advocate when raising workplace issues. She had done so for three years prior to her termination without negative employment consequences. During June and July 2014, Faude was obstructive and argumentative during shift change meetings which caused the meetings to go beyond the scheduled time and resulted in overtime costs to HCC. Faude's discontent related to: patient care; her belief that the HCC physician was not providing quality care to one patient in particular; and her belief that resident needs were not being met. She had a history of prior discipline including oral and written reprimands as well as suspensions. Prior to her termination, Ms. Faude was placed on administrative leave and the County engaged outside counsel to do an investigation.

3. **Decision:** The initial decision of the WERC Hearing Examiner found that although there were "legitimate bases for Faude's termination, the County was partially motivated to terminate her by hostility toward her lawful concerted activity. The Hearing Examiner ordered reinstatement and that Ms. Faude be made whole. The County appealed to the WERC. The WERC overturned the Hearing Examiner finding that no violations occurred and upheld the termination. Faude had engaged in workplace misconduct justifying the termination.

D. **LOSS OF CREDENTIALS.** ***Local 311, IAFF v. City of Sun Prairie*****,** A/P M-14-026 (Arbitrator Richard McLaughlin, 2/17/15 and 1/19/17). State regulations (Chapter DHS 110, Wis. Administrative Code) provide that an employee must be certified or licensed as an EMT by the Department and must be credentialed by each "emergency service provider" in order to "perform emergency medical care." However, the regulations also state: "The termination or withdrawal of an individual's credential does not by itself affect the individual's certificate or license."

1. The City's EMS Director alleged specific concerns whereby the two employees (1) did not implement appropriate medical protocols in an appropriate, effective and timely manner; (2) failed to recognize cardiac rhythms; (3) did not meet standards of professionalism and empathy; and (4) engaged in deceptive practices.

2. While there are many facts that add to the complexity of this case, essentially it involves the City's decision to terminate two EMS employees for their patient care decisions and actions taken on one emergency call and the medical director's decision to withdraw the credentials of both employees to work as paramedics under her license.

3. The Arbitrator concluded: "The investigation was not a disinterested attempt to determine fact. It neither generated, nor sought to generate, a chronology based on reliable evidence."

4. The Arbitrator concluded that the City found "no substantial evidence" that the two employees "engaged in unprofessional conduct not amenable to training." Therefore, the Arbitrator concluded that perhaps an oral or written warning, along with training and counseling, would have been appropriate as opposed to discharge.

5. Both parties agreed that the remedy must make the two employees whole and reinstatement was not available. Therefore, front pay could be considered. After reviewing the calculations and arguments, Arbitrator McLaughlin granted one employee about $168,000 in back pay and $140,000 in front pay. The other employee received about $124,000 in back pay and $189,000 in front pay. The front pay amounts are based on approximately three years of salary.

6. Upon appeal to circuit court, the arbitrator's decision was upheld.

E. **LAST CHANCE AGREEMENTS** ***Beck v. City of Fond du Lac PFC***, Case No. 2016 CV 423 (Fond du Lac Cir. Ct., 02/2017). With the exception of oral and written reprimands, discipline of police officers and firefighters are subject to statutory procedures and hearings before a PFC, an appointed hearing body or a hearing officer. Litigation and legislation occurred for years and the law changed several times as to whether or not such discipline would be subject to a grievance procedure. Also in the wake of legislation, the law now prohibits such discipline being determined through a grievance arbitration provision of a collective bargaining agreement. The rights of the PFC to determine discipline cannot be bargained away.

1. In 2014, Police Officer Beck entered into a Discipline and Last Chance Agreement negotiated between Beck's attorney and an Assistant City Attorney for the City. Beck served a twenty day disciplinary suspension and agreed that if he engaged in similar conduct he would be subject to termination. If there was a dispute over the facts of the subsequent incident, the parties would have that resolved by the Wisconsin Employment Relations Commission. Beck engaged in subsequent acts in 2015 that the City believed were in violation of the Last Chance Agreement. Beck agreed to resign, but under protest. He subsequently challenged the severance as a constructive discharge claiming the Last Chance Agreement was unenforceable. On appeal to the circuit court, the circuit court agreed with Beck, reinstated him and indicated that discipline could only follow a hearing before the City's Police & Fire Commission. (Judge Siefert Decision). This decision challenging the Last Chance Agreement and resignation is under appeal.

2. Upon the advice of the circuit court, the City filed Charges over Beck's 2015 incident with the Police & Fire Commission. Following a hearing, the PFC upheld Beck's termination. Beck appealed his termination to circuit court. This time the circuit court dismissed Beck's appeal since he failed to serve the Secretary of the Commission, a requirement under the 62.13, Stats. (Judge Grimm Decision).

I. PUBLIC RECORDS AND OPEN MEETINGS OVERVIEW

A. Understanding Wisconsin as a Blue Sky State

B. Understanding the breadth of Wisconsin's Public Records and Open Meetings Laws

C. Understanding the climate around the country regarding government records contained on or created using personal devices.

II. THE PUBLIC RECORDS LAW

A. Wisconsin's Public Records Law

1. One of the most important jobs of the custodian of records is to maintain and provide the public with access to records.

2. Section 19.31, Wis. Stat. states:

> [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. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

3. Wisconsin's Supreme Court has held that in every case, the public's interest in disclosing the record weighs heavily. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

4. The application of Public Records Law is expansive. It applies to any record that relates to a government employee's job regardless of the time and location the record is created. Definition of Record § 19.32(2), Wis. Stats.

> "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on

which electronically generated or stored data is recorded or preserved. "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

5. The Attorney General and Courts have treated the scope of the definition of a record as broad and the exceptions to the definition of record as narrow.

B. **Social media and personal accounts**

1. It's the Content, not the Format. Communications relating to government business, from whatever source, generally are public records unless an exception applies. When employees communicate through public employer-based resources, such as email or public employer sponsored web pages, such records become are subject to public records law. If an employee communicates outside of employer resources for the purposes of conducting business of the public employer, such information is a public record subject to production.

2. Retention rules apply. Employees who use personal email or engage in social networking using their own personal resources, as opposed to resources of their government employer, or who use personal text messages to communicate with employees and the public about government business must also be mindful that such communications compromise the employee's, as well as the government employer's, ability to retain public records in accordance with the requirements of Wisconsin's public records laws.

3. War Stories.

   a. Government business and the Yahoo account—Sarah Palin's predicament. The Alaska Supreme Court found such records made using a personal Yahoo account constitute public records.

   b. Secretary Clinton's emails and her private server.

   c. Obama White House Science Advisor

d. Many other examples throughout the country at the local government level, typically furthering the high costs of fallout from a political or an employment dispute.

4. What do Wisconsin Courts have to say about it?

a. Personal email communications. *Schill v. Wisconsin Rapids School District*, 2010 WI 86. A three-member Lead Opinion of the Wisconsin Supreme Court and one concurring Justice concluded that a records custodian should not release the content of an email that is purely personal and evinces no violation of law or policy. The law regarding whether a purely personal email communication made using government resources is a record subject to disclosure under the Open Records Law is not clear as a result of the *Schill* decision. Only the following is clear:

(i) Management's right to review personal email communications is not disrupted. The Court explicitly stated that this decision has no impact on management's right to "monitor, review, or have access to the personal emails of public employees [on] the government's email system."

(ii) Any exemption to the public records law is to be applied narrowly.

(iii) Four Justices determined that a records custodian should not release the content of an employee's email that is purely personal and evinces no violation of law or policy. Only three Justices found that personal email communications made by an employee using government equipment are not "records" as defined under the Open Records Law. The remaining four Justices found that personal email communications made by employees using government equipment are "records" and are subject to the requirements of the Open Records Law. The two concurring Justices and two dissenting Justices, however, were split as to whether they would order release of the personal email records.

(iv) All seven Justices were in agreement that the content of personal emails could render a particular personal email as a record subject to disclosure under the Open Records Law. The Lead Opinion and Dissent noted that personal emails used as evidence in an internal investigation or to investigate the misuse of government resources would make those records subject to disclosure under the law.

They also reaffirmed the public's interest in monitoring how government resources are used by government employees and in reviewing the conduct of disciplinary investigations. This public interest would favor disclosure of personal email communications pertaining to the investigation of allegations of misconduct.

(v) This decision provides little legal guidance as this Court very well could reach an entirely different decision if personal email communications in dispute involved potential misconduct by the government employee or been evidence pertaining to an investigation by the employer.

(vi) Records custodians must still review each email correspondence in response to an open records request to evaluate whether that email constitutes a record subject to disclosure and then whether the record should be disclosed in part or in full.

b. The public has a right to know who is attempting to influence government. *The John K. MacIver Institute for Public Policy Inc. v. Erpenbach*, 2014 WI App 9. The Court of Appeals Stated:

> Public awareness of "who" is attempting to influence public policy is essential for effective oversight of our government. For example, if a person or group of persons who has played a significant role in an elected official's election—by way of campaign contributions or other support—contacts a lawmaker in favor of or opposed to proposed legislation, knowledge of that information is in the public interest; perhaps even more so if the person or group also stands to benefit from or is at risk of being harmed by the legislation. Disclosure of information identifying the sender may assist in revealing such a connection. Here, for example, the circuit court observed that "Act 10 personally affected all government employees" and Erpenbach acknowledged in his affidavit that Act 10 "directly affected [the] rights and obligations" of the public employees who e-mailed him. The Institute asserts that "there are a number of form e-mails that make up a substantial amount of the e-mails received by Senator Erpenbach" and that this, along with the content of the e-mails, suggests coordinated activity by public employee unions to affect the outcome of Act 10. Disclosure of the redacted information sought here can provide the public with knowledge and insight regarding who was attempting, either individually or in an organized fashion, to influence the public policy changes under consideration and thereby assist the public in performing its important government oversight function. . . . . Whether

government employees, another public official, a lobbyist, the CEO or employees of a corporation, the president or members of a union, or other individuals supporting or opposing a particular interest, awareness of who is attempting to influence public policy is of significant interest to the public.

It is also of public interest to know from "where" the sender is attempting to influence public policy. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government (. . .), a private entity (. . .), or a nonprofit organization (. . .), or from individuals who may be associated with a specific interest or particular area of the state, from "where" a communication is sent further assists the public in understanding who is attempting to influence public policy and why. Thus, the redacted information identifying "who" sent e-mails attempting to influence public policy and from "where" the e-mails were sent is not "purely personal," and the public has a strong interest in disclosure of such information.

5. Social Websites. *Informal Attorney General Opinion from Attorney General J.B. Van Hollen to Gail A. Peckler-Dziki* (Dec. 23, 2009)

a. *Is the content of a government official's social website called "Making Salem Better" a public record*?

(i) Given that the website entitled "Making Salem Better" is operated by the individual serving as Salem town chair, and includes a discussion of town business involving numerous other individuals, it is reasonable to presume that the website has at least some relation to [the] office.

(ii) The Wisconsin public records law does not draw a distinction between the personal and public capacity of elected officials at the time of the record's creation, but rather looks to the content of the information in question. "It is the rule independently of the statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office."

(iii) Gathering and presenting information about town business to persons in the town is certainly [the Town Chairperson's] official functions as is receiving and responding to their concerns. . . . [U]sing this website as a

vehicle to communicate with constituents about town governance and operational matters.

(iv) A website created by [the Town Chairperson] on her own computer and at her own expense that included purely personal content (*e.g.*, sharing pictures of family vacations, or solely limited to a political campaign), would likely not constitute a record, nor might her comments in a restricted group website to which she belonged in her personal capacity.

(v) As noted above, this opinion is limited to the factual situation presented. There are likely circumstances where a public official may, in fact, generate documents in a non-official capacity that would not meet the definition of a "record" under the public records law, even though the documents make some reference to the public official's duties or functions. While it is not necessary, at this time, to articulate a precise standard for resolving any such issues, there are a number of factors that would need to be considered. These factors would include, but not be limited to: (a) a recognition that even elected officials have a constitutional right to engage in First Amendment activities and to privacy; (b) whether public resources were used; (c) whether the public official had a definable, non-public capacity to which the alleged record relates (*i.e.*, is he/she acting as a candidate, a family member, a director of a private corporation, an educator, etc.); (d) whether a reasonable member of the public would view the related activity as a public function; (e) whether the recipients of the alleged record are limited to "personal" contacts; (f) whether the alleged record was generated at a time, place, and in a manner, in which public business is normally conducted; and (g) the purposes for which the document was created, kept, or maintained.

b. *May a public official maintain a private website with access provided only to certain individuals*?

(i) Under section 19.35(1)(b) of the Wisconsin Statutes, "any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form." . . . [C]opies of records provided [must] be "substantially as readable," "audible," or "as good" as the originals. By analogy, making available publicly the information contained within "Making Salem Better" ought

to be a sufficient response to a public records request if one was made.

(ii) The "right to inspect" covers having access to and copies of record information, but not necessarily the right to participate in the discussion as a member of the Google group. There may be other ways of accommodating a right of access including provision of "read only" access to the website, or providing a copy of the website's contents on paper or in electronic format.

6. Personal Devices. A recent California decision provides substantial information about how courts may approach requests for records contained within personal devices. *City of San Jose v. Smith*, (March 2, 2017).

Both sides cite policy considerations to support their interpretation of the "public records" definition. The City argues the definition reflects a legislative balance between the public's right of access and individual employees' privacy rights, and should be interpreted categorically. Smith counters that privacy concerns are properly addressed in the case-specific application of CPRA's exemptions, not in defining the overall scope of a public record. Smith also contends any privacy intrusion resulting from a search for records in personal accounts can be minimized through procedural safeguards. Smith has the better of these arguments.

The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private."

It is no answer to say, as did the Court of Appeal, that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is for the public to make that determination, based on information to which it is entitled under the law. Open access to government records is essential to verify that government officials are acting responsibly and held accountable to the public they serve. "Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." The whole purpose of CPRA is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different

email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.

The City counters that the privacy interests of government employees weigh against interpreting "public records" to include material in personal accounts. Of course, public employees do not forfeit all rights to privacy by working for the government. Even so, the City essentially argues that the contents of personal email and other messaging accounts should be categorically excluded from public review because these materials have traditionally been considered private. However, compliance with CPRA is not necessarily inconsistent with the privacy rights of public employees. Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review.

Furthermore, a crabbed and categorical interpretation of the "public records" definition is unnecessary to protect employee privacy. Privacy concerns can and should be addressed on a case-by-case basis. Beyond the definition of a public record, the Act itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda. Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it "clearly outweighs" the public interest in disclosure. This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. The analysis here, as with other exemptions, appropriately focuses on the content of specific records rather than their location or medium of communication.

The City also contends the search for public records in employees' accounts would itself raise privacy concerns. In order to search for responsive documents, the City claims agencies would have to demand the surrender of employees' electronic devices and passwords to their personal accounts. Such a search would be tantamount to invading employees' homes and rifling through their filing cabinets, the City argues. It urges no case has extended CPRA so far.

Arguments that privacy interests outweigh the need for disclosure in CPRA cases have typically focused on the sensitive content of the documents involved, rather than the intrusiveness involved in searching for them. Assuming the search for responsive documents can also constitute an unwarranted invasion of privacy, however, this concern alone does not tip the policy balance in the City's favor. Searches can be conducted in a manner that respects individual privacy.

**Internal citations omitted.*

C. **DPPA.** On May 10, 2016, the Wisconsin Court of Appeals issued its decision in *New Richmond News v. City of New Richmond* and provided some direction to law enforcement agencies for responding to public records requests for law enforcement accident reports and incident reports that contain "personal information" and "highly restricted personal information" from department of motor vehicle records.

1. Three core principles emanate from the Court of Appeals' decision:

   a. Uniform Traffic Accident Reports. Law enforcement agencies can release unredacted uniform traffic accident reports in response to a public records request even if personal information in the accident report came from a DMV record. The Court of Appeals found a DPPA exception permitting public access to this information applied which allows disclosure of personal information if specifically authorized under state law where such use is related to the operation of a motor vehicle or public safety. The Court of Appeals concluded that Wis. Stat. § 346.70(4)(f) specifically authorizes public access to accident reports, such that law enforcement agencies can provide unredacted copies of accident reports without violating the DPPA.

   b. Incident Reports. With regard to incident reports, the Court of Appeals found the DPPA prohibits the release of personal information from a DMV record unless a specific exception in the DPPA allows release. The DPPA only permits release of personal information if one of fourteen narrow exceptions applies, and highly restricted personal information may only be released if one of four narrow exceptions applies. Although the DPPA provides an exception for a government agency to release personal information in a DMV record in carrying out its "functions," the Court concluded that responding to a public records request was not a "function" within the meaning of the DPPA exception. The Court of Appeals remanded this case to the circuit court to address whether one of the exceptions to the DPPA would permit release of personal information from the DMV record if such information came from a DMV record.

   c. Information Verified Using DMV Records. The Court of Appeals found that if personal information was first obtained from other sources and was only verified using DMV records, then that personal information is not prohibited from release by the DPPA.

2. The Court of Appeals decision forces law enforcement agencies to tread carefully in deciding whether to provide or withhold access to personal information and highly restricted personal information. First, law enforcement agencies must release uniform traffic accident reports in

response to a valid public records request—the DPPA does not prohibit release of personal information in those reports when responding to a request under the Public Records Law for such reports. While many agencies have directed requesters to the Department of Transportation to obtain these records, these local law enforcement agencies may release these records.

3. Records other than uniform traffic accident reports present different challenges in determining the appropriate response. In order to apply the Court of Appeals rationale under the DPPA and Public Records Law, a law enforcement agency must know whether the information in the incident report or other law enforcement records was first obtained from a motor vehicle record or from another source. If the personal information was first obtained from a motor vehicle record, then the DPPA prohibits release of that personal information unless one of the fourteen DPPA exceptions applies, and if the information constitutes highly restricted personal information, then the agency must determine whether one of the four exceptions applies. If this information was first obtained from a source and then verified using a motor vehicle record, then the DPPA does not apply and the information may be released unless another statute, common law, or the balancing test prohibits release of the record.

4. Under the public records law, the burden of establishing a legitimate basis to withhold access to the record belongs to the law enforcement agency and not the requester. An agency withholding access under the DPPA must be able to prove the information within the requested record was first obtained from a motor vehicle record if the agency claims the DPPA prohibits release. Likewise, in order to preserve a defense to a DPPA violation claim, a law enforcement agency asserting the DPPA does not apply should be in a position to prove the information was first obtained from a source other than the motor vehicle record and was merely verified using the motor vehicle record.

5. If the DPPA does prohibit release of the requested information, then the requester must demonstrate that he or she meets one of the narrow exceptions to the prohibition of release under the DPPA. If the agency determines the exception applies and releases the personal information from the motor vehicle record, then the agency should identify the applicable exception and inform the requester of the requester's duty to comply with the DPPA relating to use and redisclosure of protected information.

6. Law enforcement officials should also note that even if the DPPA does not apply, there may be other statutory exemptions that prohibit the agency from disclosing certain information under the Public Records Law, such as law enforcement agency records of juveniles. Furthermore, a records custodian must also conduct a balancing test to determine if the public

interest in withholding information in a record outweighs the strong interest in disclosure of public records.

7. *So, what constitutes a motor vehicle record*? This issue was not addressed by the court of appeals in the *New Richmond* Case. The courts have largely danced around this issue, but some recent pronouncements, coupled with the Court of Appeals' strong statements suggest that Departments should tread carefully on this issue and strictly interpret the DPPA when analyzing whether the personal information and highly restricted personal information found, for example, on a driver's license is a motor vehicle record and not subject to release unless an exception applies.

   a. A driver's license is probably a motor vehicle record under 18 USC § 2725(1), which defines "motor vehicle record" as any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.

   b. 18 USC § 2721(a) prohibits a State department of motor vehicles, and any officer, employee, or contractor thereof from knowingly disclosing or otherwise making available to any person or entity the personal information or highly restricted personal information from a motor vehicle record unless one of the exceptions applies.

   c. In 2015, in *Pavone v. Law Offices of Anthony Mancini, Ltd*, the federal district court in Illinois refused to dismiss a lawsuit which alleged the DPPA protected personal information contained in Illinois traffic crash reports, including driver's address, license plate number, and license number, even though the traffic crash reports were not "motor vehicle records" under DPPA, where information in the reports were obtained by police from motor vehicle records produced by Illinois Secretary of State and directly from drivers' licenses. 118 F. Supp. 3d 1004 (N.D. Ill. 2015). The Court stated, "[e]ven if the Secretary of State does not share this information with private parties, it is also plausible that officers obtain the information on the crash reports at issue here from a Secretary of State database. And even if that information is not directly supplied by the Secretary of State, it is plausible that officers who write the crash reports copy the name, license number, and address from the driver's license, which is a motor vehicle record."

D. **OPEN RECORDS LAWS AND INFORMATION ABOUT SEXUAL ASSAULT VICTIMS AND LAW ENFORCEMENT STRATEGIES**. *Democratic Party of Wisconsin v. Wisconsin Dept. of Justice*, 2016 WI 100

1. The law prior to *Democratic Party of Wisconsin v. Wisconsin Dept. of Justice*.

   a. The Wisconsin Constitution provides: "This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy." Wis. Const. art. I, § 9m.

   b. Wisconsin Stat. § 950.04(1v) provides, in part: RIGHTS OF VICTIMS. Victims of crimes have the following rights: (ag) To be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies. This paragraph does not impair the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith.

   c. Wisconsin Stat. § 950.055(1) provides: LEGISLATIVE INTENT. The legislature finds that it is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults. The legislature intends, in this section, to provide these children with additional rights and protections during their involvement with the criminal justice or juvenile justice system. The legislature urges the news media to use restraint in revealing the identity of child victims or witnesses, especially in sensitive cases.

   d. Attorney General Peggy Lautenschlager's opinin to City Attorney Vincent Moschella on April 15, 2005:

Question #5: Is there any legal authority to redact the name of a sexual assault victim from a police report?

Response: If the victim is a juvenile, the response to question no. 4 above applies. Even if the victim is an adult, however, there are a variety of public policies that may favor protecting the identity of a sexual assault victim in many cases. While the balancing test must be applied on a case by case basis, I agree generally with City Attorney Moschella's analysis on this point:

There is no blanket statutory or case law prohibition against such release. Therefore, the balancing test must be applied to each request. The usual factors would apply, including, most importantly, a release which would endanger the victim, as found in Sec. 19.35(1)(am)2.a…[A]s a practical matter, in most instances, respect for the victim's privacy will outweigh any public concerns in the application of the balancing test. Disclosure may…re-victimize the victim by…reopen[ing] emotional wounds caused by the assault, discourage victims' recourse to the judicial system…and subject victims to intimidation by family or friends of the suspect to dissuade the victim from testifying. Furthermore…the protection of the identities of sexual assault victims will encourage the reporting of such traumatic crimes[.]

2. In *Democratic Party of Wisconsin v. Wisconsin Dept. of Justice*, 2016 WI 100, ¶ 1, the Wisconsin Supreme Court analyzed two video-recorded presentations given by Attorney General Brad Schimel as Waukesha County's District Attorney. Both videos, recorded in 2009 and 2013 respectively, were requested by the Democratic Party of Wisconsin during Schimel's election for Attorney General.

   a. Both videos contained presentations given by Schimel at conferences closed to the public, which were attended by prosecutors, victim-rights advocates, and some law enforcement officials from around the state. The 2009 video contained specific litigation strategies for online child exploitation case and discussed common defenses. The 2013 video discussed victim confidentiality and contained prosecutorial strategies, wherein Schimel heavily discussed the details of a high-profile sexual extortion case involving high school students that he prosecuted.

   b. The Democratic Party of Wisconsin stated the basis for their request was to determine if Schimel engaged in misconduct during either presentation by making racial, sexist, or otherwise offensive comments. After having an opportunity to review the tapes, both the circuit court and the Democratic Party of Wisconsin's attorney concluded that no misconduct had occurred during either presentation. Despite reaching this conclusion, the Democratic Party of Wisconsin persisted with its request for the videos.

   c. The court's analysis focused on whether the record custodian's decision to withhold both videos from disclosure was proper given the fact that the videos contained information relating to prosecutorial and law enforcement strategies surrounding both real and fictional sex assault cases involving minors.

   d. With regard to both videos, the Wisconsin Supreme Court reversed the circuit court and court of appeal's decision requiring disclosure, holding that both common-law exceptions and public policy considerations prohibited disclosure of both videos. Additionally, the court held that redaction was improper in this particular scenario because the redaction would have been so extensive as to render an "end result meaningless to the viewer."

   e. With respect to the 2009 video, the Wisconsin Supreme Court began its analysis by recognizing that none of the statutory exceptions set forth in Wis. Stat. §§ 19.31-.39 apply. Thus, the court turned to analyzing common law exceptions and the application of the balancing test, ultimately holding that the public policy factors favoring non-disclosure overcome the presumption in favor of disclosure. *Id*. at ¶ 24.

(i) First, the court held that the common law exception which exempts the contents of a prosecutor's case files from disclosure apply to the 2009 video, as established in *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991). The court reasoned that, per *Foust*, prosecutorial files are exempt from disclosure, even after the case is closed, as disclosure of such information would be "harmful to the orderly administration of justice." *Democratic Party of Wisconsin*, 2016 WI 100, ¶ 12.

(ii) Second, the court held that exemptions set forth in the Freedom of Information Act (FOIA), when coupled with prior caselaw, prohibit disclosure of records that would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. *Id*. at ¶ 13. The court determined that disclosure of the 2009 video would do just that.

(iii) Finally, the court utilized the balancing test and looked to the Wisconsin Constitution and various statutory provisions for public policy considerations in doing so. In particular, the court looked to Article I, Section 9m of the Wisconsin Constitution, which states "[t]his state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy." Additionally, the court looked to Wis. Stat. § 950.055(1), which governs the rights of juvenile crime victims. According to the court, both of these provisions demonstrate a strong public policy interest in protecting the privacy of victims of crime—especially children affected by very sensitive crimes—which weighs heavily in favor of non-disclosure. *Id*. at ¶ 15.

f. With regard to the 2013 video, the court held that public policy factors favoring non-disclosure overcome the presumption in favor of disclosure.

(i) With regard to common law exceptions, the court again applied *Foust*, holding that although the 2013 video was not technically a prosecutor's paper file, the video was essentially an oral file, as Schimel was the prosecutor who handled the sex extortion case that was heavily discussed throughout the video. *Id*. at ¶ 27. Because it is the nature, not the form, of a record that governs disclosure, the court held that it would be illogical to conclude that a paper accounting of a district attorney's discretionary process must be confidential but an oral accounting of the same,

given in a confidential setting, need not. *Id*. Thus, the court concluded that the 2013 video was prohibited from disclosure via common law exceptions alone.

(ii) Despite that conclusion, the court continued on with applying the balancing test to the 2013 to further establish why non-disclosure was proper under Wisconsin's Open Records Law. Upon applying the balancing test, the court concluded that the following public policy considerations weighed in favor of non-disclosure of the 2013 video:

(iii) The content of the video, like the 2009 video, contains prosecution strategies and law enforcement tactics which, if disclosed, would allow for potential skirting of the law by those wishing to commit sexual acts against minors; and

(iv) The video discusses the victims of the sex extortion case and the devastating impact of these crimes, especially after the victims' identities were discovered. Because the victims were minors, the court again looked to Article I, Section 9m of the Wisconsin Constitution and Wis. Stat. § 950.055(1) in determining that strong public policy considerations exist that weigh in favor of protecting the identity of child victims who deserve special treatment and protection under the law.

3. Law Enforcement Strategies

a. *Democratic Party of Wisconsin*, 2016 WI 100, ¶19. "The reason for protecting prosecutorial techniques and local police strategies is obvious: if local criminals learn the specific techniques and procedures used by police and prosecutors, the disclosed information could be used to circumvent the law. The content of the 2009 video falls squarely into this category. Releasing this video would create a significant risk that specific techniques and strategies being used in Wisconsin could instantly be disseminated over the internet and exploited by sexual predators. This information would in essence serve as a textbook enlightening Wisconsin criminals on how to avoid detection, elude capture, and escape conviction. The harm arising from release would substantially impair the ongoing battle police and prosecutors face in protecting children and would impede efforts made to catch and prosecute sexual predators who lurk in the shadows and anonymity of internet websites. Although disclosing this information directly to the Democratic Party alone would not necessarily be harmful, releasing the 2009 video to one effectively renders it public to all, including anyone plotting to use it to circumvent the law. . . . Releasing the 2009 video would frustrate the public policy of investigating and prosecuting criminal activity that in

this instance would cause considerable public harm, which overwhelmingly outweighs any public interest in viewing it."

b. *Democratic Party of Wisconsin*, 2016 WI 100, ¶21. "There is no rule of law protecting only brand new or novel prosecution techniques and police strategies, and there is no evidence that releasing local strategies will not lead to circumvention of the law simply because they are also seen on television crime shows. The Democratic Party does not cite any authority to support its 'novel' argument, and when directly asked for authority for this proposition during oral argument, the Democratic Party's attorney was unable to provide any. Although child predators may know in general terms various techniques taught to and employed by police departments across the country, the specific techniques used by police officers in a particular jurisdiction or geographic area are not necessarily a matter of common public knowledge. A criminal who knows the specific techniques being used locally is much more likely to evade capture than a criminal who, after viewing a crime show, guesses at what techniques local police and prosecutors are using."

4. Victims Interests

a. *Democratic Party of Wisconsin*, 2016 WI 100, ¶29. The "fact that no specific names are used on the video does not render the victims unidentifiable. Disclosing the recording would reignite interest in the case and allow identification in the same way it occurred the first time around. There is sufficient factual detail in the recording to easily connect the dots to identify the dozens of victims, who would be re-traumatized should this case result in a repeat exposure of their identities almost a decade after these events occurred. Disclosure leading to re-victimization would run afoul of Wisconsin's constitutional commitment to treating victims with "fairness, dignity and respect for their privacy." Wis. Const. art. I, § 9m. Further, the victims involved here were all child victims who deserve special treatment and protection with an emphasis on keeping their identities confidential, "especially in sensitive cases." See Wis. Stat. § 950.055(1). This court will "make every effort to minimize further suffering by crime victims." Schilling, 278 Wis. 2d 216, ¶26."

b. *Democratic Party of Wisconsin*, 2016 WI 100, ¶30. Second, the circuit court's reasoning that the victims' reactions to the crimes were "perfectly natural" and would not be surprising to anyone is not a relevant factor in weighing disclosure over nondisclosure. Whether a victim's reaction is natural or excessive should not be a justification for re-traumatizing child victims of sensitive crimes. What must be considered is whether the victims will be re-traumatized by renewed suffering as a result of an additional violation of their privacy.

c. *Democratic Party of Wisconsin*, 2016 WI 100, ¶31. The "fact that a significant amount of the information discussed in the recording had been previously disseminated seven or eight years ago, although 'germane to the balancing test' see Linzmeyer, 254 Wis. 2d 306, ¶37, does not require disclosure. This information was disclosed almost a decade ago. As presented in the affidavit submitted by Jill J. Karofsky, Executive Director of the Office of Crime Victim Services, re-disclosing the details of a case typically re-traumatizes victims. Karofsky asserts that bringing new public attention to a case can be "crushing" for victims who have otherwise moved on from a case. It is not unreasonable—indeed, it comports with common sense—to expect additional harm will be inflicted on the victims every time a case such as this is publicized, especially if done in a high-profile way such as a lawsuit that is pursued through all three levels of Wisconsin's court system with much media attention. Moreover, releasing the 2013 video creates a real risk that future victims will not report crimes and will not cooperate with prosecutors. Effective prosecution depends upon victims reporting in the first instance and cooperating until the end of the case."

5. Redaction. *Democratic Party of Wisconsin*, 2016 WI 100, ¶24 n.10. "While excerpts of the recording may fall beyond the public policy considerations favoring nondisclosure, which ordinarily results in the release of a redacted version under Wis. Stat. § 19.36(6), our viewing of the recording validates the custodian's assessment that a redacted version would be meaningless to the viewer. See John C. v. Martha A., 592 N.Y.S.2d 229, 235-36 (Civ. Ct. 1992) (where "entire court file is permeated with confidential" information, no part can be opened for viewing); cf. Am. Civil Liberties Union v. Dep't of Defense, 543 F.3d 59, 84 (2d Cir. 2008) (affirming district court order releasing certain redacted photographs depicting abuse of detainees at military prison, but mentioning without objection that "[w]here 'individual recognition could not be prevented without redaction so extensive as to render the images meaningless,' the court ordered those photographs to be withheld"), vacated on other grounds 558 U.S. 1042 (noting intervening change in federal law); Harwood v. McDonough, 799 N.E.2d 859, 866-70 (Ill. App. Ct. 2003) (affirming withholding of report under Illinois open records law where trial court "concluded that plaintiff was not entitled to a redacted report . . . if the result of the redaction was a document consisting of blank pages, along with meaningless pronouns and articles such as the words 'and,' 'or,' 'but,' etc."); Kestenbaum v. Mich. State Univ., 327 N.W.2d 783, 788 n.10 (Mich. 1982) (observing that "redaction of the exempt information——names and addresses of students——[under personal privacy exemption in Michigan open records law] would render the computer tape useless to plaintiff Kestenbaum," who sought to use source for university directory to create political mailing list). But cf. State ex rel. Pietrangelo v. Avon Lake, 2016- Ohio-2974, ¶35, 55 N.E.3d 1091 ("As we noted in . . . rejecting the . . . argument that the remainder of a redacted document would be 'meaningless,' there is no 'exception to the explicit duty in

[the Ohio public records law] for public offices to make available all information that is not exempt after redacting the information that is exempt.'" (quoting State ex rel. Anderson v. Vermilion, 2012-Ohio-5320, ¶19, 980 N.E.2d 975)). Meaningless redaction is particularly applicable here where the records consist of video recordings. The nondisclosable content on the videos permeates the recordings, making redaction futile."

III. THE OPEN MEETINGS LAW

A. Overview

1. Section 19.81, Wis. Stat. sets forth the State of Wisconsin's policy perspective regarding meetings of governmental bodies and the need for those meetings to occur in public to the fullest extent:

> (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.

2. Accordingly, governmental bodies are required to do as follows:

   a. Give the public notice of their meetings

b. Reasonably apprise the public of what subject matters will be discussed and acted upon at those meetings.

c. Give that notice with no less than 24 hours notice unless it is impossible or impracticable to provide such notice with good cause.

d. Provide the public reasonable access to those meetings.

e. Comply with the law regarding openness of meetings.

B. **INTERGOVERNMENTAL COOPERATION AND COMPETITIVE BARGAINING INTERESTS.** *State ex rel. Herro v. Village of McFarland*, 2007 WI App. 172, 737 N.W.2d 55. School boards engaging in intergovernmental cooperation and meeting with another governmental body may still rely upon Section 19.85(1)(e), Wis. Stat. even if the reason for going into closed session is not shared by both governmental bodies. Prohibiting government entities from protecting their bargaining interests while simultaneously engaging in intergovernmental cooperation would be incompatible with the conduct of government business and would encourage inefficient government.

C. **BUT ALL PARTS OF THE MEETING MAY NOT BE CLOSED IF ONLY A PORTION IS SUBJECT TO THE 19.85 EXEMPTION.** *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 731 N.W.2d 640. Application of exemptions to the Open Meetings Law must be narrow and only applicable to that portion of the meeting which can be closed under the exemptions.

(i) The desire of a business partner to have the governmental body only discuss its negotiations and the existence of a bargaining relationship in closed session is not a permissible basis for closed session discussion under Section 19.85(1)(e), Wis. Stat.

(ii) The court notably stated, albeit in a footnote: "We fail to see how attracting the attention of other private entities interested in building . . . in the municipality would disserve the [municipality's] competitive or bargaining interests. Indeed, it seems a municipality's competitive or bargaining interests would benefit from competition for a municipal project." ¶14, n. 6.

(iii) Permitting the governed to express opinions about prospective purchases may be time consuming, frustrating, counterproductive and might increase costs. But that is a

cost the legislature has determined is appropriate in light of the public's right to know about the affairs of government.

D. **LOOSE LIPS SINK SHIPS!** An evidentiary privilege does not exist to preclude the discovery of the substance of information discussed in closed meetings of governmental bodies that are properly noticed under Section 19.85(1). *Sands v. Whitnall School District*, 2008 WI 89 *reversing* 2007 WI App. 3, 720 N.W.2d 15. Exemptions to the Open Meetings Law do not create a privilege shielding contents of closed meetings from discovery requests. Allowing limited exceptions to the open meetings statute does not equate to creating an implicit evidentiary privilege against discovery requests. Wisconsin Statute § 19.85 provides only that some meetings may be closed to the public, not that their contents are privileged against discovery requests. In other words, "closed meeting" is not synonymous with "a meeting that, by definition, entails a privilege exempting its contents from discovery." Considering the general presumptions of openness and access underlying both our discovery and open meetings statutes, there is no compelling justification for denying a litigant's rights to discovery regarding the substance of closed session discussions pertaining to that litigant.

E. **ARE STAFF MEETINGS SUBJECT TO THE OPEN MEETINGS LAW? *KRUEGER V. APPLETON AREA SCHOOL DISTRICT* –** Appeal No. 2015AP231 (WI Ct. of Appeals 06/2016) – Oral Arguments made to the Supreme Court (02/15/2017) – Decision Pending.

1. **Background**: Wisconsin's Open Meetings Law notes that "In recognition of the fact that a representative government of the American type of 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. Section 19.81(1), Stats.

2. Under the law, meetings of a governmental body must be preceded by timely notice posted prior to the meeting with the time, date, place and subject matter of the meeting, including that intended for a closed session. The meetings must be accessible to the public. Certain provisions apply for allowing for a closed session. Penalties for violating the law may apply to the governmental body members who participated in the meeting in violation of the law.

3. **Facts:** A parent of the school district requested that the district provide an alternative 9th grade Communication Arts course due to his concern with the content of the current course reading material. The parent wanted an alternative course using more stringent criteria in selecting books. The Superintendent directed some of his staff to review the parent concern. The Superintendent did not direct the staff with any particular process for that review. Neither the parent complaint, the

determination as to what process should be used to review the complaint, nor the actual review of the complaint involved the School Board.

4. The staff put together a review committee to evaluate the books used in the course as the method of addressing the parent complaint. The review committee had 17 members consisting of school administrators, teachers and staff. It held 9 meetings. It had agendas and kept minutes. It eventually reviewed 93 books and eventually forwarded a list of 23 books to the School Board's Programs and Services Committee.

5. While the parent with the original complaint asked to attend the review committee meetings, the meetings were considered internal administrative meetings and not open to the public. The parent sued alleging that the administrative review committee was a governmental body subject to the provisions of the Open Meeting Laws.

6. **Decision**: To date, the circuit court and Court of Appeals have held for the District. The Court held that the committee meetings were not school board meetings, nor directed by the Board or Superintendent by "rule or order." The Wisconsin Supreme Court will decide this case, this term.

IV. CORE PRINCIPLES TO REMEMBER

A. Remember, the law favors openness.

B. How you respond to a requester is key to maintaining good public relations.

C. Cautiously create records. Do not intermingle records containing sensitive personal information with records containing other unrelated governmental business information. Make sure that you understand public records laws and keep personal thoughts and communications separate from communications that are considered public records and on appropriate devices.

D. Clearly communicate, train, and enforce policies so that public employees are aware of and abide by such policies to keep personal or non-public information from being part of the public record.

E. Write well. Consider what your mom would think if she read what you wrote. Read what you write, before you send it.

F. Keep closed sessions narrowly tailored and focused

G. Loose lips do sink ships, and loose lips also generate tremendous legal costs.