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# Resolving Public Records Disputes in Wisconsin: the Role of the Attorney General's Office

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RESOLVING PUBLIC RECORDS DISPUTES IN WISCONSIN:  
THE ROLE OF THE ATTORNEY GENERAL'S OFFICE

by

Jonathan Anderson

A Thesis Submitted in  
Partial Fulfillment of the  
Requirements for the Degree of

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December 2013

ABSTRACT  
RESOLVING PUBLIC RECORDS DISPUTES IN WISCONSIN:  
THE ROLE OF THE ATTORNEY GENERAL'S OFFICE

by

Jonathan Anderson

The University of Wisconsin-Milwaukee, 2013  
Under the Supervision of Professor David Pritchard

This study investigates how the Wisconsin attorney general reviews and sometimes intervenes in access disputes over the state's public records law. The study posed three primary questions: How do the attorney general's administrative review mechanisms operate in practice? To what extent are the mechanisms effective at resolving disclosure disputes? And do the mechanisms help people unable to hire a lawyer to litigate? The study analyzed correspondence in 304 cases over six years to generate data on the quantity and nature of the attorney general's caseload in that time period. The study also interviewed 17 requesters to understand their disputes, their perceptions of the attorney general, and the outcomes of their cases. In short, the study revealed a wide range of data about who uses the attorney general's mechanisms, the authorities involved in disputes, the main issues underlying disputes, and the types of action the attorney general's office took in disputes. The study also found that the attorney general's administrative review mechanisms have the capacity to help resolve disclosure disputes, though in some cases requesters reported that the attorney general was not helpful. The study further found that when the attorney general's office intervenes, it often works with parties to informally resolve disputes and almost never takes formal legal action to enforce the public records law.

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## CHAPTER 1: INTRODUCTION

Before the Wisconsin legislature overhauled the state's public records law in 1981, record requesters had only one formal way to enforce their right of access to a record: litigation.<sup>1</sup> That is, requesters could ask a judge to order a government authority to comply with the public records law.<sup>2</sup> If the government authority had not responded to the records request with a sufficiently specific reason for denial, the court could order release of the record without further inquiry.<sup>3</sup> If the authority had articulated a specific reason for denial, the court was required to assess that reason, independently weighing the presumption of public access to the record against any harm that might flow from permitting access.<sup>4</sup>

Put another way: record requesters could pay a substantial sum of money to an attorney, wait awhile, and endure the complexities and hassles of litigation – all, of course, without any guarantee of success.

Then-State Senator Lynn Adelman thought that was a problem.<sup>5</sup>

“In the past, you could only go out and hire a lawyer and sue,” Adelman told the Associated Press in the early 1980s.<sup>6</sup> “To the average person, that is no remedy at all.”<sup>7</sup>

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<sup>1</sup> Linda de la Mora, *The Wisconsin Public Records Law*, 67 MARQ. L. REV. 65, 82 (1983). See also *Beckon v. Emery*, 36 Wis. 2d 510 (1967) and *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672 (1965).

<sup>2</sup> de la Mora, *supra* note 1, at 82.

<sup>3</sup> *Beckon v. Emery*, *supra* note 1, at 517-518.

<sup>4</sup> de la Mora, *supra* note 1, at 82.

<sup>5</sup> Adelman wasn't the only legislator to hold the view that litigation was often an ill-fitting enforcement mechanism for the common person. See, e.g., Reid Beveridge, *Bill to change open records law revived, then killed – for now*, WIS. ST. J., Feb. 15, 1978, at page 4, section 1 (“[Rep. Sharon Metz] urged the Assembly to differentiate between the public and the news media. She said it is individual citizens who have had trouble obtaining records from state agencies, not the news media, which have access to lawyers to force their demands.”).

<sup>6</sup> Associated Press, *Open records law in effect Jan. 1*, THE CAPITAL TIMES, Dec. 28, 1982, at 15.

<sup>7</sup> *Id.*

So Adelman, the principal author of the 1981 bill to revise the public records law,<sup>8</sup> added processes that he thought would allow citizens to enforce a right of access to a record in a cheaper and less complicated way. The first process enabled record requesters to ask the attorney general or a district attorney to sue the government authority on their behalf.<sup>9</sup> The second process gave any person the right to ask the Wisconsin attorney general to give advice as to the applicability of the public records law under any circumstances.<sup>10</sup>

The legislature ultimately added these two processes, referred to in this study as “administrative review mechanisms,” into the revised public records law. They represent the manifestation of Adelman’s and the legislature’s intent to make the public records law more accessible to everyday citizens. Paraphrasing Adelman, the Associated Press described the revised law as “a means of reducing government secrecy without having to hire a lawyer.”<sup>11</sup> Indeed, Adelman told the AP that the law “will be of more help to the average citizen than to the press,” given the news media’s deep pockets and concentrated efforts to fund public records litigation at the time.<sup>12</sup>

Yet in the nearly three decades since the legislature added the administrative review mechanisms to the public records law, the extent to which these mechanisms have actually helped the average citizen is far from clear. There is reason to believe that the attorney general and district attorneys rarely exercise their authority to enforce the public

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<sup>8</sup> See Associated Press, *Senate OKs new state open records law*, THE CAPITAL TIMES, Oct. 7, 1981, at 27 and John Nichols, *Adelman's legacy will be tough to match*, THE CAPITAL TIMES, January 8, 1998, at 8A.

<sup>9</sup> Wis. Stat. § 19.37(1)(b).

<sup>10</sup> Wis. Stat. § 19.39.

<sup>11</sup> Associated Press, *supra* note 6, at 15.

<sup>12</sup> *Open Records Law will help citizens, Adelman tells journalist group*, MILWAUKEE JOURNAL, Jan. 19, 1983, at 10 (Adelman said “[t]he press is generally aggressive enough, sophisticated enough, intimidating enough, and well-financed enough, that generally the press can get what it wants – not always, but generally – and the larger media more than the smaller media.”).

records law through litigation on behalf of record requesters.<sup>13</sup> At the same time, however, the attorney general's office has taken a wide range of actions to help record requesters navigate the public records law, such as issuing written opinions interpreting or clarifying aspects of the law, informally answering questions from the public and press over the phone, intervening in access disputes, and holding statewide training sessions on the public records law.<sup>14</sup>

Taken together, the apparent infrequency of formal enforcement actions filed by the attorney general and district attorneys, alongside the diverse range of informal advice from the attorney general, raise important questions about the public's actual ability to assert a right of access to public records – questions that cannot be answered by merely analyzing the statutory language alone. How do the public records law's administrative review mechanisms operate in practice? To what extent do the attorney general and district attorneys enforce the public records law through the administrative review mechanisms? And are the administrative review mechanisms effective at resolving disclosure disputes, particularly for people who do not have access to the courts?

This study is a start to answering those questions. The study investigates how the attorney general's administrative review mechanisms of Wisconsin's public records law operate in practice. (The study leaves direct analysis of the district attorney's administrative review mechanism for another day, though district attorneys are discussed peripherally in this study.) Building on assessment standards identified by previous research, the study also examines how effective the administrative review mechanisms are at resolving disclosure disputes. At its core, this study evaluates whether the

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<sup>13</sup> See *infra* pp. 33-40.

<sup>14</sup> See *infra* pp. 40-47.

legislature's attempt to make the public records law more accessible to ordinary people has been realized.

Investigating the viability of the public records law's administrative mechanisms is important for a number of reasons. The first reason is normative in nature: public records laws should have effective enforcement mechanisms that all people have access to. Harold Cross, the media attorney who authored the foundational book on the public's legal right to access government information in the United States,<sup>15</sup> wrote that citizens "must have the right to simple, speedy enforcement procedures geared to cope with the dynamic expansion of government activity."<sup>16</sup> This inquiry, in essence, seeks to test whether Wisconsin's public records law lives up to that ideal. To the extent record requesters cannot enforce their rights under the public records law, such rights are, in effect, illusory.<sup>17</sup>

Second, administrative review mechanisms are increasingly important in helping the press retain its watchdog role. Industry observers and researchers indicate that news organizations are litigating public records disputes less frequently than years past because of a decline in resources: namely, waning advertising revenue, smaller budgets, and fewer reporters.<sup>18</sup> This is a problem, in part, because the press has for a long time in the

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<sup>15</sup> Harold L. Cross, *The People's Right to Know* (Columbia University Press, 1953).

<sup>16</sup> *Id.*, at XII.

<sup>17</sup> Laura Nader, ed., *No Access to Law: Alternatives to the American Judicial System* (New York: Academic Press, 1980), at 4 ("If there is no access for those things that matter, then the law becomes irrelevant to its citizens.").

<sup>18</sup> See, e.g., National Freedom of Information Coalition, *Survey: People want more government transparency, traditional media less likely to sue to get it*, National Freedom of Information Coalition and Media Law Resource Center, August 23, 2011 available at <http://www.nfoic.org/survey-says-people-want-more-open-government> (last accessed December 8, 2013); Ronnell Andersen Jones, *Litigation, Legislation and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011) generally and at 594 ("Early studies and industry reports in professional journals and at journalism conferences strongly suggest that the severe budgetary cuts in traditional American newsrooms already are having an impact on openness in government."); Lucy Dalglish, *What newspapers have done for us*, THE NEWS MEDIA AND THE LAW (Spring 2009), available at

United States served as a key enforcer of public records laws. As one scholar notes, without the news media's work in the courtroom "much, if not most, of the nation's important open-government law from the last generation simply would not have come to pass."<sup>19</sup> If the press is no longer able to effectively challenge government secrecy because it cannot afford litigation, then the ability of the press to robustly inform the public is also hampered – implicating the very core of democracy.<sup>20</sup> Accordingly, ways of challenging government secrecy that require fewer resources for the records requester, such as administrative review mechanisms, are critical tools to help the press remain a viable watchdog.

And third, the study shines a spotlight on how Wisconsin's administrative review mechanisms operate in practice and the extent to which they can be effective at resolving disclosure disputes. I found no prior research focused squarely on such questions. The lack of research may be, in part, because the data this study has used was not easily

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media-and-law-spring-2009/what-newspapers-have-done-u (last accessed December 8, 2013); Michelle Rydell, *No Money to Fight*, QUILL, September/October 2009, at 35; and Robert Dreps, *Contingent Fee Access Litigation in Wisconsin*, 28 COMMUNICATIONS LAWYER: THE JOURNAL OF MEDIA, INFORMATION AND COMMUNICATIONS LAW 22, 25 (August 2011).

<sup>19</sup> Andersen Jones, *supra* note 18, at 9.

<sup>20</sup> Dalglish, *supra* note 18. ("Democracy operates on information and faith. But not the religious kind of faith. Rather, it is faith and confidence in a participatory system of government: Faith that voters will seek out truthful information about the issues of the day, and faith that they will use it to make informed decisions at the ballot box. Which brings us to the news media. Voters don't have the time or resources to gather all of that truthful, independently collected information on their own. They count on the independent, non-government sponsored press to do it for them. That system of a watchdog press has served us well for more than 200 years."). See also Wis. Stat. § 19.31, the declaration of policy in Wisconsin's public records law: "In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." The Wisconsin Supreme Court has said this statement "is one of the strongest declarations of policy to be found in the Wisconsin statutes" (*Zellner v. Cedarburg School Dist.*, 731 N.W.2d 240, 252 (2007) (citing *Munroe v. Braatz*, 201 Wis.2d 442, 449 (Ct. App. 1996)).

obtainable – at least compared to pre-existing datasets and online court records.<sup>21</sup> Further, while scholars have classified and evaluated other states’ administrative review mechanisms, this study is unique in its empirical approach and its focus on Wisconsin.

In the pages that follow, I attempt to open a window onto a system for handling public records disputes that until now has gone largely unscrutinized. Chapter 2 lays the fundamental theoretical and historical groundwork for understanding why this study is critical in a democracy; introduces the concept of freedom of information and its codified progeny, public records laws; discusses what administrative review mechanisms are and how they function in Wisconsin and other jurisdictions across the United States; and identifies specific research questions. In Chapter 3, I present the methods for this study, including how I obtained access to, collected, and analyzed the data. Chapter 4 contains the study’s principal findings, while in Chapter 5 I weave together those findings and discuss what they mean. Finally, in Chapter 6, I reiterate the primary findings and conclusions of the study, and examine their broader implications.

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<sup>21</sup> *E.g.*, Wisconsin Circuit Court Access (commonly referred to as “CCAP”) (<http://wcca.wicourts.gov>) and PACER (<http://www.pacer.gov>).

## CHAPTER 2: BACKGROUND

### A. PUBLIC ACCESS TO GOVERNMENT INFORMATION: THEORY, HISTORY, AND DEMOCRACY

The legal right to government information in the United States is principally established by public records laws.<sup>22</sup> Every U.S. state has a public records law, as do the District of Columbia and the federal government.<sup>23</sup> In general, public records laws give anyone a broad legal right of access to government records and impose a duty on government agencies and officials to produce requested records.<sup>24</sup> Public records laws typically create a presumption of openness: a record is assumed to be public unless the government identifies sufficiently legal reasons for denying disclosure. Record requests can be denied for a variety of reasons that differ from jurisdiction to jurisdiction.<sup>25</sup> Laws vary from jurisdiction to jurisdiction in other ways, too, like what constitutes a record, what governmental bodies must release records, how long governmental bodies have to respond to requests, and the types of fees requesters must pay, among other variables.

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<sup>22</sup> One school of thought claims the First Amendment to the United States Constitution guarantees a right of access to government-held information. *See, e.g.,* Thomas I. Emerson, *Legal Foundations of the Right to Know*, WASH. U. L.Q. 1-3 (1976) (“[W]e ought to consider the right to know as an integral part of the system of freedom of expression, embodied in the first amendment and entitled to support by legislation or other affirmative government action.”); Louise R. Malakoff, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93, 93 (1973). The Supreme Court of the United States, however, has repeatedly rejected this claim. *See, e.g., Houchins v. KQED*, 438 U.S. 1 (1978) (“The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.” Stewart, J., concurring) and *Saxbe v. Wash. Post*, 417 U.S. 843 (1973).

<sup>23</sup> *See* Reporters Committee for Freedom of the Press, *Open Government Guide*, available at <http://www.rcfp.org/open-government-guide> (last visited December 8, 2013) (listing public records laws in all U.S. states and the District of Columbia); and Reporters Committee for Freedom of the Press, *Federal Open Government Guide*, available at <http://www.rcfp.org/open-government-guide> (last visited December 8, 2013).

<sup>24</sup> Michael Hoefges, Martin E. Halstuk, and Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 Wm. & Mary Bill of Rts. J. 1-3 (2003).

<sup>25</sup> Student Press Law Center, *Using the Tools of the Trade: A Freedom of Information Law Primer*, available at <http://www.splc.org/knowyourrights/legalresearch.asp?id=14> (last accessed December 8, 2013).

At their core, public records laws are instruments of accountability. Their essential function is to shine light on the workings of government and the actions of people in power – to facilitate the flow of information from the clenched fists of the bureaucracy to the consciousness of the citizenry. Information is power, and public records laws empower people to participate robustly in democracy by giving them a legally enforceable right to government information.<sup>26</sup>

Indeed, public records laws are incredibly important to democracy; public access to information about government is necessary for democracy to effectively function.<sup>27</sup> Some of the chief actors in a democratic society, like the citizenry and press, need meaningful and accurate information about government to perform their duties. How else can voters make informed decisions at the polls? How else can journalists, as the public's proxy, serve as watchdogs over government? Public record laws are designed to serve these societal functions.

Broad public access to government information isn't just important for democracy, though. Prominent philosophical thinkers and jurists have posited that citizens, as popular sovereign, have an inherent right to know what government is doing in the public's name.<sup>28</sup> Such a right is, of course, entirely in the abstract sense and is not

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<sup>26</sup> Suzanne J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform* (State University of New York Press, 2007), at 10.

<sup>27</sup> Emerson, *supra* note 22 (“As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision making by the people, to whom that function is committed, is impossible.”).

<sup>28</sup> *Id.* (“The public, as sovereign, must have all information available in order to instruct its servants, the government.”) See also *Grosjean v. American Press Company, Inc. et al.*, 297 U.S. 222 (1936) (“...it goes to the heart of the natural right of an organized society, united for their common good, to impart and acquire information about their common interests.”) and Jeffery A. Smith, *Recognition of a Right to Know in Eighteenth-Century America*, at 6, paper presentation at the 2007 Annual Meeting of the American Political Science Association (“The Independent Advertiser [newspaper] related its criticism to the need for the consent of the governed and to ‘the Safety and Wisdom of the People always to assert this natural, this reserved Right—to acquaint themselves with the Affairs of Government and to know whether they are well or ill conducted.’”).



itself legally enforceable. Still, the idea of a natural “right to know” is a central thread in the rationale for public record laws.<sup>29</sup> As Harold Cross put it: “Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.”<sup>30</sup>

### *Global roots of freedom of information*

One of the earliest known freedom of information policies in the world dates back to A.D. 627 China, when Emperor T’ai-tsung created a government office that provided the public with government records and information.<sup>31</sup> The office was charged with functions similar in effect to those of the press: to “scrutiny[z]e the government and its officials and [ ] expose misgovernance, bureaucratic inefficiencies and official corruption.”<sup>32</sup> T’ai-tsung expected emperors to “admit their own imperfections as proof for their love of the truth and in fear of ignorance and darkness.”<sup>33</sup>

T’ai-tsung is the inspiration for one of the first national freedom of information laws in Western society: Sweden’s Freedom-of-Press and the Right-of-Access to Public Records Act, ratified in 1766.<sup>34</sup> Proposed a year earlier by Anders Chydenius, a Finnish<sup>35</sup> philosopher, priest, and member of the Riksdag (Swedish Parliament),<sup>36</sup> the law required

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<sup>29</sup> Cross, *supra* note 15, at XII (“Citizens of a self-governing society must have the *legal* right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.”) (Emphasis in original).

<sup>30</sup> *Id.* (The terms “freedom of information,” or “FOI” for short, and “right to know” refer to the general concept of the public’s ability to access government information.”)

<sup>31</sup> David Cuillier and Charles N. Davis, *The Art of Access: Strategies for Acquiring Public Records*, 23-24.

<sup>32</sup> Stephen Lamble, *Freedom of Information, a Finnish clergyman’s gift to democracy*, 97 FREEDOM OF INFORMATION REVIEW 4 (2002), at 2-8.

<sup>33</sup> *Id.*

<sup>34</sup> Cuillier and Davis, *supra* note 31, at 23 (“Chydenius credits not himself for the idea of FOI, but a Chinese emperor from A.D. 627 named T’ai-tsung.”).

<sup>35</sup> Finland was a part of Sweden at the time.

<sup>36</sup> Lamble, *supra* note 32, at 6.

government records “immediately be made available to anyone making a request.”<sup>37</sup>

Under the act, government must respond to requests immediately and provide records for free.<sup>38</sup> The act was later incorporated into the Swedish constitution.<sup>39</sup>

A growing number of nations are following the path of T'ai-tsung and Chydenius and enacting federal-level freedom of information laws. While some countries' FOI laws were enacted long ago, such as Colombia's in 1888 and Finland's in 1919, countries continue to pass FOI laws well into the twenty-first century, including the United Kingdom in 2000, India in 2005, and Nigeria in 2011.<sup>40</sup> The precise number of such countries changes year-to-year, but from late 2011 through spring 2012, groups tracking FOI laws identified between 86 and 116 countries that had public records laws.<sup>41</sup> While many journalists, scholars, and FOI advocates have praised the uptick in the number of freedom of information laws around the world, such progress does not by itself equate to immediate government transparency: use, compliance, and enforcement matter. Indeed, the Associated Press conducted what it called the “first worldwide test of freedom of information” by filing public records requests with more than 100 countries in 2011.<sup>42</sup> Half of the countries failed to comply with the records requests, the AP reported.<sup>43</sup>

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<sup>37</sup> David Banisar, *Freedom of Information and Access to Government Records Around the World*, Global Survey for FreedomInfo.org, at 38, available at [http://www.ndi.org/files/freeinfo\\_010504.pdf](http://www.ndi.org/files/freeinfo_010504.pdf) (last accessed December 8, 2013).

<sup>38</sup> *Id.*, at 38-39.

<sup>39</sup> *Id.*, at 39.

<sup>40</sup> Open Society Justice Initiative, *Countries with Access to Information (ATI) Provisions in their National/Federal Laws or Actionable Decrees, and Dates of Adoption & Significant Amendments*, available at <http://right2info.org/access-to-information-laws> (last accessed December 8, 2013).

<sup>41</sup> *Id.* The Open Society Justice Initiative concluded there were 95 national FOI laws as of September 2013, which includes statutes and constitutional provisions, while the website freedominfo.org cites experts who offer a range between 86 and 116 countries.

<sup>42</sup> Martha Mendoza, Ravi Nessman, Charles Hutzler, and Adriana Gomez Licon, *AP Impact: Right-to-know laws often ignored*, Associated Press, November 16, 2011, available at [http://www.boston.com/news/nation/articles/2011/11/16/ap\\_impact\\_right\\_to\\_know\\_laws\\_often\\_ignored/?page=full](http://www.boston.com/news/nation/articles/2011/11/16/ap_impact_right_to_know_laws_often_ignored/?page=full) (last accessed December 8, 2013).

<sup>43</sup> *Id.*

*Freedom of information in the United States*

The legal right to government information in the United States emerged on a less-than-linear path. Congress didn't enact the first federal, generally applicable, public records law until the mid-twentieth century. Decades before that, however, some states already had broad public record laws on the books.<sup>44</sup> And in fact, many states had statutes granting a limited legal right of access to specific types of records as far back as the mid-nineteenth century.<sup>45</sup> Moreover, some state courts identified a right of access to public records under English common law well before legally enforceable freedom of information legislation was on Capitol Hill's radar.<sup>46</sup> Courts in England often recognized a litigant's right to inspect records as "evidence or information for use in pending or prospective litigation."<sup>47</sup> This practice emerged into a common law rule giving every person a right of access to public records, so long as the requester of the record had a personal interest in the record and access would enable him or her to "maintain or defend an action in which the document or record sought can furnish evidence or necessary information" in court.<sup>48</sup>

One of the first federal statutes that gave citizens a right of access to government information is the 1946 Administrative Procedure Act.<sup>49</sup> While the APA mainly defines the process for how federal agencies establish and enforce administrative regulations, and for how people and entities can dispute agency decisions, the act also requires federal

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<sup>44</sup> Cross, *supra* note 15, at 328.

<sup>45</sup> *Id.*, at 49.

<sup>46</sup> *Id.*, at 26 (See footnote 34 of Cross).

<sup>47</sup> *Id.*, at 25.

<sup>48</sup> *Id.*, at 25-26.

<sup>49</sup> Piotrowski, *supra* note 26, at 21-22.

agencies to disclose “matters of official record.”<sup>50</sup> The APA’s legislative intent was, in part, to “make government more open and increase accountability.”<sup>51</sup> But the act was largely ineffective toward that end because of vague secrecy exemptions;<sup>52</sup> the APA permitted nondisclosure when “in the public interest” or “for good cause,” and agencies did not hesitate to apply these exemptions liberally.<sup>53</sup> In addition, the APA did not make records available to the general public, but rather, only to “persons properly and directly concerned” with a record.<sup>54</sup> The APA also did not authorize judicial review of agency disclosure decisions.<sup>55</sup>

Around the same time the APA was enacted, journalists noticed a growing trend of federal officials denying disclosure of government information citing the Housekeeping Act of 1789.<sup>56</sup> The Housekeeping Act<sup>57</sup> gave executive department administrators authority to enact internal regulations “not inconsistent with the law [regarding] the custody, use, and preservation of [department] records, papers, and property.”<sup>58</sup> Federal agencies construed the act as authorizing them to write their own information-disclosure policies.<sup>59</sup> Officials in numerous executive branch departments and agencies had cited the Housekeeping Act to withhold arguably benign information like “patronage lists, nonstrategic important-and-export data,” and other records.<sup>60</sup>

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<sup>50</sup> Herbert Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Greenwood Press, 1999), at 36.

<sup>51</sup> Piotrowski, *supra* note 26, at 22.

<sup>52</sup> *Id.*

<sup>53</sup> Foerstel, *supra* note 50, at 36.

<sup>54</sup> Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1023 (1975).

<sup>55</sup> *Id.*

<sup>56</sup> Foerstel, *supra* note 50, at 33.

<sup>57</sup> 5 U.S.C. § 301 (2012) (formerly 5 U.S.C. § 22). See also William Bradley Russell Jr., *A Convenient Blanket of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL OF RTS. J. 745 (2005).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, at 34.

<sup>60</sup> *Id.*

Executive branch officials cited the act to shield information from the legislative and judicial branches, too.<sup>61</sup> The American Society of Newspaper Editors lobbied Congress for a legislative fix, and in 1958, lawmakers amended the Housekeeping Act by attaching a single sentence: “This section does not authorize withholding information from the public or limiting the availability of records to the public.”<sup>62</sup>

In 1966, Congress enacted an ostensibly more potent public records statute designed to fix the APA’s ineffective disclosure requirements: the Freedom of Information Act, or “FOIA.”<sup>63</sup> President Lyndon Johnson signed the FOIA into law on July 4, 1966, but not without hesitation. Johnson “felt as if the FOIA was a personal attack and worked toward weakening and confusing [its] implementation.”<sup>64</sup> Indeed, in a statement released after he signed the FOIA into law, Johnson expressed repeated concerns about “maintain[ing] some degree of executive secrecy.”<sup>65</sup> Congress amended the FOIA in 1974, 1976, 1986, and 1996.<sup>66</sup>

The 1974 amendment was triggered by several factors. Congress was responding to criticism from FOIA requesters, judges adjudicating FOIA cases, and legislators that the law was hard to understand and that agencies were not taking the law’s mandates seriously.<sup>67</sup> According to a 1972 report by the House Committee on Government

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<sup>61</sup> *Id.*

<sup>62</sup> 5 U.S.C. § 301.

<sup>63</sup> Lamble, *supra* note 32, at 8-9.

<sup>64</sup> Piotrowski, *supra* note 26, at 23.

<sup>65</sup> Foerstel, *supra* note 50, at 42 (In fact, Johnson’s press office had prepared this statement but at the last minute stopped it from release. *The New York Times* subsequently noted that “the first government information withheld under the FOIA was the White House statement on the act itself.” The statement was, of course, later released.).

<sup>66</sup> *Id.*

<sup>67</sup> Project, *supra* note 54, at 1025.

Operations, agencies frequently asserted improper bases to deny requests, and did not respond to requests in a timely manner.<sup>68</sup>

The Supreme Court had also issued a major blow to access. In *EPA v. Mink*, the first FOIA case to reach the high court, justices in a 5-4 decision held that the executive branch could withhold records based solely on the assertion that the requested record was classified.<sup>69</sup> Judges did not have authority, the court found, to inspect a classified record to evaluate the propriety of classification.<sup>70</sup> Justice Stewart, in a concurring opinion in *Mink*, said that Congress “built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document ‘secret,’ however cynical, myopic, or even corrupt that decision might have been.”<sup>71</sup>

Washington was also reeling from the Watergate scandal. President Nixon had resigned office as congressional committees were deliberating the 1974 amendment.<sup>72</sup> Public distrust of government was high, tolerance of official secrecy low.<sup>73</sup> Politically, this was an opportune time for good-government reforms.

Nixon’s successor, President Gerald Ford, promised to advocate for open government when he entered office in August 1974.<sup>74</sup> As a congressman, Ford was a co-sponsor of the legislation creating FOIA.<sup>75</sup> But Ford vetoed the 1974 amendment, calling the changes “unconstitutional and unworkable.”<sup>76</sup> Congress overrode the veto.<sup>77</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *EPA v. Mink*, 410 U.S. 73, 84 (1973).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, at 95.

<sup>72</sup> Foerstel, *supra* note 50, at 47.

<sup>73</sup> *Id.*, at 46.

<sup>74</sup> Michael R. Lemov, *People’s Warrior: John Moss and the Fight for Freedom of Information and Consumer Rights* (Fairleigh Dickinson University Press, 2011), at 183.

<sup>75</sup> *Id.*, at 184.

<sup>76</sup> *Id.*, at 185.

<sup>77</sup> *Id.*

Under the 1974 changes to FOIA, Congress gave judges authority to review records the government asserted were classified, which was a direct response to *Mink*.<sup>78</sup> The amendment also made other major changes, such as requiring agencies to respond to FOIA requests and appeal processes within specific timeframes.<sup>79</sup>

In general, the FOIA gives anyone the legal right to inspect records “created or maintained by,” and in the custody of, executive branch agencies and offices in the federal government.<sup>80</sup> Parts of the Executive Office of the President are not covered by FOIA, nor are the legislative and judicial branches of the federal government. Executive agencies can deny disclosure of a record under nine statutory exemptions.<sup>81</sup>

Agencies can charge FOIA requesters record location, review, and copying fees.<sup>82</sup> For the purpose of assessing fees, people filing FOIA requests fall into five categories of requesters: “commercial,” “educational institution,” “non-commercial scientific institution,” “representative of the news media,” and “other requesters.”<sup>83</sup> Certain categories of requesters are exempt from some fees. For example, news media requesters are entitled to the first 100 pages of responsive records at no charge.<sup>84</sup> Agencies may waive fees when in the public interest.<sup>85</sup>

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<sup>78</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>79</sup> Foerstel, *supra* note 50, at 48.

<sup>80</sup> The National Security Archive, *FOIA Basics*, available at <http://www.gwu.edu/~nsarchiv/nsa/foia/guide.html> (last accessed December 8, 2013).

<sup>81</sup> 5 U.S.C. § 552(b). In general, the FOIA’s nine statutory exemptions cover classified material; internal personnel rules and practices; information specifically exempted from disclosure by other statutes under certain conditions; trade secrets and other confidential or privileged financial/commercial information obtained from a person; inter-agency or intra-agency correspondence; personnel and medical files, and like records, which if disclosed would be an invasion of privacy; law enforcement records under certain conditions; reports related to the regulation of financial institutions; and geological or geophysical information.

<sup>82</sup> The National Security Archive, *supra* note 80.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Corporations use the FOIA more than any other type of requester. A 2006 study found that commercial requesters accounted for approximately two-thirds of requests to twenty agencies in a one-month period.<sup>86</sup> Journalists' use of the FOIA, the study found, "is considerably less than conventional wisdom would have one believe."<sup>87</sup> The news media comprised just six percent of the requests in the study.<sup>88</sup>

Requesters can, in general, challenge nondisclosure or adverse agency disclosure decisions in three ways. First, litigation: FOIA requesters can sue the executive agency in federal court seeking a court order to compel disclosure.<sup>89</sup> The second way requesters can assert a right of access to a record is to file an administrative appeal, which typically entails asking the chief agency attorney to review the FOIA request and denial.<sup>90</sup> And third, requesters can seek assistance from the Office of Governmental Information Services, or "OGIS."<sup>91</sup> Located within the National Archives, OGIS dubs itself the "FOIA Ombudsman" and works to mediate disputes between record requesters and federal agencies.<sup>92</sup> OGIS has no authority to compel agencies to release records; rather, the office tries to facilitate communication and cooperation between requesters and agencies.<sup>93</sup> OGIS is relatively new in the FOIA landscape. The office opened in the fall

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<sup>86</sup> Society of Professional Journalists, *Frequent Filers: Businesses Make FOIA Their Business*, available at <http://www.spj.org/rrr.asp?ref=31&t=foia> (last accessed December 8, 2013) ("CJOG Study Finds Commercial Uses of Government Information Outpace Requests by Journalists and All Others").

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>90</sup> Reporters Committee for Freedom of the Press, *Open Government Guide: Appealing an initial denial*, available at <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/appealing-initial-denial> (last accessed December 8, 2013).

<sup>91</sup> Office of Governmental Information Services, *About OGIS: OGIS Procedures*, available at <https://ogis.archives.gov/about-ogis/ogis-procedures.htm> (last accessed December 8, 2013).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



of 2009 and handled about 1200 requests for assistance in its first two years of existence.<sup>94</sup>

The U.S. attorney general has an important role to play in the administration of the FOIA.<sup>95</sup> President Johnson's attorney general at the time the FOIA was enacted, Ramsey Clark, expressed public support for meaningful access to government information (despite Johnson's concerns).<sup>96</sup> In advice to executive agency leaders, Clark wrote, among other things, that disclosure "be the general rule, not the exception," and that "all individuals have equal rights of access."<sup>97</sup> Clark is said to have called FOIA "one of my loves."<sup>98</sup> (In contrast to Clark, Attorney General John Ashcroft sent a memo to all agencies shortly after the September 11, 2001, terrorist attacks directing them to presume records should be withheld and placing the onus on requesters to assert why the record should be released.<sup>99</sup> In 2009, newly appointed Attorney General Eric Holder reversed Ashcroft's directive, telling agencies they should treat FOIA requests with a "presumption of openness."<sup>100</sup>)

Despite whatever mitigating effect the attorney general can have on FOIA, a persistent complaint from requesters, access advocates, and journalists, among others, is

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<sup>94</sup> Letter from Miriam Nisbet to Sen. Patrick J. Leahy and Sen. Charles E. Grassley, April 13, 2012.

<sup>95</sup> Clint Hendler, *Holder Has A New FOIA Policy: Will he apply it to old cases?*, COLUMBIA JOURNALISM REVIEW, March 26, 2009, available at [http://www.cjr.org/campaign\\_desk/holder\\_has\\_a\\_new\\_foia\\_policy.php](http://www.cjr.org/campaign_desk/holder_has_a_new_foia_policy.php) (last accessed December 8, 2013) ("Guidance memos are important because they outline the standards that Justice, which serves as the government's defense lawyer in all FOIA lawsuits, will apply when weighing whether or not to defend another agency's decision to deny a record. While Justice, in practice, defends nearly all agency refusals, the idea is that agencies will make their decisions in compliance with the guidelines.").

<sup>96</sup> Foerstel, *supra* note 50, at 42-43.

<sup>97</sup> *Id.*, at 43.

<sup>98</sup> *Id.*

<sup>99</sup> Editorial, *Mr. Obama and the Rule of Law*, THE NEW YORK TIMES, March 21, 2009, available at <http://www.nytimes.com/2009/03/22/opinion/22sun1.html> (last accessed December 8, 2013).

<sup>100</sup> United States Department of Justice, *Attorney General Issues New FOIA Guidelines to Favor Disclosure and Transparency*, March 19, 2009, available at <http://www.justice.gov/opa/pr/2009/March/09-ag-253.html> (last accessed December 8, 2013).

that request processing often takes too long.<sup>101</sup> Though the FOIA generally requires agencies to make a disclosure decision within 20 business days of receiving a request,<sup>102</sup> requesters often have to wait far longer. A 2006 study by the Coalition of Journalists for Open Government revealed “[t]he backlog of FOIA requests at 13 Cabinet-level departments and at 9 of the largest agencies rose to 31 percent in 2005. The previous year, those same departments and agencies had a 20 percent backlog.”<sup>103</sup> A 2007 report from the Government Accountability Office found that while some requests were processed in less than 10 days, other requests took more than 100 days to fulfill, and sometimes much longer.<sup>104</sup> Indeed, the National Security Archive reported in 2007 that five agencies had unresolved FOIA requests dating back to the late 1980s, including one

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<sup>101</sup> See, e.g., *FOIA Advocates Skeptical About Obama's Claims of FOIA Progress*, THE ATLANTIC WIRE, March 9, 2010, available at <http://www.theatlanticwire.com/politics/2012/03/foia-advocates-skeptical-about-obamas-claims-foia-progress/49668/> (last accessed December 8, 2013); *FREEDOM OF INFORMATION ACT: Processing Trends Show Importance of Improvement Plans*, Government Accountability Office report, March 2007, at 4 (“Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received.”); Rachel Bunn, *FOIA panelists say Obama has far to go in transparency*, Reporters Committee for Freedom of the Press, January 23, 2012, available at <http://www.rcfp.org/browse-media-law-resources/news/foia-panelists-say-obama-has-far-go-transparency> (last accessed December 8, 2013) (“FOIA requests are often backlogged because the system is understaffed and has no power to force agencies to release data in a timely manner...”).

<sup>102</sup> Agencies are required by statute to grant or deny a FOIA request within 20 days of receiving the request, unless “usual circumstances” arise. See Reporters Committee for Freedom of the Press, *Open Government Guide: Response times*, available at <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times> (last accessed December 8, 2013). The term “unusual circumstances” is defined as: “(1) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request; (2) The need to search for, collect, and review and process voluminous agency records responsive to the FOIA request; (3) The need to consult with another agency or two or more agency components having a substantial interest in the determination on the FOIA request. In the event a FOIA request implicates “unusual circumstances,” the agency must give the requester a chance to modify the request or arrange “an alternative time period within which the FOIA request will be processed.” See 34 CFR § 5.21 (<http://www.law.cornell.edu/cfr/text/34/5.21>) (last accessed December 8, 2013).

<sup>103</sup> Reporters Committee for Freedom of the Press, *CJOG Study Shows Backlog of FOIA Requests Continuing to Grow*, April 15, 2006, available at <http://www.rcfp.org/browse-media-law-resources/news/cjog-study-shows-backlog-foia-requests-continuing-grow> (last accessed December 8, 2013).

<sup>104</sup> *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, Government Accountability Office report, March 2007, at 4.

request that was 20 years old.<sup>105</sup> The *New York Times* reported in January 2012 that it had just recently received a response to a FOIA request filed in 1997 with the Defense Department.<sup>106</sup> Despite taking 15 years to process, the Defense Department apparently felt some semblance of urgency; it sent the response via overnight mail.<sup>107</sup>

The FOIA has served as a template for national FOI laws around the world.<sup>108</sup> It also prompted a number of U.S. states to enact public records laws.<sup>109</sup> Wisconsin, however, was not one of them. The state has had public records statutes on the books since the mid-nineteenth century.

## **B. Wisconsin's Public Records Law**

Some scholars have credited Wisconsin as having one of the first laws in the nation to give the public a legal right of access to government records.<sup>110</sup> Much narrower in scope than today's public records law, in the mid-19th century Wisconsin law gave a right of access to specific records required to be kept by particular government authorities.<sup>111</sup> One such statute was Wis. Rev. Stat. Ch. 10, § 137, which dates back to

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<sup>105</sup> The National Security Archive, *40 Years of FOIA; 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s*, The Knight Open Government Survey conducted by the National Security Archive/The George Washington University, July 2, 2007, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm> (last accessed December 8, 2013).

<sup>106</sup> Matthew L. Wald, *Slow Responses Cloud a Window Into Washington*, THE NEW YORK TIMES, January 28, 2012, available at <http://www.nytimes.com/2012/01/29/us/slow-freedom-of-information-responses-cloud-a-window-into-washington.html> (last accessed December 8, 2013).

<sup>107</sup> *Id.*

<sup>108</sup> Lamble, *supra* note 32, at 11 (“After the United States' Freedom of Information Act became law on 4 July 1966 – Independence Day – pressure intensified on governments around the world to allow their citizens similar rights.”). See also John Ackerman and Irma Sandoval-Ballesteros, *Information Regulation: Controlling the Flow of Information To and From Administrative Agencies: The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 111 (2006) (“[T]he U.S. system is the one normally taken as a model for contemporary FOI laws.”).

<sup>109</sup> Project, *supra* note 54, at 1164.

<sup>110</sup> See, e.g., Hoefges, *supra* note 24, at 2 (Footnote 3).

<sup>111</sup> These statutes include Wis. Rev. Stat. Ch. 10, §§ 29, 37, and 137 (1849). See Reporters Committee for Freedom of the Press, *Foreword: The Development of Public Access Law in Wisconsin*, available at <http://www.rcfp.org/wisconsin-open-government-guide/foreword> (last accessed December 8, 2013).

1849 – just one year after statehood.<sup>112</sup> The law required, in part, that county clerks of circuit court and other officials give “any person” access to inspect “all books and papers required to be kept.”<sup>113</sup> The Wisconsin Supreme Court affirmed this right in the 1856 case of *County of Jefferson v. Besley*, which held that government officers subject to Wis. Rev. Stat. Ch. 10, § 137 had a duty to keep their offices “in a suitable condition to answer all the reasonable wants of the public, at the expense of the county.”<sup>114</sup> This duty entailed, in part, ensuring that clerks’ offices were sufficiently heated and lit so citizens could comfortably transact business.<sup>115</sup> “To require these officers to keep their offices open during business hours, for the convenience of the citizens having business to transact in them, and yet provide no means of warming or lighting them, would be simply absurd,” the court said.<sup>116</sup>

Sixty-eight years later, in 1917, the Wisconsin legislature enacted the state’s first generally applicable public records law. Consisting of two paragraphs, the law broadly required state and local government officials to retain records and gave the public a qualified right to inspect and copy records.<sup>117</sup> The 1917 statute was “enacted to unify a

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<sup>112</sup> Bill Lueders, *Early case sheds light on records*, Wisconsin Freedom of Information Council, December 2007, available at [http://wisfoic.org/index.php?option=com\\_content&view=article&id=106:december-early-case-sheds-light-on-records-&catid=44:2007-columns&Itemid=76](http://wisfoic.org/index.php?option=com_content&view=article&id=106:december-early-case-sheds-light-on-records-&catid=44:2007-columns&Itemid=76) (last accessed December 8, 2013).

<sup>113</sup> *Id.*

<sup>114</sup> *County of Jefferson v. Besley*, 5 Wis. 134, 136 (1856).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> The statute reads:

“18.01 (1) Custody and delivery of official property and records. (1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).”

number of specific provisions relating to public officers”<sup>118</sup> and “case law served as the primary body of law in determining access to government materials.”<sup>119</sup> The Wisconsin Supreme Court issued ten decisions interpreting the 1917 law.<sup>120</sup>

Then in 1981, the state legislature passed Wisconsin Act 335, representing a major overhaul of the public records law. State lawmakers had been unsuccessfully attempting to change the public records law since at least 1977.<sup>121</sup> The 1981 changes were prompted principally by the legislature’s desire to make the public records law easier for citizens to use and government to comply with. In large part, the legislature did that by merging various statutes and codifying court rulings and attorney general opinions related to public access to government records into a single statutory scheme.<sup>122</sup>

The legislature largely left intact common law governing what records should or should not be public.<sup>123</sup> Indeed, much of the visible product of Act 335 is the public record law’s statutory framework: defining what government officials and agencies are subject to the law; what a public record is; what types of records can be exempt from disclosure; and specific procedural elements, like what fees record custodians can charge requesters and how quickly record custodians must respond to record requests. Among other changes, the revised public records law also supplemented the common-law mandamus enforcement mechanism with the current administrative review mechanisms: giving requesters a right to ask the attorney general or a district attorney to file a

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<sup>118</sup> *Karen Schill v. Wisconsin Rapids School District*, 786 N.W.2d 177, 198 (2010).

<sup>119</sup> *Id.*

<sup>120</sup> de la Mora, *supra* note 1, at 74.

<sup>121</sup> de la Mora, *supra* note 1, at 83.

<sup>122</sup> Wisconsin Freedom of Information Council, *Law clearly demands openness*, THE CAPITAL TIMES, July 28, 1999, at 4A.

<sup>123</sup> The legislature explicitly incorporated the “[s]ubstantive common law principles construing the right to inspect, copy, or receive copies of records” in the revised public records law through Wis. Stat. § 19.35(1)(a).

mandamus action on their behalf, and giving the right to record requesters to ask the attorney general to interpret the public records law. Substantially similar administrative review mechanisms were already part of the open meetings law at the time the public records law was revised.<sup>124</sup> Indeed, there is some evidence that the legislature designed the public record law's administrative review mechanisms based on the open meetings law.<sup>125</sup> While Act 335 was passed in 1981, the changes did not go into effect until 1983.<sup>126</sup>

#### *Senate Bill 250 and the Open Records Board*

The original version of Act 335, Senate Bill 250, called for the creation of a panel charged with oversight and enforcement of the public records law, dubbed the "Open Records Board."<sup>127</sup> Composed of seven members, including state and local government officials, two representatives of the news media, and two members of the public, the board would have been located within the Wisconsin Department of Justice.<sup>128</sup> Under the legislation, the board could issue advisory opinions and adopt administrative rules interpreting the public records law.<sup>129</sup> Of particular relevance to this study, the bill would also have allowed record requesters to petition the board to review record custodians' disclosure decisions, such as the denial of a records request or imposition of a fee.<sup>130</sup> As part of its review, the board would have held a hearing<sup>131</sup> and had authority to "administer oaths, examine witnesses, receive oral and documentary evidence, subpoena

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<sup>124</sup> 1975 Wisconsin Act 426, available at <http://docs.legis.wisconsin.gov/1975/related/acts/426.pdf> (last accessed December 8, 2013).

<sup>125</sup> Associated Press, *Senate OKs new state open records law*, THE CAPITAL TIMES, Oct. 7, 1981, at 27.

<sup>126</sup> 1981 Wisconsin Act 335, Section 27 (last page), available at <http://docs.legis.wisconsin.gov/1981/related/acts/335.pdf> (last accessed December 8, 2013).

<sup>127</sup> 1981 Senate Bill 250.

<sup>128</sup> 1981 Senate Bill 250 at 4.

<sup>129</sup> *Id.*, at 3.

<sup>130</sup> *Id.*, at 10.

<sup>131</sup> *Id.*, at 21.

witnesses to compel attendance before it[, and] require the production or examination of any record which it deems relevant in any matter under investigation or in question.”<sup>132</sup> Record custodians would have been required to comply with the board’s decisions (e.g., if the board found a record custodian improperly denied a request, the custodian was required under the bill to release the record).<sup>133</sup> Dissatisfied parties could appeal to circuit court, the trial-level court in the Wisconsin Court System.<sup>134</sup>

The Open Records Board, however, never became law. The attorney general at the time, Bronson La Follette, opposed the board, according to Lynn Adelman, then a state senator from New Berlin who is now a federal judge in Milwaukee.<sup>135</sup> Adelman said that immediately after he introduced the bill, he met with La Follette and La Follette’s chief deputy, Joe Sensenbrenner.<sup>136</sup> La Follette didn’t want the board, Adelman said, so he removed it from the bill.<sup>137</sup>

“Basically it was kind of a turf issue, in a way,” Adelman said.<sup>138</sup> “They wanted their office to be a big player in this business.”<sup>139</sup> He added:

They wanted the attorney general’s office to kind of have the right of first refusal, I think, of bringing a lawsuit, like if the attorney general’s office thought that this was really meritorious, they could go in there and do this mandamus procedure. But, in the event that they didn’t, that a citizen could go in there and sue himself.<sup>140</sup>

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<sup>132</sup> *Id.*, at 10.

<sup>133</sup> *Id.*, at 21.

<sup>134</sup> *Id.*

<sup>135</sup> Interview with Hon. Lynn Adelman, July 23, 2012, Wisconsin Eastern District Federal Courthouse, Milwaukee, Wisconsin.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

Adelman said he needed the attorney general to support the bill for it to have any chance of passing, so he assented to what La Follette wanted.<sup>141</sup> “I don’t think I had a choice, because the bill would have gone nowhere without the AG’s support, because they were, you know, the AG was a powerful position in Madison, and they had always had an involvement in open records,” Adelman said.<sup>142</sup>

The Wisconsin Associated Press also opposed the Open Records Board.<sup>143</sup>

*Subsequent amendments to the public records law*

Since the 1981 overhaul, the Wisconsin legislature has amended the public records law in multiple instances. One of the most significant changes came in 2003, when the legislature passed, and the governor signed, legislation giving a narrow class of record subjects a limited statutory right to challenge a record custodian’s decision to release certain types of records. The law, 2003 Wisconsin Act 47, in general gives record subjects who are public employees the right to seek judicial review of a record custodian’s decision to release personnel records that implicate the employee’s privacy or reputational interests. Such records, for example, may contain investigative and disciplinary information concerning the employee, or information obtained via search warrant or subpoena.<sup>144</sup> Senior-level public employees and public officials do not have this right under the law, though they are afforded the opportunity to supplement the requested record.<sup>145</sup> Act 47 was the legislature’s response to a line of Wisconsin Supreme

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> de la Mora, *supra* note 1, at 84 (Footnote 160: “The Wisconsin Associated Press passed a resolution which stated its support of the bill if the following items were eliminated...the formation of an open records board to handle appeals.”).

<sup>144</sup> Wis. Stat. § 19.356(2)(a).

<sup>145</sup> Wisconsin Legislative Council Act Memo for 2003 Wisconsin Act 47 at 2.



Court cases on the right of record subjects to challenge release of records:<sup>146</sup> namely, *Woznicki v. Erickson*<sup>147</sup> and *Milwaukee Teachers' Education Association et al v. Milwaukee Board of School Directors et al.*<sup>148</sup>

In *Woznicki*, the Wisconsin Supreme Court held that record subjects had a right to challenge release of a record implicating their privacy or reputational interests.<sup>149</sup> While no such right was, at the time, explicitly articulated in statute, the court's majority found that such a right was "implicit" in the law.<sup>150</sup> "The statutes and case law have consistently recognized the legitimacy of the interests of citizens to privacy and the protection of their reputations," said Justice William Bablitch,<sup>151</sup> who wrote the majority opinion.<sup>152</sup> Consequently, the court held, a record custodian who intended to release a record that implicated a record subject's privacy or reputational interests had a duty to notify the record subject that the requested record was slated for release.<sup>153</sup> Doing so would give the record subject an opportunity to seek judicial review of the disclosure decision, the court said.<sup>154</sup> Commentators often refer to this duty as the "Woznicki rule."

The court in *Milwaukee Teachers'* affirmed the Woznicki rule, holding that public school teachers had a right to challenge release of records about them that implicated

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<sup>146</sup> 2003 Wisconsin Act 47 Joint Legislative Council Prefatory Note at 1.

<sup>147</sup> *Woznicki v. Erickson*, 202 Wis.2d 178 (1996).

<sup>148</sup> *Milwaukee Teachers' Education Association et al. v. Milwaukee Board of School Directors et al.*, 227 Wis.2d 779 (1999).

<sup>149</sup> *Woznicki v. Erickson*, *supra* note 147 at 193.

<sup>150</sup> *Id.*, at 185.

<sup>151</sup> Before being elected to the state supreme court, Bablitch was a state senator. He voted in favor of the 1981 changes to the public records law alongside his senate colleague Lynn Adelman (See Associated Press, *supra* note 113).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*, at 193.

<sup>154</sup> *Id.*

their privacy or reputational interests. The court's decision made clear that the Woznicki rule was not just limited to district attorneys, but to all record custodians.<sup>155</sup>

Part of the reason the legislature enacted Act 47 in 2003 was to clarify the process for administering the Woznicki rule and to limit the rule's breadth. The court in both cases failed to articulate "criteria for determining when privacy and reputational interests were implicated or for providing notice to affected parties."<sup>156</sup> The news media and record custodians argued that these two cases delayed the processing of record requests and needlessly triggered litigation.<sup>157</sup> Consequently, the Wisconsin Legislature's Joint Legislative Council created the Special Committee on Review of the Open Records Law, in part, to propose a legislative response to the two cases.<sup>158</sup> The committee ultimately recommended 2003 Wisconsin Act 47, which partially codified the Woznicki rule into statute.<sup>159</sup>

#### *Basic elements of the public records law*

Wisconsin's public records law principally comprises state statutes<sup>160</sup> and case law interpreting the statutes. The state attorney general also has statutory authority to interpret and give advice on the public records law, and the Wisconsin Supreme Court has repeatedly found that attorney general opinions can be considered persuasive, though

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<sup>155</sup> 2003 Wisconsin Act 47 Joint Legislative Council Prefatory Note at 1.

<sup>156</sup> Wisconsin Legislative Council Act Memo for 2003 Wisconsin Act 47 at 1.

<sup>157</sup> See, e.g., Jeff Hovind, *August: Records fix shows system can work*, Wisconsin Freedom of Information Council, August 2003, available at

[http://www.wisfoic.org/index.php?option=com\\_content&view=article&id=88:august-records-fix-shows-system-can-work&catid=48:2003-columns&Itemid=81](http://www.wisfoic.org/index.php?option=com_content&view=article&id=88:august-records-fix-shows-system-can-work&catid=48:2003-columns&Itemid=81) (last accessed December 8, 2013); Jeff Hovind, *April: New law improves records access*, Wisconsin Freedom of Information Council, April 2004, available at [http://www.wisfoic.org/index.php?option=com\\_content&view=article&id=110:april-new-law-improves-records-access-&catid=47:2004-columns&Itemid=80](http://www.wisfoic.org/index.php?option=com_content&view=article&id=110:april-new-law-improves-records-access-&catid=47:2004-columns&Itemid=80) (last accessed December 8, 2013).

<sup>158</sup> 2003 Wisconsin Act 47 Joint Legislative Council Prefatory Note at 1.

<sup>159</sup> *Id.*

<sup>160</sup> Principally, though not exclusively, Wis. Stat. §§ 19.31-19.39. In addition, record custodians can deny disclosure of records based on exemptions in Wisconsin's Open Meetings Law. See Wis. Stat. § 19.35(1)(a).

non-binding, legal authority.<sup>161</sup> Other Wisconsin and federal laws have the capacity to affect disclosure of records, too.<sup>162</sup>

Any person has the right to inspect a record “[e]xcept as otherwise provided by law.”<sup>163</sup> The public records law presumes that all public records are open for public inspection.<sup>164</sup> The government can deny disclosure, however, in “exceptional”<sup>165</sup> cases: when nondisclosure is mandated by law, or when the public interest in nondisclosure outweighs the public interest in disclosure.<sup>166</sup> The public has an absolute right of access to some records through statute or common law rule. For example, the public has an absolute right of access to police activity logs (or informally, the police “blotter”) pursuant to the 1989 Wisconsin Supreme Court case *Newspapers, Inc. v. Breier*.<sup>167</sup> Nondisclosure might also be absolute, such as 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.”<sup>168</sup> To the extent there is no absolute rule mandating disclosure or nondisclosure, release of a public record

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<sup>161</sup> See e.g., *Karen Schill et al. v. Wisconsin Rapids School District et al.*, *supra* note 118, at ¶106 (“Although we are not bound by an attorney general’s opinion, a well-reasoned opinion is of persuasive value when a court later addresses the meaning of the same statute. The opinions and writings of the attorney general have special significance in interpreting the Public Records Law inasmuch as the legislature has specifically authorized the attorney general to advise ‘any person’ as to the applicability of the Law.”) and ¶126 (“Furthermore, a statutory interpretation by the attorney general ‘is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general’s opinion.’”) (citing *Staples for Staples v. Glienke*, 142 Wis. 2d 19, 28) (Ct. App. 1987). See also *State v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295, 302 (2008).

<sup>162</sup> Wis. Stat. § 19.36(1).

<sup>163</sup> Wis. Stat. § 19.35(1)(a).

<sup>164</sup> Wis. Stat. § 19.31 (“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.”).

<sup>165</sup> *Id.* (“The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”).

<sup>166</sup> Wisconsin Department of Justice, *2012 Wisconsin Public Records Law Compliance Outline*, August 2012, at 17, available at <http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf> (last visited December 8, 2013).

<sup>167</sup> *Newspapers, Inc. v. Breier*, 1989 Wis.2d 417, 440 (1979).

<sup>168</sup> Wis. Stat. § 19.36(10)(b).

will be dependent on what is known as the “balancing test,” in which the record custodian weighs the public interest in disclosure versus the public interest in nondisclosure.<sup>169</sup> If the public interest in disclosure outweighs nondisclosure, the record should be released; if the public interest in nondisclosure outweighs disclosure, the record should not be released.

A government agency or official subject to disclosure duties under the public records law is referred to as an “authority.”<sup>170</sup> With some exceptions, authorities include units of state government, local municipalities, public school districts, quasi-governmental corporations, and elected officials.<sup>171</sup>

The “legal custodian” (also referred to as “record custodian”) is the person responsible for carrying out an authority’s duties under the public records law: receiving public records requests, determining whether a record is subject to disclosure or not, and responding to records requests, among other tasks.<sup>172</sup> The highest ranking officer of an authority is by default the “legal custodian” of records unless he or she designates someone else to be the custodian.<sup>173</sup> Elected officials are generally both “legal custodian” and “authority” unless the elected official designates someone else as the custodian.<sup>174</sup>

A “record” under the public records law is “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

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<sup>169</sup> Wisconsin Department of Justice, *supra* note 124 at 17: “Requested records will 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.” Citing *Hathaway v. Joint Sch. Dist. No.1*, Green Bay, 116 Wis. 2d 388, 397 (1984).

<sup>170</sup> Wis. Stat. § 19.32(1).

<sup>171</sup> *Id.*

<sup>172</sup> Wis. Stat. § 19.33.

<sup>173</sup> Wis. Stat. § 19.33(4).

<sup>174</sup> Wis. Stat. § 19.33(1).

an authority.”<sup>175</sup> The statutory definition of “record” identifies examples of documents that are subject to the law, such as “handwritten, typed or printed pages,”<sup>176</sup> and examples of documents that would not be subject to the law, like drafts prepared for personal use.<sup>177</sup> The attorney general has opined that a record “must be created or kept in connection with [the] official purpose or function of the agency,” and that “content determines whether a document is a ‘record,’ not medium, format, or location.”<sup>178</sup>

A “requester” is “any person who requests inspection or copies of a record.”<sup>179</sup>

Unlike some state public records laws that only allow state residents to file records requests,<sup>180</sup> both Wisconsin residents and nonresidents have a right of access under Wisconsin’s public records law.<sup>181</sup> The only exception: “a committed or incarcerated person.”<sup>182</sup>

Record custodians must respond to public record requests “as soon as practicable and without delay.”<sup>183</sup> The public records law authorizes fees for the “actual, necessary and direct cost” of copying, transcription, photographic processing, and mailing or

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<sup>175</sup> Wis. Stat. § 19.32(2).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Wisconsin Department of Justice, *supra* note 124 at 3.

<sup>179</sup> Wis. Stat. § 19.32(3).

<sup>180</sup> *E.g.*, Virginia’s Freedom of Information Act only confers access rights to “citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.” Va. Code Ann. § 2.2-3700(B). In *McBurney v. Young*, 133 S. Ct. 1709, 569 U.S. \_\_\_, the Supreme Court held on April 29, 2013, that the law’s restriction to state residents was not unconstitutional. See Aaron Mackey, *Supreme Court: States can prohibit non-residents from using public records laws to gather information*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, April 29, 2013, available at <http://www.rcfp.org/browse-media-law-resources/news/supreme-court-states-can-prohibit-non-residents-using-public-records> (last accessed December 8, 2013).

<sup>181</sup> Wis. Stat. § 19.32(3).

<sup>182</sup> *Id.* However, such individuals may seek “inspection or copies of a record that contains specific references to [him or her] 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.” *Id.*

<sup>183</sup> Wis. Stat. § 19.35(4)(a).

shipping.<sup>184</sup> Custodians may also charge a fee to locate a record if the cost is \$50 or more.<sup>185</sup> These fees are not mandatory; the record custodian has discretion to waive fees when in the public interest.<sup>186</sup>

Authorities and record custodians who “arbitrarily and capriciously” deny or delay access to a record or charge an excessive fee may be liable to pay the public record law’s penalty provisions: (1) punitive damages and/or (2) a civil forfeiture.<sup>187</sup> The attorney general and district attorneys have authority to enforce such penalties.<sup>188</sup> But before these penalties become relevant to a dispute, record requesters will likely have attempted to invoke at least one of the public records law’s enforcement provisions.

#### *Enforcement provisions*

For the purposes of this proposal, the word “enforcement” is used broadly: it includes processes in which record requesters can compel the production of records, but also processes that lack such force yet still give requesters a chance to challenge, or appeal, the decisions of record custodians.<sup>189</sup> The extent to which enforcement provisions are effective at resolving disclosure disputes, and are accessible to all records requesters to use, vary widely among jurisdictions in the United States, and is the central focus of this thesis.

Litigation is perhaps the most prominent and potent tool for enforcing public records laws. All public records laws in the United States can be enforced through litigation, most commonly in which the records requester sues the government body that

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<sup>184</sup> Wis. Stat. § 19.35(3)(a)-(d).

<sup>185</sup> *Id.*

<sup>186</sup> Wis. Stat. § 19.35(3)(e).

<sup>187</sup> Wis. Stat. § 19.37(3)-(4).

<sup>188</sup> *Id.*

<sup>189</sup> Record custodians are the people who have legal custody of a governmental body’s records. Wisconsin’s public records law refers to record custodians as “legal custodians.” *See* Wis Stat. § 19.33.

has custody of the record, seeking a court order commanding that the record be released.<sup>190</sup>

Such is the case in Wisconsin. Requesters who go to court typically ask a circuit (trial) court to issue a writ of a mandamus,<sup>191</sup> which is an order compelling a government official to comply with his or her duties under the public records law (e.g., releasing a public record). Plaintiffs might also file suit seeking a declaratory judgment that a government official or agency has violated the public records law.<sup>192</sup> Plaintiffs who prevail “in whole or in substantial part” have a right to recover attorney’s fees.<sup>193</sup> Another common type of litigation involves instances in which the subject of a requested record sues to block disclosure of the record. The requester of the record has a right to intervene in the suit and represent his or her (or its) interests in court.<sup>194</sup>

Parties have a right to appeal circuit court decisions to the Wisconsin Court of Appeals. From there, dissatisfied parties can petition Wisconsin’s highest state court, the Wisconsin Supreme Court, to hear their case. But just like the Supreme Court of the United States, the Wisconsin Supreme Court has discretionary review in most instances; the justices select a comparatively small number of cases to hear based on statutory

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<sup>190</sup> Daxton R. Stewart, *Constructively Managing Conflict About Open Government: Use of Ombuds and Other Dispute Resolution Systems in State and Federal Sunshine Laws*, Dissertation for Ph.D., UNIVERSITY OF MISSOURI (2009), at 46.

<sup>191</sup> Wis. Stat. § 19.37(1)(a).

<sup>192</sup> E.g., *Isthmus Publishing Company, Inc. et al. v. Governor Scott Walker et al.*, Dane County Case No. 2011-CV-1062; *Juneau County Star-Times et al. v. Juneau County et al.*, Juneau County Case No. 2010-CV-109; and *The Journal Times et al. v. Village of Mount Pleasant et al.*, Racine County Case No. 2011-CV-1926.

<sup>193</sup> Wis. Stat. § 19.37(2)(a).

<sup>194</sup> Wis. Stat. § 19.356(4) (“Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right.”).

criteria.<sup>195</sup> Parties in cases pending before the court of appeals may also seek direct review by the state supreme court.<sup>196</sup>

Going to court, however, is time consuming, complex, and perhaps most obviously, expensive.<sup>197</sup> Indeed, evidence suggests that litigation is increasingly out of reach for financially strapped news organizations.<sup>198</sup> In Wisconsin and a growing number of jurisdictions, record requesters have other options to try to enforce their right to public records: administrative review mechanisms.

#### *Administrative review mechanisms*

At least 32 jurisdictions in the United States, including Wisconsin, have adopted processes for record requesters to dispute record custodians' disclosure decisions aside from litigation.<sup>199</sup> Such processes, referred to in this study as "administrative review mechanisms," at their very essence give requesters an opportunity to have a third party review, and opine on, a disclosure dispute (e.g., finding the record custodian properly or improperly withheld the requested record, or that the record custodian does or does not have a legal basis to charge a particular fee, among other examples).

In Wisconsin, record requesters can attempt to resolve disclosure disputes through the public records law's two administrative review mechanisms: record requesters can ask the attorney general or a district attorney to sue on their behalf (hereinafter referred to

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<sup>195</sup> Wis. Stat. § 809.62(1r).

<sup>196</sup> Wis. Stat. § 808.05 (e.g., *Milwaukee Journal Sentinel v. City of Milwaukee*, 815 N.W.2d 367 (2012), in which the Milwaukee Journal Sentinel petitioned the supreme court for direct review while the case was pending before the court of appeals. The supreme court accepted direct review; the court of appeals never issued an opinion.).

<sup>197</sup> See, e.g., Nader, *supra* note 17, at 1 ("The observation that Americans have no access to law for certain types of cases has appeared in numerous law review articles since the turn of the century and probably before. The reasons for lack of access have usually been documented by these same authors – the type of cases and lack of time, money, and knowledge.").

<sup>198</sup> National Freedom of Information Coalition, *supra* note 18.

<sup>199</sup> Stewart, *supra* note 190, at 211.



as “Litigation Surrogate”), or requesters can ask the attorney general to opine on the dispute (hereinafter referred to as “Attorney General Advice”). The attorney general’s involvement in the public records law is handled by the Wisconsin Department of Justice (“DOJ”), the state agency led by the attorney general.

*(1) Administrative Review Mechanism 1: Litigation Surrogate*

The Litigation Surrogate administrative review mechanism gives record requesters the right to ask the attorney general or a district attorney to sue on their behalf.<sup>200</sup> This right is only a right to request; neither the attorney general nor district attorneys are required to take any action upon receipt of such requests. While I have been unable to locate complete data revealing how many times the attorney general or district attorneys have actually acted under this authority (hence the purpose for this proposal), there is reason to believe such instances are relatively rare. Consider:

**a. I have located only three cases in which the attorney general and district attorneys have exercised their enforcement authority under the Litigation Surrogate mechanism.<sup>201</sup>**

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<sup>200</sup> Wis. Stat. § 19.37(1)(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.”).

<sup>201</sup> *State of Wisconsin v. City of Rhinelander*, Oneida County Case No. 2004-CV-236; *State of Wisconsin et al. v. David A. Zien et al.*, 2008 WI App 153; and former Dane County District Attorney William Foust’s lawsuit against the DeForest School District in 1991 (case number unknown). There are also several peripheral cases that involve attorney general and district attorney action on the public records law, but such cases are not purely Litigation Surrogate actions. The attorney general sued former Department of Transportation Secretary Frank Busalacchi and State Representative Jeffrey Stone under the public records law, but those were civil forfeiture cases – not enforcement actions to compel disclosure of public records. And in *Capital Times v. Bock*, Dane County Case No. 164-312 (April 12, 1983), former Dane County District Attorney Hal Harlowe gave some support to the *Capital Times* in its pursuit of UW-Madison professors’ outside activity reports. The *Capital Times* had invoked the Litigation Surrogate mechanism shortly after the mechanism became law in 1983, asking the attorney general to sue on the newspaper’s behalf (even though the newspaper had already filed suit against UW). The attorney general referred the *Capital Times*’s request to Harlowe, who agreed to take action. In explaining his decision, Harlowe told the *Capital Times*: “I think the Legislature’s intent was that the DA’s office become involved in cases that the district attorney feels are of sufficient public interest to warrant that involvement” (Rob Fixmer, *DA intervenes for C-T in UW disclosure case*, THE CAPITAL TIMES, Feb. 23, 1983, at 1, 13.) Harlowe filed a brief in the *Capital Time*’s lawsuit supporting disclosure, but he did not file suit himself (Rob Fixmer and

The Wisconsin Attorney General appears to rarely exercise Litigation Surrogate enforcement authority. One Department of Justice official said he could not recall any public records case prosecuted by the DOJ before 2002.<sup>202</sup> And correspondence from the early 1990s reveals that assistant attorneys general declined to file mandamus actions on behalf of citizen requesters, telling the requesters that the public records law “encourage[ed] private enforcement” through reimbursement of attorney’s fees if the suit substantially prevailed in whole or in part.<sup>203</sup>

Indeed, I have been able to locate only two instances in which the attorney general has filed suit under the public record law’s Litigation Surrogate mechanism.<sup>204</sup> Both cases were during Attorney General Peg Lautenschlager’s term.

*AG Case 1: State of Wisconsin v. City of Rhinelander*<sup>205</sup>

In 2004, the Department of Justice sued the City of Rhinelander to compel release of a settlement agreement with the city’s insurance company.<sup>206</sup> Two Rhinelander-area

David Blaska, *UW makes prof reports public: How UW faculty’s outside activities came to public light*, THE CAPITAL TIMES, April 29, 1983, at 1, 4.).

<sup>202</sup> Daniel P. Bach, *Bucher’s criticisms of state are unwarranted*, WAUKESHA FREEMAN, Aug. 4, 2005, at 10A.

<sup>203</sup> I reviewed this correspondence for an academic research paper. The correspondence, dated April 1993 through November 1993, and all of 1994, are in the archives of the Wisconsin Historical Society.

<sup>204</sup> My search principally consisted of keyword searches of the Wisconsin Freedom of Information Council website (namely, the “Your Right to Know” columns), the NewspaperARCHIVE (BadgerLink) database of Wisconsin newspapers, the Wisconsin Newspaper Association’s Wisconsin Newspapers Digital Research Site, and Google News Archive. Keywords included: “Wisconsin,” “attorney general,” “district attorney,” “public records law,” and/or “open records law.” I also emailed Bill Lueders, the president of the Wisconsin Freedom of Information Council, on April 27, 2012. I asked him if was aware of any cases “in which the attorney general or a district attorney has sued an authority under the public records law upon request of a records requester pursuant to Wis. Stat. § 19.37(1)(b).” I said I was aware of the Rhinelander case. Lueders responded: “There have been cases, although I’m not having a great deal of success remembering them. I know Dane County DA Bill Foust brought an enforcement action against the Village of DeForest in the 1990s (I think, could have been 1989, the year he took office) for having destroyed a tape after being asked to produce it. There have not been any enforcement actions by the AG’s office since J.B. Van Hollen took over, so far as I know (this is something that probably would come to my attention). Bob Dreps, our attorney, might know of other cases; I’m including him in this reply.”

<sup>205</sup> *State of Wisconsin v. City of Rhinelander*, Oneida County Case No. 2004-CV-236.

<sup>206</sup> Associated Press, *Open-records suit brings terms of Rhinelander deal to light*, WIS. ST. J., Sept. 4, 2004, at C3.

journalists filed record requests with the city for copies of the agreement, and the city attorney denied the requests citing a confidentiality clause in the settlement.<sup>207</sup> The journalists, Meredyth Albright of the *Rhineland Daily News* and Ken Krall of WXPR radio, asked the attorney general to opine as to whether the city's denial was legally sufficient.<sup>208</sup> After learning of the case, the Department of Justice sued the city on behalf of Albright and Krall.<sup>209</sup> The city quickly relented and released the agreement.<sup>210</sup> The DOJ voluntarily withdrew the suit within a month of it being filed.<sup>211</sup>

*AG Case 2: State of Wisconsin et al. v. David A. Zien et al.*<sup>212</sup>

In 2005, the Department of Justice sued State Sen. David Zien and State Rep. Scott Gunderson after they refused to release a draft of a bill that had not yet been introduced into the legislature.<sup>213</sup> The lawmakers were in the process of writing legislation that would have legalized concealed carry of handguns, and according to media reports, shared a draft of the bill with the National Rifle Association.<sup>214</sup> The bill reportedly would have required the Department of Justice to issue permits.<sup>215</sup>

At the direction of Attorney General Lautenschlager, an assistant attorney general filed a records request with the legislators for the bill draft.<sup>216</sup> Zien and Gunderson denied the request, arguing that the bill draft was exempt from disclosure under the “draft”

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<sup>207</sup> *Id.*

<sup>208</sup> Telephone interview with Meredyth Albright, April 28, 2012.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Dan Benson, *Open meetings lawsuit against Rhineland dismissed*, MILWAUKEE JOURNAL SENTINEL, Sept. 10, 2004, at 7B (The headline is erroneous. This isn't an open meetings case.).

<sup>212</sup> *State of Wisconsin et al. v. David A. Zien et al.*, Dane County Case No. 2005-CV-2896.

<sup>213</sup> Peg Lautenschlager, *Public deserves look at concealed gun bill*, THE CAPITAL TIMES, Oct. 15-16, 2005, at 13A.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

exemption to the public records law.<sup>217</sup> The assistant attorney general who asked for the bill draft reiterated the request, and referred to a 2003 attorney general opinion concluding that bill drafts shared with third parties are public records.<sup>218</sup> The legislators wouldn't budge.

On September 1, 2005, the Department of Justice sued Zien and Gunderson in Dane County Circuit Court, seeking a declaratory judgment that the legislators were violating the public records law and that the bill drafts were public records.<sup>219</sup> Freedom of information advocates widely praised Lautenschlager for filing suit.<sup>220</sup>

The judge, however, disagreed with Lautenschlager. In June 2007, Dane County Circuit Judge David Flanagan held that bill drafts do not become public records until they are formally introduced.<sup>221</sup> Complicating the case, Lautenschlager was also no longer the attorney general when the judge ruled, having lost her re-election bid at the primary stage.<sup>222</sup> Lautenschlager attempted to appeal in her personal capacity, but the state court of appeals held she could not do so.<sup>223</sup> Lautenschlager had sued the legislators under the Litigation Surrogate mechanism in her official capacity as attorney general, and not directly as a private requester. Therefore, the court of appeals held, whoever holds the office of attorney general has proper authority to “direct the litigation.”<sup>224</sup> Lautenschlager’s successor, J.B. Van Hollen, chose not to appeal the circuit court’s decision.<sup>225</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See, e.g., Dave Zweifel, *AG is right to challenge lawmakers*, THE CAPITAL TIMES, Nov. 7, 2005, at 8A.

<sup>221</sup> Greg Peck, *Judge slams the door on Legislature’s integrity*, THE CAPITAL TIMES, August 2, 007 at A8.

<sup>222</sup> *State of Wisconsin et al. v. David A. Zien et al.*, 2008 WI App 153, at ¶14.

<sup>223</sup> *Id.*, at ¶2.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

Van Hollen has not filed a public records mandamus action during his tenure. “He has never brought an enforcement action against anyone,” said Bill Lueders, president of the Wisconsin Freedom of Information Council.<sup>226</sup> Van Hollen, Lueders said, “does not want to use his office to prosecute public officials for violating these laws.”<sup>227</sup>

Like the attorney general, district attorneys appear to rarely exercise their authority under the Litigation Surrogate mechanism. I have located just one case.<sup>228</sup>

*DA Case 1: Dane County DA lawsuit against DeForest Area School District*

Former Dane County District Attorney William Foust sued the DeForest Area School District in February 1991 after a trade union asserted school officials destroyed an audio recording of a school board meeting.<sup>229</sup> In August of that year, a Dane County judge concluded the school district violated the public records law.<sup>230</sup> The recording actually wasn’t destroyed, and the judge ordered school officials to produce the recording.<sup>231</sup>

**b. Multiple officials have argued that the attorney general’s role in the public records law is not oriented toward resolving individual access disputes.**

In 2003, Attorney General Lautenschlager created the Government Integrity Unit, a division within the Department of Justice charged with investigating complaints about

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<sup>226</sup> Stewart, *supra* note 190, at 75. Lueders said that Van Hollen’s predecessor, Peg Lautenschlager, had “‘a pretty good track record’ of bringing actions against public officials and agencies for not following the law.” Lueders cited two public-records lawsuits filed by Lautenschlager against state legislators. Both lawsuits implicated the question of whether drafts of bills that have been shared with lobbyists are public records. A Dane County judge concluded the answer was no, and dismissed the first case (*State of Wisconsin et al. v. David A. Zien et al.*, Dane County Case No. 2005-CV-2896). Van Hollen’s administration decided not to pursue the second case because of the disposition of the first case (*State of Wisconsin v. Jeffrey Stone*, Milwaukee County Case No. 2006-CX-3). See also Associated Press, “DOJ gives up on open records lawsuit,” THE DAILY REPORTER, July 20, 2007, available at <http://dailyreporter.com/2007/07/20/doj-gives-up-on-open-records-lawsuit/> (last accessed December 8, 2013).

<sup>227</sup> *Id.*

<sup>228</sup> See *supra* note 204 for search process.

<sup>229</sup> *DA files lawsuit against schools*, WIS. ST. J., Feb. 26, 1991, at 2C.

<sup>230</sup> State Journal staff, *Judge: School violated law*, WIS. ST. J., Aug. 23, 1991, at 3D.

<sup>231</sup> *Id.*

government malfeasance and enforcing the state's public records and open meetings law.<sup>232</sup> In 2005, the Associated Press reviewed the complaints made to the unit and how the unit had responded to such complaints. The AP found that the Government Integrity Unit declined to investigate three-quarters of complaints it had received in its first 18 months of existence (including but not limited to complaints about public-records issues).<sup>233</sup>

Monica Burkert-Brist, an assistant attorney general who initially led the Government Integrity Unit, told the AP the unit can only focus on cases with a statewide impact: "We're not a roving commission to do good," Burkert-Brist said. "We're not the way people can solve every grievance about how government operates in their area."<sup>234</sup> Burkert-Brist also said that DOJ attorneys write letters and make phone calls to resolve complaints, which she argued saves resources compared to litigation.<sup>235</sup>

The AP conducted a similar analysis in 2007, during Van Hollen's first year in office, and revealed that the Government Integrity Unit declined to formally investigate more than 90% of complaints (again, not just public record complaints) within a three-year period.<sup>236</sup> The AP found that such complaints were principally "handled through correspondence that noted resolutions short of an investigation, including declarations that no violations were found, suggestions to seek help from local prosecutors or private attorneys and training in state law for government officials."<sup>237</sup>

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<sup>232</sup> Todd Richmond, Associated Press, *Watchdog squad makes few friends*, THE CAPITAL TIMES, March 14, 2003, at A3.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Associated Press, *Public integrity unit passes on many cases*, WATERTOWN DAILY TIMES, March 12, 2007, at 8.

<sup>237</sup> *Id.*

In response, Deputy Attorney General Raymond Taffora said the rate of the DOJ's enforcement actions is similar to the judicial system, where most lawsuits don't go to trial.<sup>238</sup> Said Taffora: "You would no more say that the Department of Justice is ... not concerned, or lazy or not following up than you would say the judges are not following up on cases that are filed in the court system."<sup>239</sup>

Indeed, the attorney general's office has repeatedly gone on record acknowledging that it typically does not file mandamus actions on behalf of requesters. Deputy Attorney General Daniel Bach in 2005 touted the Department of Justice's success at resolving public records disputes without court action:

In less than two years almost 200 open meetings and/or public records complaints or matters have been reviewed, in addition to the other work that unit performs. Of those numbers, the vast majority were resolved without litigation. This means that our office often was able to address the concerns of the complainants by getting cooperation from the public officials involved. Meeting practices were changed, public records were produced – in other words, we effected the same remedy provided by a lawsuit without unnecessary costs or the intervention of the courts. ... Most public officials are good public servants who try to do their best to comply with the open meetings and public records laws. Nonetheless, even the best intentioned may violate these provisions. Often in those situations, the intervention of our office without filing suit can get things back on track in a community.<sup>240</sup>

In October 2011, Assistant Attorney General Bruce Olson said during the DOJ's online training seminar about the public records law that "[b]ecause we think our resources are better allocated to education than enforcement, we'll [enforce] only where a matter involves statewide concern."<sup>241</sup> Olson did not indicate how the attorney general's office defines "statewide concern."

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Bach, *supra* note 202.

<sup>241</sup> Wisconsin Department of Justice Webinar, October 20, 2011.

In sum, the foregoing suggests that what the Litigation Surrogate mechanism prescribes in statute is not necessarily how the Litigation Surrogate mechanism operates in practice. There is strong reason to believe that the attorney general and district attorneys rarely exercise their authority under the Litigation Surrogate mechanism. In the instances they have, the record requesters are mostly not the “average person” State Senator Lynn Adelman identified as being the intended beneficiary of Litigation Surrogate action. And the attorney general’s office has gone on record saying it is primarily interested in disputes that implicate statewide interests; that the low number of formal Litigation Surrogate actions is not indicative of a problem; and that writing letters is a more common and efficient way of responding to complaints than going to court.

(2) Administrative Review Mechanism 2: Attorney General Advice

The second administrative review mechanism in Wisconsin’s public records law gives record requesters a right to “request advice from the attorney general as to the applicability of [the public records law] under any circumstances.”<sup>242</sup> Here again, this mechanism is a right to request; nothing requires the attorney general to even respond to such requests. Still, the attorney general’s office usually does.<sup>243</sup>

The attorney general’s response typically takes one of three forms: a formal opinion, informal opinion, or attorney correspondence.

Formal opinions hold the heaviest weight. By statute, only certain government officials have authority to request that the attorney general issue a formal opinion, such as

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<sup>242</sup> Wis. Stat. § 19.39.

<sup>243</sup> Bill Lueders, *June: Attorney general's office plays vital openness role*, Wisconsin Freedom of Information Council, June 2009, available at [http://www.wisfoic.org/index.php?option=com\\_content&view=article&id=162:june-attorney-generals-office-plays-vital-openness-role-&catid=34:monthly-columns&Itemid=55](http://www.wisfoic.org/index.php?option=com_content&view=article&id=162:june-attorney-generals-office-plays-vital-openness-role-&catid=34:monthly-columns&Itemid=55) (last accessed December 8, 2013).



a county corporation counsel. But the attorney general is not obligated to issue opinions, even when requested by the people with authority to do so. The attorney general typically issues formal opinions because they address important legal issues or try to clarify blurry areas in the law.

The writing and editing process for creating formal opinions is significant. An assistant attorney typically writes a first draft. A panel of three assistant attorneys general then reviews and edits that draft, along with senior-level officials in the Department of Justice. Ultimately, the draft makes its way to the attorney general. If the AG approves the formal opinion, he or she signs it. Formal opinions are posted on the DOJ's web site and legal databases such as LexisNexis and Westlaw.

Informal opinions concern issues that are important but usually less so compared to formal opinions. Informal opinions do not receive panel review, but do undergo "rigorous review" by senior DOJ officials. The AG then reviews the draft and signs it if he approves it. The informal opinion is then posted on the DOJ's website.

Lastly, basic correspondence – letters, e-mails – are for the least important issues or are communications to people who are not authorized to request formal or informal opinions. The DOJ says that it responds to all correspondence.

Bill Lueders, president of the Wisconsin Freedom of Information Council, wrote in 2009 that the attorney general's office receives "well more than 100" such written requests, and at least 500 telephone inquiries, per year.<sup>244</sup> "I remain stunned by the volume," Lueders wrote.<sup>245</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

The nature of advice the attorney general's office can give under this mechanism is quite broad. To illustrate:

- *Record requesters have asked the attorney general to opine as to the validity of record custodians' disclosure decisions.* For example, between 1993 and 1994, WLUK-TV in Green Bay was attempting to gain access to records of the high-profile murder investigation of Thomas Monfils, a paper mill worker killed by other employees.<sup>246</sup> The television station filed records requests with the Green Bay Police Department and the Brown County District Attorney for various investigative documents and audiovisual material. At least three of the requests were denied. The television station asked the attorney general to determine whether the stated reasons for denying the records of all three requests were legally valid.<sup>247</sup> The attorney general's office agreed with nondisclosure for two of the requests, and opined that the records responsive to the third request should be released. (I don't know whether the television station actually obtained the records the attorney general's office said should be disclosed, or if the attorney general opinion had any impact.)
- *Record requesters have asked about the legality of fees.* For instance, in 2004, Bill Lueders, the president of the Wisconsin Freedom of Information Coalition and then-news editor at the *Isthmus* newspaper in Madison, sought emails from the

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<sup>246</sup> *6 Co-Workers Tried After Man Dies in Vat*, THE NEW YORK TIMES, September 26, 1995, available at <http://www.nytimes.com/1995/09/26/us/6-co-workers-tried-after-man-dies-in-vat.html> (last accessed December 8, 2013).

<sup>247</sup> WLUK-TV to Wisconsin Department of Justice, April 4, 1993. Wisconsin Department of Justice/General Correspondence, Wisconsin Historical Society Library-Archives, Madison, WI; WLUK-TV to Wisconsin Department of Justice, June 14, 1993. Wisconsin Department of Justice/General Correspondence, Wisconsin Historical Society Library-Archives, Madison, WI; WLUK-TV to Wisconsin Department of Justice, June 3, 1994. Wisconsin Department of Justice/General Correspondence, Wisconsin Historical Society Library-Archives, Madison, WI.

Madison Metropolitan School District. The district's record custodian attempted to charge Lueders for the time it took to determine whether the records should be released and for redacting records. Lueders asked the attorney general's office whether these charges were valid under the law. Attorney General Peg Lautenschlager wrote back about two months later, finding no legal basis for the fees.<sup>248</sup> I don't know whether this letter had an impact on the record custodian's position. However, the Wisconsin Supreme Court ruled in 2012 that record custodians cannot impose fees for redaction.<sup>249</sup> The attorney general filed an amicus brief in that case arguing, among other things, the position it took in the Lueders letter: charging for redaction is not authorized under statute or case law.<sup>250</sup> In fact, the amicus brief cited the letter to Lueders.<sup>251</sup>

- *Record requesters have asked about what constitutes a "record" under the public records law.* The editor of *Onalaska Community Life* asked the attorney general in 1994 whether proposals submitted by businesses for a government contract can be released before the contract has been awarded.<sup>252</sup> The attorney general's office replied that such proposals do not become public records until the contract for which they were submitted has been awarded.
- *Record requesters have sought guidance as to how the public records law applies in relation to other laws.* For example, in 2008, a coalition of Wisconsin

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<sup>248</sup> Peg Lautenschlager/Wisconsin Department of Justice to Bill Lueders/Isthmus, June 1, 2004, available at [http://wisfoic.org/agopinions/060104\\_Lueders1.pdf](http://wisfoic.org/agopinions/060104_Lueders1.pdf) (last accessed December 8, 2013).

<sup>249</sup> *Milwaukee Journal Sentinel v. City of Milwaukee*, 815 N.W.2d 367 (2012)

<sup>250</sup> *Milwaukee Journal Sentinel et al. v. City of Milwaukee et al.*, Wisconsin Supreme Court, Case 2011AP1112, Brief of Amicus Curiae Wisconsin Department of Justice, available at [https://acefiling.wicourts.gov/documents/show\\_any\\_doc?appId=wscca&docSource=EFile&p\[caseNo\]=2011AP001112&p\[docId\]=79442&p\[eventSeqNo\]=38&p\[sectionNo\]=1](https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p[caseNo]=2011AP001112&p[docId]=79442&p[eventSeqNo]=38&p[sectionNo]=1).

<sup>251</sup> *Id.*, at 10.

<sup>252</sup> David Skoloda to Wisconsin Department of Justice, May 11, 1994. Wisconsin Department of Justice/General Correspondence, Wisconsin Historical Society Library-Archives, Madison, WI.

newspapers asked the attorney general to opine on whether the federal Driver's Privacy Protection Act ("DPPA") required local police departments to redact personal information of persons mentioned in police incident reports.<sup>253</sup> Under DPPA, state departments of motor vehicles are prohibited from disclosing drivers' personal information (e.g., name, social security number, home address).<sup>254</sup> Police departments in Wisconsin had in several instances relied on DPPA as the basis for redacting information from police incident reports, even though DPPA does not cover law enforcement agencies.<sup>255</sup> And, the Wisconsin League of Municipalities had advised that police departments "be cautious and redact any information that was obtained from DMV records."<sup>256</sup> Citing these problems, attorneys for the newspapers wrote the request to the attorney general asking for clarification on how the DPPA intersects with the public records law, while also arguing that the police departments' reliance on DPPA was misguided.<sup>257</sup> About 10 months later, the attorney general issued a lengthy informal opinion, generally concurring with the newspaper coalition.<sup>258</sup>

- *The attorney general's office has engaged in dispute mediation-oriented activity under this mechanism's authority.* Assistant Attorney General Lewis Beilin said that sometimes assistant attorneys general will "pick up the phone and...find facts...[to determine] what's an appropriate response...[to] kind of mediate

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<sup>253</sup> Robert Dreps and Jennifer Peterson to Attorney General J.B. Van Hollen, July 3, 2007.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Attorney General J.B. Van Hollen to Robert Dreps and Jennifer Peterson, April 29, 2008, *available at* <http://wisfoic.org/agopinions/DrepsPeterson2.pdf> (last accessed December 8, 2013).

disputes.”<sup>259</sup> I have been able to locate two such examples. In 1992, Assistant Attorney General Alan Lee met with the attorney for the Village of Marshall in response to citizen complaints that the village’s copying fees were too expensive.<sup>260</sup> The village revised its copy-fee policy after Lee intervened.<sup>261</sup> The second example is from 1994 and also involves Assistant Attorney General Alan Lee. Lee wrote to the clerks of two Wisconsin townships<sup>262</sup> and said that a records requester had a right to inspect property assessment records, even if such records are being held by a contractor.<sup>263</sup> Prior to gathering the primary data for this study, I had not found records of any other instances in which the attorney general’s office had directly contacted governmental to assert a requester’s right of access.

- *The attorney general’s office has also released memorandums directed at record custodians and the public to clarify important and timely issues.* In June 2000, Attorney General Jim Doyle wrote to public record custodians across the state warning them not to charge excessive fees.<sup>264</sup> Doyle’s office had received complaints that governmental authorities were charging locating fees for routine records like meeting minutes and bills.<sup>265</sup> And in July 2010, Attorney General Van Hollen issued a public memorandum in the wake of a state Supreme Court

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<sup>259</sup> Telephone conversation between Jonathan Anderson and Assistant Attorney General Lewis Beilin, July 18, 2011.

<sup>260</sup> Pamela Seelman, *Village responds to openness issues*, THE CAPITAL TIMES, Dec. 11, 1992, at 7A.

<sup>261</sup> *Id.*

<sup>262</sup> The Town of Gale and Town of Ettrick.

<sup>263</sup> Alan Lee/Wisconsin Department of Justice to Town of Gale and Town of Ettrick, copied to requesters Thomas Walker/Walker Appraisal Service, 1994. Wisconsin Department of Justice/General Correspondence, Wisconsin Historical Society Library-Archives, Madison, WI.

<sup>264</sup> Associated Press, *Stop charging excessive fees for records, attorney general warns officials*, First Amendment Center Online, June 9, 2000, available at <http://www.freedomforum.org/templates/document.asp?documentID=12712> (last accessed December 8, 2013).

<sup>265</sup> *Id.*

ruling about access to personal emails of public employees.<sup>266</sup> The court issued a plurality opinion holding that purely personal emails of public employees were not subject to disclosure under the public records law.<sup>267</sup> The memo advised record custodians they should apply the ruling narrowly, and affirmed record requesters' rights to information that might reveal misuse of public resources.<sup>268</sup>

- *The attorney general holds annual seminars intended to educate the public about its rights, and record custodians about their duties, under the public records law.* Attorneys general have held these seminars since at least the early 1990s.<sup>269</sup> The seminars are open to the public and held at multiple locations throughout the state.

These are just a few examples of how the Attorney General Advice mechanism has operated in practice, which are based largely on my review of a small number of primary records (e.g., requests to the attorney general, the attorney general's responses). These examples illustrate the diverse range of interpretive action the attorney general's office has taken: informally answering inquiries over the phone and in writing, issuing advisory opinions on a particular issue, taking active steps to resolve disputes, educating the public and government officials about the public records law. Identifying the contours of this range is part of the point of this study. Doing so has the potential to transform the vague statutory authorization to "give advice" into concrete examples record requesters can use and scholars can evaluate.

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<sup>266</sup> Correspondence/Memorandum from Attorney General J.B. Van Hollen to Interested Parties, July 28, 2010, available at <http://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf> (last accessed December 8, 2013).

<sup>267</sup> Joe Forward, *Public interest protects personal emails of government employees from disclosure upon request*, State Bar of Wisconsin, July 21, 2012.

<sup>268</sup> Correspondence/Memorandum, *supra* note 266.

<sup>269</sup> Dave Zweifel, *Edgerton council needs openness lesson*, THE CAPITAL TIMES, Aug. 16, 1993, at 3C.

Not all jurisdictions' administrative review mechanisms are like Wisconsin's, however. Whether the third-party reviewer (e.g., attorney general, district attorney) can take corrective action based on its review, and the form that the review takes, is not the same in each jurisdiction. Indeed, administrative review mechanisms vary widely across the United States in structure, formality, potency, and purpose.

### **C. Administrative Review mechanisms in the United States**

*Structure.* Administrative review mechanisms vary widely in structure. Some mechanisms are self-contained governmental units, such as the Connecticut Freedom of Information Commission ("CFOIC"), an independent government agency within the Connecticut state government.<sup>270</sup> The commission has an executive director, appointed commissioners, and support staff.<sup>271</sup> Other mechanisms are distinct units of already existing structures, such as the New York Committee on Open Government ("NYCOG"), a unit of the New York Department of State.<sup>272</sup> NYCOG has 11 committee members, including various members of state government, the public, and the news media; and an executive director who runs the day-to-day operations.<sup>273</sup>

Alternatively, many mechanisms are overseen by staff within an already existing structure, such as the governor's office or attorney general's office, with no distinct subunit exclusively devoted to managing administrative review mechanisms. Such is the

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<sup>270</sup> Connecticut Freedom of Information Commission, *A Citizen's Guide to the Freedom of Information Commission*, available at <http://www.ct.gov/foi/cwp/view.asp?a=4161&q=488530> (last accessed December 8, 2013).

<sup>271</sup> *Id.* See also Conn. Gen. Stat. § 1-205(a). Commissioners are appointed by Connecticut's governor "with the advice and consent of either house of the General Assembly" (either the state House of Representatives or state Senate).

<sup>272</sup> Harry Hammitt, *Mediation Without Litigation*, THE FOI REPORTS, Vol. 2, No. 3, National Freedom of Information Coalition (2007), at 5.

<sup>273</sup> *Id.*

case in Wisconsin: the attorney general's office<sup>274</sup> and district attorneys are the third parties that perform administrative review (also referred to as "mechanism administrators").<sup>275</sup>

*Formality.* Administrative review mechanisms also vary in the formality of procedures they follow. Some mechanisms are more legalistic and adversarial in nature, while other mechanisms focus more on voluntary negotiation, cooperation, and the parties' interests. In Connecticut, the CFOIC acts in a quasi-judicial manner: record requesters file complaints with the commission; the commission may hold a formal hearing in which parties make arguments and answer questions; and the commission can make a court-like ruling on which party is right.<sup>276</sup>

In contrast, the processes of Wisconsin's administrative review mechanisms are relatively less formal. Record requesters need only call or write a letter to the attorney general or a district attorney, and await a response. Record requesters may need to provide detailed information about the dispute, but the procedures are nonetheless minimal.

*Potency.* Quite simply, some mechanisms contain more powerful tools to resolve disclosure disputes than other mechanisms. Whereas some mechanisms have binding authority to compel disclosure of records, and the ability to launch formal investigations and subpoena records and witnesses, other mechanisms have substantially less power (e.g., only the power to issue an advisory opinion). However, the authority to compel

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<sup>274</sup> The Department of Justice's State Programs, Administration and Revenue ("SPAR") unit is charged, in part, with "advis[ing] the public and governmental agencies on open meetings and public records issues." SPAR is not distinctly focused on public records matters, however. See Wisconsin Department of Justice, Division of Legal Services, *State Programs, Administration and Revenue (SPAR)*, available at <http://www.doj.state.wi.us/dls/state-programs-administration-revenue-unit> (last accessed December 8, 2013).

<sup>275</sup> Wis. Stat. §§ 19.37-19.39.

<sup>276</sup> Connecticut Freedom of Information Commission, *supra* note 270.



disclosure is not the only factor when assessing the potency of a mechanism. Whether the mechanism has sufficient resources to operate effectively,<sup>277</sup> whether the mechanism's administrators are perceived to be credible and impartial,<sup>278</sup> and the extent to which record requesters have a right to review, among other factors, influence mechanism potency.

*Purpose.* Lastly, some mechanisms have an explicit purpose: they were created, often by a legislature, with a specific intent to resolve disclosure disputes. Other mechanisms do not contemplate a purpose; they just articulate a process (e.g., the elements of third-party review of a record custodian's decision). In Florida, for example, the state's attorney general is required by law to mediate disclosure disputes. The process is non-adversarial and "has the objective of helping the disputing parties reach a mutually acceptable, voluntary agreement."<sup>279</sup> Alternatively, some mechanisms merely authorize review, without overt reference to disputes. Such is the case with one of the mechanisms in Wisconsin: record requesters can ask the attorney general to interpret the public records law, but nothing in the statutory provision creating that right says its purpose is to resolve disclosure disputes or that the attorney general should attempt to make an effort to resolve disputes. Indeed, the attorney general has no obligation to even respond to the request. Presumably, though, the language is broad enough to authorize activity geared toward dispute resolution.

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<sup>277</sup> Deborah Mohammed-Spigner, *The Connecticut Freedom of Information Commission (FOIC): Facilitating Access to Public Records*, Dissertation for Ph.D., RUTGERS UNIVERSITY (2009), at 98.

<sup>278</sup> Stewart, *supra* note 190, at 232.

<sup>279</sup> Fla. Stat. sec. 16.60(1).

*Types of administrative review mechanisms*

In general, four common types of administrative review mechanisms exist among jurisdictions within the United States: (1) mediation-oriented mechanisms, (2) adjudication-oriented mechanisms, (3) advisory-oriented mechanisms, and (4) litigation surrogate mechanisms. These categories are principally based on typologies of freedom of information enforcement regimes developed by Stewart,<sup>280</sup> Hammitt,<sup>281</sup> and Mohammed-Spigner.<sup>282</sup>

My analysis diverges from those of these scholars in an important way. In large part, these scholars defined types of *dispute systems* by classifying all of the mechanisms within one jurisdiction as a single type. While this approach helps to easily classify jurisdictions with basic descriptors, and perhaps reflects the enforcement and compliance environment as a whole in which mechanisms operate, categorizing by system arguably fails to fully recognize the nuances of the individual mechanisms that jurisdictions have adopted. Indeed, jurisdictions can (and do) use multiple types of mechanisms that are very different.

Accordingly, I have attempted to classify each major type of administrative review mechanism adopted by jurisdictions without reference to the mechanism's role in systems of dispute resolution. My approach, which categorizes solely by the essential nature of the mechanism, avoids the potentially thorny task of shoehorning all the mechanisms a jurisdiction has into the same category, even if those mechanisms are vastly different.

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<sup>280</sup> See generally Stewart, *supra* note 190.

<sup>281</sup> See generally Hammitt, *supra* note 272.

<sup>282</sup> See generally Mohammed-Spigner, *supra* note 277.

(1) How Scholars Have Classified Administrative Review Mechanisms

Stewart identified five types of systems that jurisdictions have adopted to manage disclosure disputes: Multiple Process, Administrative Facilitation, Administrative Adjudication, Advisory, and Litigation.

- Multiple Process systems contain “multiple levels of processing, starting with options that cost less for parties and involve more interest-based problem solving.”<sup>283</sup>
- Administrative Facilitation systems “call on an individual or office to investigate and facilitate disputes, seeking to resolve disputes before they go to court.”<sup>284</sup>
- Administrative Adjudication systems “rely on individuals or offices to make determinations and rulings about openness, binding or otherwise.”<sup>285</sup>
- Advisory systems also “rely on individuals or offices to make determinations and rulings about openness,” but only in an advisory capacity.<sup>286</sup> Citing the right of record requesters to ask the attorney general for advice on the public records law, Stewart classified Wisconsin as having an advisory system.<sup>287</sup> This classification fails to account for the other administrative review mechanism in Wisconsin: the right of record requesters to ask the attorney general or a district attorney to sue on their behalf.
- Finally, Litigation systems “contemplate no formal system beyond adjudication in court.”<sup>288</sup>

Hammit, too, identified five types of systems: Formal Resolution, Informal Resolution, Formal/Informal Resolution, Attorney General Mediation, and Miscellaneous Government-Sponsored Entities. In his article, *Mediation Without Litigation*, Hammit described the structure and nature of each jurisdiction’s system within their respective categories. However, Hammit failed to articulate the definitions of the categories (e.g.,

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<sup>283</sup> Stewart, *supra* note 190, at 23.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*, at 24.

<sup>287</sup> *Id.*, at 45.

<sup>288</sup> *Id.*

the difference between Formal Resolution and Informal Resolution), and did not include Wisconsin in his analysis.

And, in a comparison of eight states, Mohammad-Spigner identified four types of “Systems of Appeals”: Internal appeal, Courts, Information Officer/Ombudsman, and Commission (123). Like Hammitt, Mohammad-Spigner did not offer detailed descriptions of what these categories mean, nor did she include Wisconsin in her analysis.

(2) *Types of Administrative Review Mechanisms: A Synthesis*

Synthesis of the foregoing section on how scholars have classified the types of dispute systems in public records laws around the United States reveals four basic types of administrative review mechanisms: (1) mediation-oriented mechanisms, (2) adjudication-oriented mechanisms, (3) advisory-oriented mechanisms, and (4) litigation surrogate mechanisms.

Mediation-oriented mechanisms aim to resolve disclosure disputes via cooperation between parties. The process is theoretically simple: “negotiation assisted by a third party.”<sup>289</sup> The principal administrative review mechanism in Florida, for instance, uses a mediation-oriented approach. State statutes require the Florida attorney general to employ at least one mediator, who is generally an assistant attorney general, to resolve disclosure disputes between record requesters and record custodians.<sup>290</sup> The mediator “acts to encourage and facilitate the resolution of a dispute between two or more parties.

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<sup>289</sup> William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved* (Jossey-Bass, 1988) at 49.

<sup>290</sup> Fla. Stat. § 16.60.

It is a formal, nonadversarial process that has the objective of helping the disputing parties reach a mutually acceptable, voluntary agreement.”<sup>291</sup>

Another mediation-oriented approach is the government ombudsman, an official whose job is to “receive and investigate citizen complaints against administrative acts of government.”<sup>292</sup> Some jurisdictions have an ombudsman specifically for disclosure disputes, like the federal government’s Office of Government Information Services,<sup>293</sup> which dubs itself the “FOIA Ombudsman,”<sup>294</sup> while other jurisdictions, like Iowa<sup>295</sup> and Arizona,<sup>296</sup> have general-purpose ombudsmen, who in addition to dealing with complaints about state government generally, have purview over records matters.

Adjudication-oriented mechanisms principally aim to resolve disclosure disputes through more formal, quasi-judicial processes. Where mediation-oriented mechanisms seek mutual satisfaction by the parties, adjudication-oriented mechanisms are geared more toward identifying who is right in a dispute.<sup>297</sup> For example, in Utah, record requesters can appeal to the State Records Committee, a unit of the state’s Department of Administration.<sup>298</sup> The committee must review the dispute unless the issue implicated by the appeal has already been resolved by a prior case.<sup>299</sup> The committee otherwise will hold a hearing on the matter at which time parties can “testify, present evidence, and

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<sup>291</sup> Fla. Stat. § 16.60(1).

<sup>292</sup> United States Ombudsman Association, *About OSOA*, available at [http://usoan.non-profitsites.biz/en/About\\_Us/about\\_usoa.cfm](http://usoan.non-profitsites.biz/en/About_Us/about_usoa.cfm) (last accessed December 8, 2013).

<sup>293</sup> Peter Haldis, *OGIS issues first year report*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, March 18, 2011, available at <http://www.rcfp.org/node/98218> (last accessed December 8, 2013).

<sup>294</sup> National Archives and Records Administration: Office of Government Information Services, *The FOIA Ombudsman*, available at <http://blogs.archives.gov/foiablog/> (last accessed December 8, 2013).

<sup>295</sup> Hammitt, *supra* note 272, at 9.

<sup>296</sup> *Id.*, at 11.

<sup>297</sup> Stewart, *supra* note 190, at 23-24.

<sup>298</sup> Hammitt, *supra* note 272, at 12.

<sup>299</sup> *Id.*

comment on the issues.”<sup>300</sup> Parties to the dispute can also file written argument such as legal briefs.<sup>301</sup> The committee has binding authority to order government agencies to release records;<sup>302</sup> parties dissatisfied with the committee’s determination can appeal further to the state court system.<sup>303</sup> Other states that have adjudication-oriented mechanisms include New Jersey and Hawaii.<sup>304</sup>

Advisory-oriented mechanisms generally entail processes in which a third party reviews a disclosure dispute and may opine in a non-binding, advisory capacity. The goal of resolving the dispute is not necessarily contemplated in this model. Such mechanisms most often take the form of written opinions or informal telephone conversations with disputants. One of Wisconsin’s administrative review mechanisms is advisory-oriented: the attorney general has authority to “opine as to the applicability of [the public records law] under any circumstances.”<sup>305</sup> The State of Washington has a mechanism similar to Wisconsin’s. Record requesters whose request has been denied can ask the Washington attorney general to opine “on whether the record is exempt” from disclosure.<sup>306</sup> To help administer this mechanism, the state’s attorney general created the “Open Government Ombudsman” in 2005.<sup>307</sup>

Lastly, in litigation surrogate mechanisms, a third party can sue the government agency on behalf of the record requester. In essence, the third party sues in lieu of the

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<sup>300</sup> *Id.*, at 13.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Stewart, *supra* note 190, at 28-29.

<sup>305</sup> Wis. Stat. § 19.39.

<sup>306</sup> Wash. Rev. Code § 42.56.530 (“Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt.”).

<sup>307</sup> Hammitt, *supra* note 272, at 10.

requester. Wisconsin and Nebraska have these types of mechanisms. In Wisconsin, record requesters can ask the state attorney general or a district attorney to litigate on their behalf.<sup>308</sup> And in Nebraska, record requesters can ask the attorney general to review record custodians' disclosure decisions.<sup>309</sup> The Nebraska attorney general can order record custodians to release records or comply with the state's public records law.<sup>310</sup> If the record custodian refuses, the record requester can demand that the attorney general sue the custodian.<sup>311</sup> The attorney general must file suit within 15 days of such a request.<sup>312</sup>

Jurisdictions, of course, may have more than one type of mechanism. Connecticut, for example, has both mediation- and adjudication-oriented mechanisms. Record requesters can file a complaint with the Connecticut Freedom of Information Commission, which is an independent governmental body the Connecticut state legislature created in 1975.<sup>313</sup> The commission is a non-judicial administrative panel consisting of five commissioners and staff,<sup>314</sup> and according to the Connecticut Foundation for Open Government, is "one of the best and most proactive oversight bodies" in the United States.<sup>315</sup> The purpose of the commission is, in part, to help resolve

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<sup>308</sup> Wis. Stat. § 19.37(b).

<sup>309</sup> Neb. Rev. Stat. § 84-712.03.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* ("If the public body continues to withhold the record or remain in noncompliance, the person seeking disclosure or compliance may (a) bring suit in the trial court of general jurisdiction or (b) demand in writing that the Attorney General bring suit in the name of the state in the trial court of general jurisdiction for the same purpose. If such demand is made, the Attorney General shall bring suit within fifteen calendar days of its receipt. The requester shall have an absolute right to intervene as a full party in the suit at any time.").

<sup>313</sup> Connecticut Freedom of Information Commission, *supra* note 270.

<sup>314</sup> Stewart, *supra* note 190, at 25.

<sup>315</sup> Connecticut Foundation for Open Government, *Access to Public Records in Connecticut: A Survey of Compliance by Local Agencies with the Freedom of Information Act* (1999).

disputes between record requesters and government agencies.<sup>316</sup> In the mediation-oriented mechanism, complaints are first reviewed by a staff attorney, who works in an ombudsman-like fashion to informally resolve disputes.<sup>317</sup> If that fails, a more formal, adjudication-oriented process ensues: parties present arguments at a hearing and can submit written briefs, and the commission can order a record be released.<sup>318</sup> Parties dissatisfied with the commission's decision may seek judicial review<sup>319</sup> by first appealing to the state Superior Court, which is the trial court in Connecticut's state court system.<sup>320</sup> But, requesters cannot seek judicial review before going through the commission first.<sup>321</sup>

Thus, jurisdictions in the United States have adopted four basic types of administrative review mechanisms: mediation-oriented mechanisms, adjudication-oriented mechanisms, advisory-oriented mechanisms, and litigation surrogate mechanisms. These labels alone, however, are insufficient metrics to meaningfully evaluate administrative review mechanisms. For instance, Wisconsin and New York both contain advisory-oriented mechanisms, but that doesn't mean both mechanisms are equally effective at resolving disclosure disputes. Understanding the context in which the mechanisms are situated is essential to developing a richer sense of their potency. Therefore, a specific set of standards for assessing the effectiveness of administrative review mechanisms needs to be identified.

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<sup>316</sup> Conn. Gen. Stat. § 1-205(d).

<sup>317</sup> Connecticut Freedom of Information Commission, *supra* note 270 at 3.

<sup>318</sup> *Id.*, at 3-7.

<sup>319</sup> *Id.*

<sup>320</sup> State of Connecticut Judicial Branch, *Connecticut Courts*, available at <http://www.jud.ct.gov/courts.htm> (last accessed December 8, 2013).

<sup>321</sup> Stewart, *supra* note 190, at 28.



#### **D. Standards for Assessing the Effectiveness of Administrative Review Mechanisms at Resolving Disclosure Disputes**

Scholars have articulated a variety of important factors that shape the effectiveness of administrative review mechanisms. Stewart said that administrative review mechanisms should be independent,<sup>322</sup> impartial,<sup>323</sup> and credible.<sup>324</sup> And, Mohommad-Spigner identified several factors “that influence the functioning”<sup>325</sup> of administrative review mechanisms, including political will to support mechanisms,<sup>326</sup> resources available to support mechanism functioning,<sup>327</sup> the quantity of time it takes for mechanisms to function,<sup>328</sup> and the legal complexity of mechanisms.<sup>329</sup>

What follows is a synthesis of these factors as a set of assessment standards to measure the effectiveness of administrative review mechanisms. The factors are divided into three categories: (1) factors that can be evaluated by mechanism design, (2) factors that can be evaluated only by assessing how the mechanism operates in practice, and (3) factors that require a hybrid analysis. I have added three factors that the above scholars did not explicitly articulate in the literature: (4) whether record requesters have a legal right to administrative review, (5) whether jurisdictions have specific oversight procedures to assess mechanism functioning, and (6) whether the mechanism is oriented toward dispute resolution. Ultimately, I will use all these factors to evaluate how

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<sup>322</sup> Stewart, *supra* note 190, at 197.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*, at 232.

<sup>325</sup> Mohammed-Spigner, *supra* note 277, at 98.

<sup>326</sup> The concept of political will was discussed by sources in Stewart, but was not an explicit factor Stewart discussed. Stewart does discuss, however, how cultures of openness and secrecy shape the functioning of mechanisms. This study is not intended, or designed, to evaluate how cultural factors shape effectiveness of administrative review mechanisms.

<sup>327</sup> Mohammed-Spigner, *supra* note 277, at 98.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

effective Wisconsin's administrative review mechanisms are at resolving disclosure disputes.

*(1) Factors evaluated by mechanism design.*

**a. Binding or advisory: Does the mechanism have binding authority to compel the release of records, or can it offer only advisory opinions regarding the dispute?**

Mechanisms that have binding authority to compel government agencies to release records may in general have stronger authority to resolve disclosure disputes than mechanisms without binding authority. At the very least, some evidence suggests record requesters favor binding authority over advisory authority. A 2007 Indiana University study on public perception of Indiana's principal administrative review mechanism, the Indiana Public Access Counselor ("PAC"), which has authority to issue advisory opinions and informally engage with government agencies to resolve disputes,<sup>330</sup> found strong public support for bolstering the PAC's enforcement power.<sup>331</sup> The study's authors surveyed users of the PAC; 91% of the survey's respondents thought the PAC "should be able to levy fines or issue enforcement actions of some sort against those who do not comply" with the state's public records law.<sup>332</sup>

But a lack of binding authority does not necessarily mean a mechanism is ineffective. Stewart's case study of the Virginia Freedom of Information Advisory Council, which is the primary administrative review mechanism in Virginia, revealed that

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<sup>330</sup> Hammitt, *supra* note 272, at 8.

<sup>331</sup> Yunjuan Luo & Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study*, INDIANA UNIVERSITY SCHOOL OF JOURNALISM BLOOMINGTON, available at <http://www.nfoic.org/sites/default/files/ICOG-IU-2008-Survey.pdf> (last accessed December 8, 2013).

<sup>332</sup> *Id.*, at 3.

even though the council lacks authority to compel government agencies to release records, local and state government officials often respected the council's opinions.<sup>333</sup>

**b. Right to administrative review: Do record requesters have a legal right to administrative review, or is review at the discretion of the mechanism administrator?**

Administrative review mechanisms that give record requesters a right to review are presumably more potent than mechanisms that only give requesters a right to ask for review. In Connecticut, record requesters have a right to obtain review by the Connecticut Freedom of Information Commission. But in Wisconsin, record requesters only have a right to request review by the state attorney general or a district attorney depending on the mechanism invoked by the requester.

**c. Orientation: Is the mechanism oriented toward dispute resolution?**

Is the mechanism oriented toward dispute resolution, or is the mechanism simply a way to trigger third-party review to decipher who's right, without concern for obtaining agreement by the parties? I suggest that mechanisms that are oriented toward dispute resolution are going to be more effective at resolving disputes than mechanisms without such a purpose.

**d. Oversight: Does the mechanism have any accountability measures built in like having to submit an annual report?**

New York,<sup>334</sup> Rhode Island,<sup>335</sup> Indiana,<sup>336</sup> and several other states require mechanisms to file annual reports. Such reports often contain information such as the

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<sup>333</sup> Stewart, *supra* note 190, at 161 (Stewart quoting Forrest M. Landon, a member of the Virginia Freedom of Information Advisory Council: "In the years that have gone by, it's been less and less significant that there's no binding nature to [the council's] opinions," Landon said. "As the office has gained clout and gained awareness around the state of what it does, as the numbers have shown its use, as the training sessions have occurred free in any community wherever there's any conflict going, that's become less and less important.").

<sup>334</sup> Hammitt, *supra* note 272, at 5.

<sup>335</sup> *Id.*, at 16.

number of yearly inquiries for advice, cases or written opinions, and the nature of disputes. Mechanisms already subject to such accountability measures may be more effective for the simple fact that tracking the quantity and nature of disputes may help stakeholders identify problem areas and refine processes.

*(2) Factors evaluated by assessment of mechanism operation in practice.*

**a. Political will: To what extent is there a commitment from people charged with administering the mechanism, and from political officials who may have some manner of oversight (e.g., funding), to support the mechanism’s functions and goals?**

Effective mechanisms require internal and external political support. Internally, the mechanism administrator should be an advocate of the mechanism and work in good faith toward the essential mission of reviewing disclosure disputes.<sup>337</sup> Part of my analysis could include evaluating the extent to which the administrator actually engages the mechanism, if the administrator has such discretion. Externally, the mechanism also needs support from “other branches of government that influence [its] functioning.”<sup>338</sup> External support includes fulfilling financial and basic operational needs, making personnel decisions, and respect of authority.<sup>339</sup>

**b. Resources: Are sufficient resources available to support mechanism functioning?**

Mechanisms ought to have sufficient resources<sup>340</sup> to operate. Mechanisms that lack enough resources to function are of limited to no value. For instance, even though the Office of Government Information Services, or OGIS, was created by Congress in 2007 to help mediate federal FOIA disputes, the office didn’t received funding until

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<sup>336</sup> *Id.*, at 8.

<sup>337</sup> Mohammed-Spigner, *supra* note 277, at 98.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> Resources include but are not limited to funding, staff, and office space, among other things.

2009.<sup>341</sup> Even then, OGIS reported that its ability to fully function was hampered by a lack of resources compared to the agency's workload.<sup>342</sup> In this context, the resources available to a mechanism, and the political will to obtain those resources, are inextricably linked.

**c. Time: How much time does it take for mechanisms to function?**

Administrative review mechanisms should be required to function in a timely manner and within a defined period of time. In Minnesota, for example, record requesters who disagree with a record custodian can ask the state Commissioner of Administration to issue an advisory opinion on the dispute.<sup>343</sup> The commissioner must decide within five days of receiving the request whether to issue an opinion.<sup>344</sup> If the commissioner decides to opine on the dispute, he or she must release an opinion within 20 days of the request.<sup>345</sup> A 30-day extension is permitted, however.<sup>346</sup>

In Wisconsin, on the other hand, there are no time limits for the public records law's administrative review mechanisms to function.<sup>347</sup>

**d. Legal complexity: Is the mechanism adequately navigable by a lay person (or, does navigation require advanced legal knowledge)?**

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<sup>341</sup> Corinna Zarek, *FOIA reforms don't spell victory yet*, THE NEWS MEDIA & THE LAW (Spring 2008), *Reporters Committee for Freedom of the Press*, available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2008/foia-reforms-dont-spell-vic> (last accessed December 8, 2013).

<sup>342</sup> Stephen Miller, *Budget, interagency issues limit influence of OGIS*, *Reporters Committee for Freedom of the Press*, October 21, 2010, available at <http://www.rcfp.org/node/98107> (last accessed December 8, 2013) ("Limited funding and difficulty working with the sprawling federal FOIA bureaucracy constrained the Office of Government Information Services in its first year of operation, according to statements made at a Wednesday briefing.").

<sup>343</sup> Hammitt, *supra* note 272, at 5.

<sup>344</sup> *Id.*, at 6.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> Interestingly, there is a time limit in an enforcement provision of the open meetings law, requiring the attorney general or a district attorney to act on a verified complaint within 20 days of receipt (Wis. Stat. § 19.97(4)). But the proposed study is principally limited to the public records law, not the open meetings law.

Part of the problem with litigation is that, while potent, it is a complex process generally outside of the ability of the lay person to successfully navigate. This is in direct tension with the democratic ideal of freedom of information and egalitarian ethic of Wisconsin's public records law. Administrative review mechanisms should be simple enough for the average person to be able to use.

(3) Factors evaluated by a hybrid approach.

**a. Independence, impartiality and credibility**

Citing standards from the United States Ombudsman Association (“USOA”) and American Bar Association, Stewart found that the factors of independence, impartiality, and credibility were essential characteristics of effective administrative review mechanisms.<sup>348</sup> As the following descriptions show, these factors are deeply intertwined in their basic definitions and their application to administrative review mechanisms.<sup>349</sup>

The American Heritage Dictionary defines “independence,” in part, as “[f]ree from the influence, guidance, or control of another or others.”<sup>350</sup> To that end, USOA guidelines provide that an ombudsman should be “free from outside control or influence” in “structure, function and appearance.”<sup>351</sup> These steps help ensure an ombudsman makes

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<sup>348</sup> Stewart, *supra* note 190, at 83-84. (The USOA also lists confidentiality as essential characteristics of ombudsman programs. Stewart did not include confidentiality as a substantive part of his case studies of Virginia, Arizona, and Iowa. Nor is confidentiality, in my opinion, a key element of Wisconsin's administrative review mechanisms. As such, I have omitted confidentiality as a standard for assessing mechanism effectiveness.)

<sup>349</sup> While Wisconsin does not have an ombudsman mechanism, the fundamental principles that undergird the ombudsman model are still relevant to other processes of dispute resolution.

<sup>350</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 917 (3rd ed., 1992).

<sup>351</sup> United States Ombudsman Association, “Governmental Ombudsman Standards,” 1 (2003), *available at* [www.usombudsman.org/documents/PDF/References/USOA\\_STANDARDS.pdf](http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf) (last accessed December 8, 2013).

impartial decisions and that his or her conclusions are based solely on the merits of the dispute “in the light of reason and fairness.”<sup>352</sup>

“Impartial” means “[n]ot partial or biased” and “unprejudiced,”<sup>353</sup> with “fair” as a synonym (“fair” meaning “free of favoritism”<sup>354</sup>). Impartiality, the USOA says, “is at the heart of the Ombudsman concept.”<sup>355</sup> An ombudsman should “receive and review each complaint in an objective and fair manner, free from bias, and treat all parties without favor or prejudice.”<sup>356</sup> Doing so “instills confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman’s findings and recommendations.”<sup>357</sup>

The dictionary definition of “credibility” is “[t]he quality, capability, or power to elicit belief.”<sup>358</sup> Credibility’s word stem, “credible,” means “[c]apable of being believed.”<sup>359</sup> The USOA’s definition of credibility focuses on the propriety of the review process. “If the process the Ombudsman uses to investigate complaints is flawed,” the USOA says, “the resulting recommendations are more likely to be ignored.”<sup>360</sup> Therefore, an ombudsman should “perform his or her responsibilities in a manner that engenders respect and confidence and be accessible to all potential complainants.”<sup>361</sup> Such action helps to ensure an ombudsman’s work has value and that all parties accept the ombudsman’s conclusions.<sup>362</sup>

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<sup>352</sup> *Id.*

<sup>353</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 350, at 904.

<sup>354</sup> *Id.*, at 655.

<sup>355</sup> United States Ombudsman Association *supra* note 351 at 5.

<sup>356</sup> *Id.*, at 1.

<sup>357</sup> *Id.*

<sup>358</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 350, at 438.

<sup>359</sup> *Id.*, at 438-439.

<sup>360</sup> *Id.*, at 8.

<sup>361</sup> *Id.*, at 2.

<sup>362</sup> *Id.*

In short, for administrative review mechanisms to work effectively, mechanism administrators ought to be free from undue control, act in an unbiased and fair manner, and their decisions must be respected and believed by mechanism users. These principles are clearly linked: mechanism administrators subject to political manipulation cannot by definition render impartial decisions, and failure to act impartially will almost assuredly degrade credibility. Indeed, Stewart found that “[a]ny perceived lapses in independence or impartiality will necessarily implicate” credibility.<sup>363</sup> Because these factors are so interconnected, measuring them requires a hybrid approach: I will evaluate independence itself by mechanism design, and will then evaluate all three factors – independence, impartiality, and credibility – together by public perception and functioning.

*Measuring independence by mechanism design*

I will assess the independence of Wisconsin’s administrative review mechanisms in the ways outlined by the USOA: (1) structure, (2) function, and (3) appearance (or perception).<sup>364</sup> Structural assessment entails looking at who the mechanism administrators are, the political nature of their office, identifying practices or policies that insulate the mechanism from undue influence (or make the mechanism susceptible to undue influence), and examining the intersection of other factors like resources and political will.

Structurally, some mechanisms function through entities specifically designed for independence from the rest of government, like the Connecticut Freedom of Information Commission and state ombudsman offices. Other mechanisms are located within already existing governmental units known for acting in a non-partisan and independent manner.

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<sup>363</sup> Stewart *supra* note 190, at 229.

<sup>364</sup> United States Ombudsman Association *supra* note 351 at 1.



The Virginia Freedom of Information Advisory Council is one example: it's situated inside the Virginia Division of Legislative Services, similar to Wisconsin's Legislative Reference Bureau.

Many mechanisms are located within state attorneys general offices, including Wisconsin's. While mechanisms operated by state attorneys general are not by default suspect of political influence, such arrangements raise some concerns. First, the attorney general, as mechanism administrator, may not be an independent third party when state agencies are implicated in a dispute. Because the attorney general's job is generally to serve as the state's legal counsel, the attorney general may have a conflict of interest in such disputes.

Secondly, Wisconsin attorneys general (and district attorneys) are elected. Elected officials at the helm of administering review mechanisms may be more vulnerable to pressures of political clout: if donors are disputants, if other government officials who endorsed the elected official are the subject of complaints. Of course, the mere fact that the mechanism administrator is an elected official does not necessarily mean the mechanism will be politically colored. District attorneys, state-court judges, and the attorney general are all elected positions in Wisconsin. Still, charges of political influence have seeped into some of those offices.<sup>365</sup> Moreover, the mechanism administrator is probably not going to be able to be wholly removed from the political process (e.g., when seeking and maintaining funding), no matter what safeguards are put in place.

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<sup>365</sup> See, e.g., Patrick Marley, *Pricey court race might set new pace*, MILWAUKEE JOURNAL SENTINEL, April 6, 2007, available at <http://www.jsonline.com/news/wisconsin/29269919.html> (last accessed December 8, 2013); Patrick Marley, *Justice Gableman not charged legal fees in ethics case*, MILWAUKEE JOURNAL SENTINEL, December 15, 2011, available at <http://www.jsonline.com/news/statepolitics/gableman-not-charged-legal-fees-pc3f5do-135711223.html> (last accessed December 8, 2013); Patrick Marley, *Van Hollen will drop suit over voter data checks*, MILWAUKEE JOURNAL SENTINEL, January 15, 2009, available at <http://www.jsonline.com/news/wisconsin/37657009.html> (last accessed December 8, 2013).

Aside from where the mechanism is situated, mechanism leadership can also shape independence. Non-partisan committees or boards made up of stakeholders in the public records law, such as citizens, journalists, attorneys, and government officials, among others, govern some mechanisms.<sup>366</sup> In contrast, individuals have complete purview over the functioning of other mechanisms.<sup>367</sup>

For the remaining two ways to evaluate independence, I will assess mechanism functioning and public perception by my review of case records and through interviews of mechanism users, other disputants, and stakeholders of the public records law.

*Measuring independence, impartiality, and credibility by public perception*

While I'm not sure it's possible to objectively measure how impartial and credible mechanism administrators are, I can measure *perception* of impartiality and credibility, just as Stewart did. In three case studies, Stewart interviewed people involved in or familiar with the administrative review mechanisms in Iowa, Virginia, and Arizona: mechanism administrators, press association representatives, government officials, and organizations that represent government interests. Stewart developed a typology of dispute systems in public records laws. He also focused heavily on ombudsman-like mechanisms, and found that they could be effective at resolving disclosure disputes. In making that finding, Stewart cited three main tenets of ombudsman systems that respondents in his study identified: independence, impartiality, and credibility.<sup>368</sup>

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<sup>366</sup> Including the Connecticut Freedom of Information Commission, Virginia Freedom of Information Advisory Council, New York Committee on Open Government, New Jersey Government Records Council, and Utah State Records Committee.

<sup>367</sup> Including Wisconsin's mechanisms, Iowa Office of Citizens' Aide/Ombudsman, and North Dakota's attorney general, among many other mechanisms.

<sup>368</sup> Stewart, *supra* note 190, at 82-207.

In Virginia, the state’s Freedom of Information Advisory Council has authority to offer informal advice and issue advisory opinions about the Virginia Freedom of Information Act.<sup>369</sup> Most respondents in Stewart’s case study praised the council’s executive director, Maria Everett, as a fair and even-handed arbiter of disputes.

The head of the Virginia Sherriff’s Association, John Jones, described Everett as “very balanced” when evaluating disputes, and said Everett “does not represent one side or the other.”<sup>370</sup> “The sheriff gets [a] good shake,” Jones said, “and so does the media.”<sup>371</sup> Similarly, the leader of the state’s police chiefs association emphasized Everett’s judicious attitude and extensive knowledge of the Virginia Freedom of Information Act:

The litmus test for her is, ‘Does it comply with the law?’ She does a very good job of researching issues rather than rushing to judgment. She’s very professional, very forthcoming, and very exacting in her assessment of situations. She knows our FOIA act inside and out, and I trust her and her understanding of FOIA policy.<sup>372</sup>

Everett herself has said that the council “doesn’t have a dog in the fight” and that she “serves an ombudsman role and not that of an access advocate.”<sup>373</sup>

Like Virginia, Arizona’s state ombudsman has authority to offer informal advice and assistance to citizens involved in public-records disputes.<sup>374</sup> Some of Stewart’s respondents raised concerns about the ability of the Arizona ombudsman’s office to be impartial. One of them, a media attorney, argued the office’s location in state government impinged on the ombudsman’s independence and ability to be impartial:

The news media have heightened protection in our system (from government interference). And then to turn to a government agency for

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<sup>369</sup> *Id.*, at 36-37.

<sup>370</sup> *Id.*, at 157.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*, at 157-158.

<sup>374</sup> *Id.*, at 177-178.

help in enforcing the law against the government? It's one thing to go to the courts, that's in the judicial system. But the ombudsman gets a paycheck and is funded by the legislature.<sup>375</sup>

John Fearing, the deputy executive director of the Arizona Newspapers Association, initially echoed this same concern. But his view later changed: "There was some fear in the beginning that this person, because they're paid by the government, would favor the government, but I don't believe that has happened," Fearing told Stewart.<sup>376</sup> Indeed, Stewart noted that most sources he spoke to believe Arizona's ombudsman office had a strong track record of impartiality.<sup>377</sup> Among them: the ombudsman himself, who told Stewart an impartial mindset is essential to credibility:

I haven't seen concerns by people in government or people outside of government about our ability to be impartial. I think they feel they're going to get a fair shake from us. It's our attitude, that we're not just trying to make someone think we're impartial, we really are impartial. When you have that attitude, that's the way you talk to a government person or a citizen, that's going to come across. You can't fake it.<sup>378</sup>

Iowa's primary administrative review mechanism is similar in structure to Arizona's. The Iowa Citizens' Aide/ombudsman is a general-purpose ombudsman whose oversight includes public-records issues.<sup>379</sup> Stewart interviewed executive staff of the Iowa Citizens' Aide and government officials who have been the subject of complaints reviewed by the Citizens' Aide. Stewart found a disparity between how ombudsman officials perceived their impartiality and how disputants perceived the Citizens' Aide's impartiality.

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<sup>375</sup> *Id.*, at 198.

<sup>376</sup> *Id.*, at 198.

<sup>377</sup> *Id.*, at 197.

<sup>378</sup> *Id.*, at 199.

<sup>379</sup> Hammitt, *supra* note 272, at 9.

Internal perception of the Citizens' Aide was perhaps unsurprisingly positive. The state ombudsman, William Angrick, said he sees the Citizens' Aide office as "an objective, impartial, timely investigator of complaints."<sup>380</sup> A senior staffer of the ombudsman office told Stewart, "I try to be conscientious about what I say and how that comes across so the government doesn't see me as biased. If they see me as one-sided, it's downhill from there."<sup>381</sup>

But externally, some officials in government and government-related organizations had a different opinion, telling Stewart they felt the Citizens' Aide office unfairly favored citizen complainants over government officials. Consider:

- The attorney for the state school boards association told Stewart that the Citizens' Aide "tend[s] to side with citizens long before they talk to the public body with whom they have a beef. The office comes across as significantly biased."<sup>382</sup>
- The general counsel of the Iowa League of Cities said the Citizens' Aide is "very much ... an advocate for rights of citizens, particularly when it comes to open meetings and open records. They don't often take the side of cities, and we find ourselves at odds with them. That's their job. Their job is to take on state and local agencies when they feel there's been a violation of the law."<sup>383</sup>
- One unnamed source told Stewart: "My biggest problem with the Ombudsman's office is that they see their job as acting as a zealous advocate for aggrieved citizens. What I mean is, they see violations where there aren't any, and attribute

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<sup>380</sup> Stewart, *supra* note 190, at 110.

<sup>381</sup> *Id.*, at 111.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

bad motives to people, and assume the worst about government officials in any situation where the facts are ambiguous.”<sup>384</sup>

- Said another unnamed source: “The Ombudsman’s office assumes that every local government official is either stupid or corrupt. That rankles people.”<sup>385</sup>

In defense of these charges, a Citizens’ Aide official told Stewart she acts as an advocate only when she has confirmed the veracity of a complaint. Such action, this official said, is a proper function of the ombudsman’s office:

We may feel passionate about the intent of open government law, that it is good and fair. But until you’ve seen the documents and seen both sides, you really can’t go to one side or the other. It’s usually not until the very end, if you have a substantiated complaint, do you take on advocate role. I usually don’t feel like an advocate, but (when violations are apparent) you can say, ‘This is what the law is and this is how you do it. You don’t get to choose.’<sup>386</sup>

Clearly there is a chasm between internal and external perception of Iowa’s ombudsman office. But, as Stewart notes, such a result is not necessarily surprising: the foregoing anecdotes may be particularly negative because government respondents are often in a defensive posture when interacting with mechanism administrators.<sup>387</sup> “In these cases,” Stewart says, “being an impartial advocate of the law could mean being perceived as the open government police, who only come calling when a complaint has been made.”<sup>388</sup>

### *Conclusion*

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<sup>384</sup> *Id.*, at 112.

<sup>385</sup> *Id.*, at 113.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*, at 228.

Stewart concludes from these three case studies that administrative review mechanisms are “at their best when they are perceived to be independent, impartial and credible agencies for people to turn to when open government issues arise.”<sup>389</sup> “Long-term effectiveness of these offices,” Stewart says, “will hinge on the extent to which they can be seen as an authoritative source in public access matters.”<sup>390</sup>

Part of this study attempts to answer whether Stewart’s conclusions about independence, impartiality, and credibility hold true in Wisconsin. I assess independence by examining how Wisconsin’s administrative review mechanisms are structured, how the mechanisms operate in practice, and how disputants perceive of mechanism administrators’ independence. Further, I evaluate the extent to which disputants perceive mechanism administrators as impartial and credible. Did disputants accept the findings or advice of the mechanism administrator as valid and just? Or did disputants believe that the mechanism administrator was unfair, or biased toward or against a particular party or dispute disposition?

### **E. Research Questions**

While state statutes form the basic procedural framework and legal authority for the attorney general’s administrative review mechanisms in Wisconsin, they do not provide any insight into how the mechanisms are used by record requesters, how the attorney general’s office handles requests, the disposition of requests, or even the quantity and nature of requests. Thus, before this study can evaluate the effectiveness of the mechanisms, a clear picture of how the mechanisms operate in practice must be

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<sup>389</sup> *Id.*, at 231-232.

<sup>390</sup> *Id.*

drawn. Such is the basis for the first question, **RQ1: How do the attorney general's administrative review mechanisms operate in practice?**

Data from RQ1 are necessary to fully evaluate how effectively the attorney general's administrative review mechanisms resolve disclosure disputes. If the attorney general disagreed with a record custodian, did the custodian change his or her position? Or, if the attorney general found in favor of the record custodian, did the requester respect that opinion as fair and credible? These issues specifically, along with the assessment standards outlined in Part B of the Literature Review, form the basis of the second question, **RQ2: How effective are the attorney general's administrative review mechanisms at resolving disclosure disputes?**

Finally, the data obtained from RQ1 and RQ2 can help illuminate whether the attorney general's administrative review mechanisms are functioning consistently with their intended purpose – to help people who lack resources to litigate. Thus, **RQ3 states: To what extent do the attorney general's administrative review mechanisms help people who cannot afford to hire a lawyer to litigate?**



## **CHAPTER 3: RESEARCH METHODS**

To answer the foregoing research questions, this study used two types of data-gathering methods. The first method entailed analysis of requests to and responses from the attorney general that implicated the administrative review mechanisms. The second method was interviews with people who sought assistance from the attorney general.

### **A. Analysis of requests to and responses from the attorney general.**

The first set of data for this study derived from analysis of correspondence to and from the Wisconsin attorney general. The correspondence involved letters and e-mails people sent to the attorney general's office invoking one or both of the administrative review mechanisms, and the attorney general's responses. Most pieces of correspondence to the attorney general were requests under Wis. Stat. § 19.37(1)(b) asking the AG to file a mandamus action to compel release of a record, or requests to the AG for interpretation of the public records law under Wis. Stat. § 19.39.

To view the correspondence, I contacted the AG's office in June 2012 to ask for access to the correspondence. I had several conversations with DOJ officials through e-mail and by phone, as well as a face-to-face meeting. That meeting was in July 2012 at DOJ's headquarters in Madison, Wisconsin. Participants of the meeting included Kevin Potter, administrator of the DOJ's Division of Legal Services; Mary Burke, assistant attorney general; David Pritchard, my thesis adviser; and myself.

I had initially sought to review archived correspondence the DOJ had in storage. However, getting access to those records proved to be impractical and would likely have involved a significant cost. I was told that a DOJ staff member would have had to sort

through boxes of archived letters to separate correspondence related to the administrative review mechanisms from all other correspondence, some of which might not be subject to release.

I was, however, able to get access to binders of correspondence that precisely implicated the administrative review mechanisms. The binders held correspondence for the years 2001 to 2002, and 2007 to 2010.<sup>391</sup> I was told that as a matter of practice, public records correspondence was routinely placed in the binders, though officials could not guarantee for me that every single correspondence received and sent in the time period I wanted was in the binders.

Using the binders was a much more viable option than paying someone to sort through boxes and boxes of general correspondence. Consequently, I reached agreement with DOJ on a course of action in early August 2012. On August 24, October 3, and November 19, I drove to DOJ's headquarters in Madison and personally inspected the correspondence. I scanned the documents using a portable scanner, logged each scan, and saved the scanned documents as PDF files.

After scanning, I built a Microsoft Access database to record data from the records. Among the primary information I tracked:

1. Requester name
2. Requester type
  - a. Citizen
  - b. Incarcerated/committed person
  - c. Media
  - d. Authority
  - e. Business

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<sup>391</sup> I had sought correspondence between 2002 and 2006, when Peg Lautenschlager was attorney general, but I was told the DOJ did not have that correspondence in the binders.

- f. Government
  - g. Political-advocacy
  - h. Law firm
  - i. Administrator
  - j. Unknown
3. Date of request
  4. Date of attorney general's response
  5. County where request originated
  6. Whether or not requester was an attorney
    - a. I searched each requester's name in the lawyer-search function of the State Bar of Wisconsin's website
  7. Entity or person lawyer was writing on behalf of (if applicable)
  8. Entity associated with requester (if applicable)
  9. If requester sought interpretation, mandamus action, or both
  10. What issues the request implicated, including:
    - a. Access
    - b. Delay/response time
    - c. Fee
    - d. Record existence/production
    - e. Definition
    - f. Authority's policy and/or notice
    - g. Record format
    - h. Record retention
    - i. Accuracy of record
    - j. Record destruction
    - k. Record subject notification
    - l. Limitations on record requester
    - m. Authority's response procedures
    - n. Other
  11. Description of records at issue
  12. Authority county (not applicable if state agency)
  13. Authority type
    - a. E.g., law enforcement, municipality, specific state agencies
  14. Evidence authority was in contact with attorney general before AG response
  15. Evidence AG sent authority copy of response
  16. AG response author

After inputting all of the data into the database, I constructed various queries to sort and analyze the data. I also exported some data into Microsoft Excel for specialized analysis, such as calculating the amount of workdays between the request date and the response date. I then constructed numerous tables, which are presented in the findings section, below.

## **B. Semi-structured interviews with mechanism users.**

The second prong of data collection entailed contacting a sample of people who filed the above requests and asking them to participate in an interview.<sup>392</sup> I interviewed 17 people whose answers are reflected below.<sup>393</sup> I did not interview everyone I contacted, and many people declined to be interviewed or did not respond to requests to be interviewed. I would have liked to interview more people, but I had to stop conducting interviews because of time constraints.

The amount of interviews I obtained provided plenty of material, however. That's because the purpose of the interviews was not to get a representative sample of the requesters; I was not trying to measure all of the requesters or get data that could be generally applicable to all requesters in the population of cases. Rather, I intended the interviews to provide illustrative examples of ways in which the attorney general's administrative review mechanisms operate in practice, and whether or not they can be effective at resolving disclosure disputes. Because this study was largely exploratory in nature, the interviews were more about identifying what kinds of cases were possible than explaining all the types of cases the study found.

I sought interviewees who had a range of experiences – whose cases reflected different types of cases and outcomes. I emphasized media and citizen requesters, as those two types of requesters are particularly relevant to this study. I also interviewed people who I felt were in a unique position to illuminate the strengths and weaknesses of attorney general intervention.

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<sup>392</sup> I conducted the interviews based on a set of questions, which can be found in Appendix C.

<sup>393</sup> I actually interviewed 18 people, but I am not including one of the interviews because the interviewee was not a requester. The interviewee was the editor of one of the requesters who offered to take part in the project. I have not used data from that interview in this study directly, though the data was helpful in identifying themes and patterns from my other interviews.

I conducted all of the interviews by phone, recorded them, and then transcribed the conversations (except for one person who preferred to submit answers in writing). After the interviews were transcribed, I read through them numerous times. I examined cases in which AG review helped resolve disputes, as well as cases in which AG review did not help resolve disputes. I also looked at similarities and differences among cases, as well as patterns and themes.

## CHAPTER 4: FINDINGS

The three research questions that undergird this study are fairly broad: How do the attorney general's administrative review mechanisms operate in practice, to what extent are they effective, and do the mechanisms actually help people who cannot afford to hire a lawyer to litigate a dispute? To answer these questions, I rely on data collected as described in the previous chapter: (1) analysis of correspondence from people who requested help from the attorney general through its administrative review mechanisms, and the AG's responses to such requests, and (2) depth interviews with 17 of the people who made such requests.

The first section of this chapter discusses the major findings of both sets of data. I then present the data in whole. The second section contains analysis of DOJ correspondence, which initially gives a wide view of the correspondence caseload and then delves into specific aspects of the cases. In the third section, I present data from the depth interviews with requesters, which I divided into subsections based on dispositions of cases, themes and patterns.

### **A. Summary of major findings**

*1. The typical user.* Analysis of the correspondence reveals a typical user of the attorney general's administrative review mechanisms. The majority of requesters sought assistance from the AG as individuals without affiliation to an organization or profession, were not lawyers, lived in medium-sized to rural areas of the state, filed just one request, and likely had a dispute involving a local authority. That finding is important, because it not only helps to understand how the attorney general's administrative review

mechanisms operate in practice, but more specifically whether the mechanisms actually help people who cannot afford to hire a lawyer to litigate. At the very least, this portrait of the typical user suggests that the people whom the legislature sought to help by establishing the mechanisms are the same people who are using the mechanisms.

*2. The attorney general's office prefers informal resolution instead of formal legal action.* This study finds that the attorney general's office rarely takes formal legal action in public records disputes; the AG's office declined all of the requests for formal legal action in the correspondence this study reviewed. Moreover, the study finds that the attorney general's office often acts as an informal intermediary to help resolve disputes, even though such action is not explicitly contemplated in the statutory language of the administrative review mechanisms.

*3. Attorney general intervention has the capacity to help resolve disputes – but that does not always happen.* Some interviewees reported that the attorney general's office helped resolve their disputes, while others reported that the AG's office was not helpful. Interviewees who said the AG was helpful mostly prevailed in their disputes, though interestingly some requesters who did not prevail also said the AG helped resolve their disputes. Those requesters who said the AG was not helpful generally did not prevail or did not receive a substantive answer from the attorney general's office. Indeed, the study finds a wide range of responses from the attorney general's office: some responses were lengthy and thorough, while in other cases the attorney general's office declined to offer advice or be involved in the dispute.

## B. Analysis of correspondence

### 1. Quantity of cases, requests, and requesters

A basic question about how the attorney general’s administrative review mechanisms operate in practice concerns caseload: How many cases did the AG’s office handle in the time period under study – from 2002 to 2003, and from 2007 to 2010?

Year	No. of cases	Percent of total
2001	39	12.83%
2002	32	10.53%
2007	55	18.09%
2008	71	23.36%
2009	62	20.39%
2010	42	13.82%
Other <sup>395</sup>	3	0.99%
<b>Total</b>	<b>304</b>	<b>100%</b>

For the purposes of this study, a “case” is an umbrella term to encapsulate a unique issue a “requester” presented to the AG through a “request.” A requester was the person who sent the request to the AG, and the request was a unique correspondence or communication asking the AG to take some sort of action. I principally measured cases for two reasons. First, cases are more accurate counts of the workload the attorney general’s office handled, because some cases involved multiple requests and requesters in the same dispute. (For example, in some instances, both the records requester and authority sent the AG requests for advice on the same issue, such as whether a particular record should be released. But those requesters and requests are all tied to the same dispute, and thus, one case.) Second, measuring by case reflects more closely the way the attorney general’s office responded to requests. Where a case involved multiple

<sup>394</sup> Cases dated by year the AG issued a final response.

<sup>395</sup> In one case, a requester withdrew a request before a response was issued. Two cases did not have responses.



requesters or requests, the AG's office did not always respond separately to every distinct communication. Rather, the AG's office often issued a single letter responding to multiple requests from sometimes multiple requesters in the same case.

The study finds that the AG handled at least 304 cases in the time period under study, or slightly more than 50 cases on average per year.<sup>396</sup> As Table 1 illustrates, the year 2002 had the smallest caseload, at 32 cases, and 2008 had the largest caseload, at 71 cases. The average number of cases in the first two-year period, from 2001 to 2002, was 35.5 cases. That number increased in the latter years, with an average of 63 cases between 2007 and 2008, and an average of 52 cases between 2009 and 2010.<sup>397</sup> Dates were not available in three of the cases.

There were 321 requests, of which the 304 cases derived, as previously noted, and there were 282 unique requesters. That means some requesters sought AG guidance in multiple instances. The quantity of requesters is made up of individuals, but some entities were included because I could not identify a particular person within the entity who made the request. I included entities in such situations because to not do so would mean some requests would not have been accounted for in this tally.

## *2. Types of requests*

I coded whether the case was a request to the AG for advice as to the applicability of the public records law under Wis. Stat. § 19.39 (referred to as "AGA"), or whether the request was asking the AG to sue as a surrogate for the requester – to file a mandamus action against an authority under Wis. Stat. § 19.37(1)(b) (referred to as "LSAG"). I

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<sup>396</sup> In other words, the mean of the total caseload:  $304/6=50.66$ .

<sup>397</sup> Disclosure: I filed a request to the attorney general in 2008 seeking advice and a mandamus action.

coded cases as AGA unless the requester (1) explicitly asked the attorney general to file a mandamus action, (2) said the request was made pursuant to Wis. Stat. § 19.37(1)(b), or (3) in some other way was clearly asking the attorney general to go to court to obtain access to a record or force an authority to comply with the public records law.

<b>Table 2. Types of requests to the attorney general.</b>		
<b>Request type</b>	<b>No. of cases that implicated type of request</b>	<b>Percent of actual caseload</b>
AGA	233	76.64%
LSAG	56	18.42%
AGA+LSAG	12	3.95%
Other	3	0.99%
<b>TOTAL</b>	<b>304</b>	<b>100%</b>
Definitions: AGA requests sought the attorney general's advice as to the applicability of the public records law pursuant to Wis. Stat. § 19.39. LSAG requests asked the attorney general to file a mandamus action against an authority under Wis. Stat. § 19.37(1)(b). AGA+LSAG requests asked the attorney general for both advice and to file a mandamus action.		

As Table 2 shows, more than three-quarters of the cases, 76.64%, were requests for advice. Just 18.42% of the cases involved requesters asking the AG to file a mandamus action. Twelve cases, or about 3.95%, implicated both requests for advice and requests for mandamus. The three “other” cases are requests from district attorneys seeking advice about how to resolve disclosure disputes between other parties.

The attorney general's office declined all of the requests for a mandamus action on various grounds, citing, among other reasons: the authority was complying with the law or had a legally sufficient reason for denying disclosure; the dispute was not unusual

nor of statewide concern; the case was a private dispute or predominately local issue; or there was not enough information or there was conflicting information.

### 3. Issues presented in cases

I coded the principal public records issues in each case. Some cases presented more than one issue. I initially coded for five broad issues: access, delay/response time, definition, fee, and other. In the process of coding, I added issues that arose repeatedly. And, at the conclusion of coding, I reviewed all of the cases I initially coded

“other.” I again added issues where relevant patterns emerged. I thus identified 14 issues that arose multiple times among the cases I reviewed.

As Table 3 shows, the most common issue was whether a record requester had a right of access to a record. An access issue was present in nearly half of the cases and

<b>Issue</b>	<b>No. of cases that issue was present in</b>	<b>Percent of actual caseload</b>
Access	149	49.01%
Delay/response time	84	27.63%
Fee	59	19.41%
Record existence/production	31	10.20%
Other	22	7.24%
Definition	19	6.25%
Authority's policy and/or notice	7	2.30%
Record format	7	2.30%
Record retention	7	2.30%
Accuracy of record	4	1.32%
Record destruction	4	1.32%
Record subject notification	4	1.32%
Limitations on record requester	3	0.99%
Authority's response procedures	2	0.66%
<b>TOTAL</b>	<b>402*</b>	<b>132.24%**</b>
* This number is larger than the 304 total cases in this study because some cases had more than one issue. **Does not equal 100% percent because some cases had more than one issue.		

<sup>398</sup> See Appendix for explanation of what each issue means.

accounted for the largest share of cases. An access issue was limited to whether a record should have been released or not. Access issues included record requesters who asked the AG to review the validity of the denial of a record request, and authorities that asked the AG whether a particular record should be released. Cases such as delays or fees, which can in effect create a barrier to access but are not strictly about whether access should be granted, were coded separately.

The second-most-common issue in cases concerned disputes or questions about the amount of time an authority could take to respond to a records request. The issue, which arose in about 20% of cases, almost always was a complaint about a delay – that an authority had not yet responded to a records request or had not produced records responsive to the request. And the third-most-common issue involved a fee, which was present in about 19% of cases.

That the most persistent issue in cases concerned access is not surprising given the balancing test component of the public records law. Public records laws in some states contain a long list of specific records that are not subject to release,<sup>399</sup> but Wisconsin's public records law is different. Some records are expressly required by statute or case law to be released or withheld, but if such records are not implicated in a records request, then the authority must conduct a balancing test – weighing the public interest in disclosure versus the public interest in non-disclosure. Conducting that

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<sup>399</sup> See, e.g., Digital Media Law Project, *Access to Public Records in Illinois*, available at <http://www.dmlp.org/legal-guide/illinois/access-public-records-illinois> (last accessed December 8, 2013); and Digital Media Law Project, *Access to Public Records in Washington*, available at <http://www.dmlp.org/legal-guide/washington/access-public-records-washington> (last accessed December 8, 2013).

analysis is often subjective and lacks bright boundaries, which could be one reason why access is such a prevalent issue in the cases in this study.<sup>400</sup>

#### 4. Types of requesters

More than half of the cases, 55%, were initiated by citizen requesters – people who wrote to the attorney general without explicitly affiliating themselves with an organization or unit of government, and were not in prison. As Table 4

<b>Requester type</b>	<b>No. of cases initiated by requester</b>	<b>Percent</b>
Citizen	169	55.59%
Incarcerated/committed	33	10.86%
Media	30	9.87%
Authority	20	6.58%
Business	18	5.92%
Government	17	5.59%
Political-advocacy	8	2.63%
Law firm	5	1.64%
Administrator	3	0.99%
Unknown	1	0.33%
<b>TOTAL</b>	<b>304</b>	<b>100%</b>

illustrates, the composition of remaining requesters was divided much more narrowly.

The media accounted for less than 10% of the requesters. This is an interesting finding, because the media more often than not are among the most active plaintiffs in public-records lawsuits in Wisconsin.<sup>402</sup> Such a disparity calls for deeper comparison between users of different types of enforcement tools, such as administrative review mechanisms and litigation.

<sup>400</sup> See, e.g., Kathleen Bartzen Culver, *The Price of Access: An Impact Analysis of Harms Associated with Disclosure under the Wisconsin Open Records Law*, Dissertation for Ph.D., UNIVERSITY OF WISCONSIN (1999) at 261; and Dreps *supra* note 18 (“By preserving this common law balancing test, which must be applied case-by-case and document-by-document, however, Wisconsin’s Open Records Law invites litigation.”)

<sup>401</sup> See Definition of Requesters in Appendix B.

<sup>402</sup> Dreps *supra* note 18.

Note that Table 4 accounts for proxy requests – that is, requests in which someone wrote to the AG on behalf of someone else. Eleven cases implicated proxy requests. In all but one of those cases I was able to identify the original requester – the person whom the proxy requester was making the request for. Cases in which a proxy requester was present I coded the fields as they reflected the original requester and not the proxy. This was possible except for the one case that I could not identify the nature of the client. That case was coded as proxy – unknown.

<b>Table 5(a).</b> Single-case requesters vs. multiple-case requesters by individuals.		
<b>No. of cases filed by requester</b>	<b>No. of requesters</b>	<b>% of requesters</b>
1	254	90.07%
2	24	8.51%
3	2	0.71%
4	1	0.35%
7	1	0.35%
<b>TOTAL</b>	<b>282</b>	<b>100%</b>

##### *5. Single-case requesters vs. multiple-case requesters*

As Table 5(a) illustrates, most cases involved one-time requesters. Almost all of them, slightly more than 90%, were involved in just one case. About 8% of requesters returned twice. Two requesters sought assistance three separate times, and one requester sought assistance four times. The most active requester in the time period under study sought AG assistance seven times.

Although the news media were not frequent requesters overall – accounting for less than 10% of all requesters – they were frequent repeat requesters. Indeed, media organizations were the most frequent repeat requesters among entities. *The Lakeland*

*Times*, in Minocqua, sought AG review in four cases. The *Janesville Gazette*, *Milwaukee Journal Sentinel*, and Wisconsin Freedom of Information Council were each involved in three cases. The Associated Press and *Wisconsin State Journal* were both tied to two cases. The *Milwaukee Journal Sentinel* and *The Lakeland Times* also have strong records of litigating public records disputes, a fact that again raises an interesting question about the relationship between users of administrative review mechanisms and the court system.<sup>403</sup>

Entity type	Entity name	No. of cases
Media	Lakeland Times	4
Media	Janesville Gazette	3
Media	Milwaukee Journal Sentinel	3
Media	WISFOIC	3
Business	Great Northern Adjusters	3
Media	AP	2
Media	Wisconsin State Journal	2
Business	Go Kid Go Transport & Tours, LLC	2
Business	Just Drive, inc.	2
Law firm	Hinkfuss, Sickel, Petitjean and Wieting	2

Cases with and without lawyer-requesters	No. of cases	Percent of cases with lawyers
Cases without lawyer-requesters	270	88.82%
Cases with lawyer-requesters	34	11.18%
TOTAL	304	100%

<sup>403</sup> Disclosure: I have worked for the *Milwaukee Journal Sentinel* and its sister company Journal Broadcast Group. Also, at the time of submitting this thesis, I am employed by *The Lakeland Times*. However, I played no role in any of the requests filed by these organizations.

Several of these media organizations were involved in a major media coalition request to the AG. Even though that was a single request, there were multiple requesters, and as such, the request is included with each applicable media entity in Table 5(b).

*6. Few requesters were lawyers*

Most of the cases were not initiated by lawyers. As Table 6(a) shows, lawyers sought AG assistance in just about 11% of cases. And as Table 6(b) illustrates, requests from authorities made up the largest share of the cases in which requesters were lawyers or were represented by lawyers.

<b>Table 6(b). Lawyer-requesters based on requester type.</b>		
<b>Cases with lawyer-requesters based on requester type</b>	<b>No. of cases</b>	<b>Percent</b>
Authority	9	26.47%
Citizen	8	23.53%
Law firm	5	14.71%
DA—Administrator	3	8.82%
Government	3	8.82%
Media	3	8.82%
Business	1	2.94%
Political-advocacy	1	2.94%
Unknown	1	2.94%
TOTAL	34	100%

Analysis of the extent to which lawyers use the attorney general’s administrative review mechanisms is important, because the legislative intent in creating the mechanisms was to help people who were not lawyers or couldn’t afford to hire lawyers. This study’s findings appear consistent with that intent insofar as the majority of users were not lawyers and were not represented by a lawyer.



Even though the number of requesters who were lawyers was relatively small, some analysis of those numbers is warranted. That authorities made up the largest share of cases in which a lawyer sent the request is not surprising. Authorities in public records disputes more often than not hold the upper hand, with relatively easy access to legal counsel. Many of the requests authorities sent were from in-house lawyers, such as city attorneys and county corporation counsels.

That citizens composed the second-largest share of attorney-written requests is also interesting. Deeper analysis of citizen cases reveals that five of the eight cases were lawyers writing in their personal capacities. Lawyers wrote on behalf of citizen requesters in the remaining three cases; the underlying requester in one of those cases was also a lawyer.

<b>Table 7. County origin of cases.</b>		
<b>County</b>	<b>No. of cases</b>	<b>Percent</b>
Dane	42	13.82%
Milwaukee	30	9.87%
Brown	18	5.92%
Dodge	11	3.62%
Winnebago	10	3.29%
Racine	9	2.96%
La Crosse, Rock, Sheboygan, Washington	8 each	2.63% each
Kenosha	7	2.30%
Columbia, Juneau, Oneida, Outagamie, Portage, Waukesha, Wood	6 each	1.97% each
Green, Marathon, Waupaca	5 each	1.64% each
Chippewa, Eau Claire, Grant, Lincoln, Vernon, Walworth	4 each	1.32% each
Douglas, Fond du Lac, Jefferson, Langlade, Manitowoc, Ozaukee, Polk, Saint Croix	3 each	0.99% each
Ashland, Buffalo, Clark, Florence, Jackson, Pierce, Price, Sauk, Trempealeau	2 each	0.66% each
Barron, Calumet, Door, Iowa, Marinette, Rusk, Sawyer, Shawano, Vilas	1 each	0.33% each
Out of state	14	4.61%
Unknown	3	0.99%
<b>TOTAL</b>	<b>308*</b>	<b>101.32%**</b>
* This number is larger than the 304 total cases in this study because some cases had requesters from more than one county.		
**Does not equal 100% percent because some cases had requesters from more than one county.		

### 7. Requester county

County population did not directly tie to the quantity of cases from each county.

Dane County had by far the most requesters of any county, even though Milwaukee

County had about twice the population. That's likely because Dane County is the state

capital and is a hub of governmental activity. Milwaukee County had the second-most requesters, followed by Brown County. Dodge and Winnebago were fourth and fifth, respectively, likely because of prisons.

<b>Table 8. State authorities vs. local authorities.</b>		
<b>Authority</b>	<b>No. of cases</b>	<b>Percent</b>
Local	215	70.72%
State	75	24.67%
Other 1. A specific authority not subject of case (10) 2. Entity holding record is not an authority (5) 3. Requester did not sufficiently identify authority (1)	16	5.26%
TOTAL	306*	100.66%**
*More than 304 cases because two cases implicated both state and local authorities. **Does not equal 100% because two cases implicated both state and local authorities.		

As Table 2 shows,

incarcerated and committed persons were the second-most-common type of requester.

Both Dodge and Winnebago counties are home to state prison facilities, but the counties have significantly lower populations than Dane, Milwaukee, and Brown counties (though a state prison is also located in Brown County).

Overall, the majority of cases came from relatively medium to small counties, even though Dane and Milwaukee had more cases than other counties individually. Of all the cases known to have originated from a Wisconsin county, 195, or about 67%, came from counties with populations less than 200,000 people.

#### *8. Authorities: State vs. local*

Cases overwhelmingly involved local authorities. Authorities in nearly 71% of the cases were local government bodies and officials, including school districts. Cases

involving state government concerned just a quarter of the cases, at 24.67%. A little more than 5% of the cases could not be coded as involving a state or local authority, mostly for one of two reasons: the case did not concern a specific authority, or the AG concluded that the entity holding onto the record did not meet the definition of an “authority” under the public records law. In one case the requester did not sufficiently identify the specific authority.

#### *9. Authority types*

As Table 9 shows, the most common type of authority present in cases was a law enforcement agency, which was in about 18% of cases. This number accounts for law enforcement agencies at the state and local level. School districts were the second-most-common, present in nearly 11% of cases. Note, however, that requests to municipalities in general – towns, villages, cities, city attorneys, counties, and county register of deeds – actually composed the largest single share, at about 32%, or 99 cases. That number does not account for cases involving law enforcement and corrections.

<b>Table 9.</b> Types of authorities present in cases.		
<b>Authority type</b>	<b>No. of cases</b>	<b>Percent</b>
Law enforcement	56	18.42%
School or school district	33	10.86%
Town	27	8.88%
County	25	8.22%
City	24	7.89%
DOC	21	6.91%
Village	19	6.25%
University of Wisconsin (system and campuses)	16	5.26%
A specific authority not subject of case	10	3.29%
District attorney	8	2.63%
Emergency services	6	1.97%
DOA, entity holding record is not an authority, library	5 each	1.64% each
Unknown, Wisconsin Board of Veterans Affairs	3 each	0.99% each
Circuit court branch, city attorney, DHS, Director of State Courts Office, DOR, DOT, DRL, former elected official, housing authority, county register of deeds	2 each	0.66% each
Intergovernmental commission, court reporter (circuit court), clerk of court (circuit court), county fair board, DATCP, DCF, DNR, DOJ, DVA, DWD, governor, county jail, legislature, local economic development agency, municipal court, Office of the Commissioner of Insurance, Office of Lawyer Regulation, sanitary district, state legislator, State Ethics Board, state treasurer, Wisconsin Natural Resources Board, Wisconsin State Historical Society, Wisconsin Department of Military Affairs	1 each	0.33% each
<b>TOTAL</b>	<b>311*</b>	<b>102.3%**</b>
* This number is larger than the 304 total cases in this study because some cases had multiple types of authorities.		
** Does not equal 100% percent because some cases had multiple types of authorities.		

*10. Authority county for local authorities.*

As Table 10 shows, local authorities in Milwaukee County were involved in more cases than any other county: 23, or 7.57% of cases. This ranking does not include state agencies, which may help explain why Milwaukee County, which is the most populous county in the state, leads the table. Dane County followed Milwaukee at 14 cases, or 4.61% of cases. Both counties have significantly more cases each than any other counties individually.

However, while in general larger counties tended to have more cases involving local authorities, there were exceptions. La Crosse, Washington, and Waukesha counties tied for third, at eight cases each. La Crosse and Washington counties have less than half the population of Waukesha County. Brown County had seven cases, even though it has a substantially larger population than La Crosse and Washington counties. And Racine County had more than double the population of Portage County, yet Portage had double the cases than Racine.

The single-largest share of cases came from medium-sized counties with populations between 100,000 and 200,000 people. There were 11 such counties with a combined 60 cases. The second-largest share of cases arose from the state's four most-populous counties, with 52 cases. From there on out, the combined amount of cases by county size dropped consistently.<sup>404</sup>

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<sup>404</sup> A county's population may also drive the propensity of people in that county to seek review of a dispute. People in smaller communities tend to avoid formal dispute processes such as litigation and the attorney general's administrative review mechanisms compared to more populated communities. *See* Craig Sanders, *Newspapers' Use of Lawyers in the Editorial Process in Holding the Media Accountable: Citizens, Ethics, and the Law* 138-153 (David Pritchard, ed., 2000) (Bloomington: Indiana University Press, 2000).

Most local authorities involved in cases, however, were not located in the state's major urban centers. Of all the cases from Wisconsin counties in which the authority was known, 75% of authorities were in counties with populations fewer than 200,000 people; 46% of authorities were in counties with populations fewer than 100,000 people.

<b>Table 10.</b> Counties where authorities were located.		
<b>County</b>	<b>No. of cases</b>	<b>Percent</b>
Milwaukee	23	7.57%
Dane	14	4.61%
La Crosse, Washington, Waukesha	8 each	2.63% each
Brown	7	2.30%
Kenosha, Portage, Rock, Sheboygan	6 each	1.97% each
Dodge, Fond du Lac, Lincoln, Marathon, Sauk, Walworth	5 each	1.64% each
Columbia, Oneida, Outagamie, Ozaukee, Vernon, Winnebago, Wood	4 each	1.32% each
Chippewa, Douglas, Jackson, Manitowoc, Racine, St. Croix	3	0.99%
Ashland, Barron, Buffalo, Florence, Grant, Juneau, Pierce, Polk, Price, Trempealeau, Waupaca	2 each	0.66% each
Adams, Burnett, Calumet, Clark, Door, Eau Claire, Green, Green Lake, Iowa, Jefferson, Kewaunee, Langlade, Marinette, Oconto, Rusk, Sawyer, Vilas, Waushera	1 each	0.33% each
State authorities	75	24.67%
<b>OTHER:</b>		
A specific authority not subject of case	12	3.95%
Entity holding record is not an authority	5	1.64%
Unknown identity of authority	4	1.32%
Case concerns statewide generally; not limited to just one county	3	0.99%
Case concerns various school districts; not all identified	2	0.66%
All Wisconsin counties	1	0.33%
Unknown county	1	0.33%
<b>TOTAL</b>	<b>311*</b>	<b>102.30%**</b>
<p>* This number is larger than 304 total cases because two cases had multiple counties.  ** Exceeds 100% because two cases had multiple counties. Case ID 57 was coded as both Rock County and State. Case ID 231 was coded under five counties. 304+7=311.</p>		



*11. Attorney general responses were fairly timely*

Overall, the attorney general's office responded to most inquiries in a fairly timely manner. The AG's office responded to nearly three-quarters of requests, 72.78%, within 30 business days. The AG took longer than 90 days in less than 5% of requests. The median response time was 23 days. (The mean response time was 33 days, but the small quantity of very long response times inflated that number, despite most responses coming within a month.)

<b>Table 11(a).</b> Response time in 30-day intervals. Weekdays only. Holidays not included.		
<b>Day range</b>	<b>No. of requests</b>	<b>Percent of requests with request dates and response dates</b>
1-30 days	230	72.78%
31-60 days	61	19.30%
61-90 days	11	3.48%
> 90 days	14	4.43%
TOTAL	316	100%

<b>Table 11(b).</b> Accrued response time. Weekdays only. Holidays not included.		
<b>Day range</b>	<b>No. of requests</b>	<b>Percent of requests with request dates and response dates</b>
30 days	230	72.78%
60 days	291	92.09%
90 days	302	95.57%
120 days	305	96.52%
150 days	308	97.47%
320 days	316	100.00%

<b>Table 11(c).</b> Weekdays between request dates and response dates. Holidays not included.		
<b>Day range</b>	<b>No. of requests</b>	<b>Percent of requests with request dates and response dates</b>
1-5 days	6	1.90%
6-10 days	30	9.49%
11-15 days	42	13.29%
16-20 days	61	19.30%
21-26 days	64	20.25%
27-30 days	27	8.54%
31-40 days	33	10.44%
41-50 days	17	5.38%
51-60 days	11	3.48%
61-70 days	5	1.58%
71-80 days	4	1.27%
81-90 days	2	0.63%
91-100 days	1	0.32%
101-120 days	2	0.63%
121-150 days	3	0.95%
151-200 days	0	0.00%
201-250 days	1	0.32%
251-300 days	6	1.90%
301-320 days	1	0.32%
<b>TOTAL</b>	<b>316</b>	<b>100%</b>

*12. Cases in which authority was involved before AG response*

Table 12 illustrates cases in which there was evidence that the authority was in contact with the attorney general's office at some point between when the requester contacted the AG and when the AG responded to the requester. Often such contact involved the authority sending its position on the issue. Sometimes the AG initiated

contact with the authority; sometimes the authority sent information without any evidence of the AG asking for it.

This factor is important because the AG's response can be heavily shaped by the facts of the case and how much information the AG's office has. Getting more information about the case from both sides may help clarify facts and prompt the attorney general's office to issue a more specific and concrete response.

As Table 12 shows, an authority was in contact with the AG in about two-thirds of cases before the AG issued a response.

<b>Table 12.</b> Cases in which authority was involved in case prior to AG issuing response.		
	<b>No. of cases</b>	<b>Percent</b>
Authority not involved in case	203	66.78%
Authority involved in case	70	23.03%
Not applicable	30	9.87%
Unknown	1	0.33%
<b>TOTAL</b>	<b>304</b>	<b>100%</b>

### *13. Cases in which the attorney general copied authority in response letter*

In its response letters, the attorney general's office copied the authority in about 41% of cases. Sometimes the requester had copied the authority in the request to the attorney general, while in other instances the attorney general's office appeared to have initiated the contact with the authority.

The reason this factor matters is that it reveals one type of action the attorney general's office has taken in response to requests. Copying the authority may be particularly helpful for a requester who prevails in a case. But understanding how the attorney general replies to correspondence is also important because there were a significant number of cases in which the attorney general did not copy the authority – raising questions about the attorney general's consistency in responding to requests and what factors affect whether the attorney general will copy an authority.

<b>Table 13. Cases in which attorney general's office copied authority in response letter.</b>		
	<b>No. of cases</b>	<b>Percent</b>
No	144	47.37%
Yes	125	41.12%
Not applicable*	29	9.54%
Unknown	6	1.97%
<b>TOTAL</b>	<b>304</b>	<b>100%</b>
*Not applicable includes "Requester is authority," "A specific authority not subject of case," "Requester is administrator," and "Entity holding record is not an authority"		

#### *14. Attorney general response author*

Perhaps one explanation for why some cases entailed varying degrees of AG action was because of the particular DOJ officials who were involved in the cases. Six assistant attorneys general handled the bulk of the cases; one assistant attorney general, Alan Lee, was the most-active response author by far. The attorney general signed responses in just four cases.

<b>Table 14. AG response author.</b>		
<b>Person</b>	<b>No. of cases person signed letter</b>	<b>Percent</b>
AAG Alan Lee	114	37.50%
AAG Mary Burke	54	17.76%
AAG Maureen McGlynn Flanagan	33	10.86%
AAG Jennifer Sloan Lattis	26	8.55%
AAG Lewis Beilin	21	6.91%
AAG David Dudley	20	6.58%
Sandra Tarver	11	3.62%
Attorney General J.B. Van Hollen	4	1.32%
Kevin Potter	4	1.32%
Mary Woolsey Schlaefer	3	0.99%
Nine people who issued no more than three responses	11	3.62%
Unknown	2	0.66%
Request withdrawn	1	0.33%
TOTAL	304	100%

*Summary of correspondence analysis*

The foregoing data offer a glimpse into the system and caseload of the attorney general's administrative review mechanisms. In particular, the data show the extent to which people requested assistance from the attorney general's office, who those people were and what authorities they were disputing with, the major issues underlying the disputes, and what action the attorney general took in response to requests. That data is summarized as follows:

## 1. Quantity and nature of cases

- a. The attorney general's office handled more cases in the latter half of the time period under review than the former half.
- b. Most requests sought advice from the attorney general rather than any sort of formal legal action.
- c. The most common issues requesters raised were whether they had a right of access to a record, the amount of time an authority was taking to respond to a records request, fees, and whether or not records actually existed.

## 2. Requesters and authorities

- a. Most requesters were people unaffiliated with an organization or unit of government, and were not in prison or institutionalized. Incarcerated and committed persons accounted for the second-most number of cases, while media requesters came in third by a narrow margin.
- b. Most requesters filed just one case. About 10% of requesters filed more than one case. Of those requesters who filed more than once, media requesters were the most frequent of entities.
- c. Lawyers requested a comparatively small number of cases. This amount accounts for lawyers who filed requests for themselves and on behalf of someone else.
- d. The single-largest share of cases originated from requesters in Dane County, followed by Milwaukee and Brown counties. Though Milwaukee County has the largest population, more cases may have come from Dane County because it's the state capital and governmental hub, with a high concentration of people and entities that may be more likely to file public records requests than Milwaukee County. The majority of cases overall, however, came from counties with populations less than 200,000 people.
- e. Cases overwhelmingly involved local authorities rather than state authorities.
- f. Law enforcement agencies accounted for the single-largest share of particular types of authorities in cases, followed by schools. However, when all municipalities were combined, they accounted for the largest share of cases.
- g. Local authorities in Milwaukee County were involved in the single-most number of cases, followed by Dane County. However, most local

authorities overall were not located in the state's major urban centers. Of all cases from Wisconsin counties in which the authority was known, 75% of cases came from counties with populations fewer than 200,000 people. This measurement does not include state agencies.

### 3. Attorney general action

- a. The attorney general's office declined all of the requests for formal legal action, namely requests to seek a writ of mandamus.
- b. Overall, the attorney general's office responded to most inquiries in a fairly timely manner. The AG's office responded to nearly three-quarters of requests, 72.78%, within 30 business days.
- c. An authority was in contact with the attorney general's office in about two-thirds of cases before the AG issued a response. In about 41% percent of cases, the AG sent a copy of the response to the authority. Those numbers mean that the attorney general's office does more than merely issue response letters abstractly opining about the public records. To the contrary, these numbers suggest that the attorney general's office routinely engages with parties in cases.
- d. Just a handful of assistant attorneys general managed most cases. The attorney general personally signed response letters in four cases.

## C. Interviews

The second stream of data for this study comes from interviews with 17 people whose correspondence I reviewed in the foregoing section. Table 14 lists these requesters. Most of them are citizen and media requesters; two are government requesters. Interviewees whom I interviewed spanned the state, from densely populated Milwaukee and Dane counties, to the Fox Cities, to central and northwest Wisconsin. The average interview length was 27 minutes and 24 seconds, and the total combined length of all interviews was 7 hours, 18 minutes, and 31 seconds.

<b>Table 15.</b> Table of interviewees.					
<b>No.</b>	<b>Name</b>	<b>Type</b>	<b>County</b>	<b>Length</b>	<b>Interview date</b>
1	Janine Anderson	Media	Racine	21:44	5-8-13
2	Ted Cogley	Citizen	Brown	1:17:26	4-15-13
3	Geoff Davidian	Media	Milwaukee	22:36	4-10-13
4	Kayla Heimerman	Media	Rock	23:16	4-12-13
5	Zygmund Jablonski	Citizen	Ashland	48:10	5-22-13
6	Alan Kesner	Government	Milwaukee	23:06	5-8-13
7	Bill Lueders	Media	Dane	39:58	4-17-13
8	Darla Meyers	Citizen	St. Croix	20:40	4-11-13
9	Dale Neumann	Citizen	Chippewa	27:16	5-22-13
10	Jenny Nowak	Citizen	Marathon	10:31	4-10-13
11	Gail Peckler-Dziki	Media	Kenosha	25:23	4-15-13
12	Mark Pitsch	Media	Dane	21:09	4-16-13
13	Patricia Rose	Media	Waupaca	20:01	4-10-13
14	Chan Stroman	Citizen	Dane	17:16	4-15-13
15	Anthony Varda	Government	Dane	27:12	5-7-13
16	Pam Warnke	Media	Marathon	n/a	4-24-13
17	Jim Winter	Media	Dane	12:47	4-12-13

*1. Attorney general intervention can help resolve disputes.*

Numerous requesters reported that contacting the attorney general's office helped them resolve disputes. This finding includes instances in which requesters clearly prevailed – when AG review helped requesters get access to records or parts of records



that were previously withheld. But interestingly, several requesters also said that their disputes were resolved even when the AG found they shouldn't get access.

Jim Winter's case is a prime example of how the AG can help resolve a dispute. Winter, who at the time of his request was the editor of the *Poynette Press*, was seeking access to performance evaluations of a former village administrator. The village board chose to not renew the administrator's employment contract, and Winter wanted to know why. In a lengthy response issued by an outside lawyer, the village denied release of the performance evaluations under the public record law's balancing test. Winter wrote to the AG in February 2009; he argued why the performance evaluations should have been released and asked the AG to issue an opinion.

The AG's office responded favorably to Winter, finding that the performance evaluations were indeed public record, though the assistant attorney general who wrote the response, Jennifer Sloan Lattis, said some other related records could be withheld. Lattis had contacted the village's attorney and recommended that the village reconsider its denial of the evaluations. Lattis also enclosed within her response a copy of prior correspondence that the AG's office had issued on the subject.

Winter said that he used Lattis' response letter to push for access:

I shared that opinion with the village president in Poynette and the village attorney, and made a second request to get that performance appraisal. And when they received that opinion, they went ahead and gave it to me. . . . Once I did get the response, it was the response I was hoping and expecting to get from [the attorney general]. They were on our side, and it ultimately ended up helping me get the information I was looking for.

Winter's experience is not unique among the cases in this study. In fact, his interaction with the attorney general is illustrative of a process that occurred repeatedly: A requester asked the AG to review a dispute, the AG's office informally reached out to the authority, and the authority reconsidered or changed its disclosure position. That process, in which the AG's office acts as an intermediary to help resolve the dispute, is not explicitly contemplated in the statutory language of the administrative review mechanisms. But it happened often in the cases this study examined, as tables 12 and 13 in the preceding section show.

The attorney general's office also helped Madison attorney Chan Stroman resolve a disclosure dispute. She was seeking police activity data from the Madison Police Department, and was having difficulty obtaining the data in a useable electronic format. The police had also denied access to portions of the data. Stroman wrote a request to the Dane County District Attorney's office asking for "appropriate action to encourage compliance" with the public records law. The DA's office forwarded that request to the DOJ because Stroman personally knew the DA at the time, Brian Blanchard.

Alan Lee and David Dudley, two assistant attorneys general, handled Stroman's request. In a response letter to Stroman, Dudley wrote that he spoke to the Madison city attorney about the dispute, and that the city attorney contacted the police department. That action got results: The police department agreed to produce the records in the requested electronic format and with minimal redactions, which Stroman said she did not have a problem with.

In her interview with me, Stroman articulated in precise terms how the AG's office can help break through a common barrier to access – translating what a requester wants. Stroman said the person she was working with at the police department wasn't so much intentionally denying access but instead seemed to not understand that her request was permissible under the public records law.

The attorney general did not really end up having to kind of do a full-blown even informal opinion. What they did is they basically facilitated communicating what I wanted, and what I was willing to accept in terms of redactions or modifications. And, the interesting thing was, there was this kind of odd hang up where I was trying to explain that I didn't want the data in kind of either paper form or unmanipulable electronic form. What I wanted was the data in comma-separated CSV (a comma-separated values files), so that it could be loaded and so on and so forth. And unfortunately the person I was communicating with, dealing with the open records request, didn't understand that. They were not familiar enough with data formats to understand that that was very simple and straightforward. And so, having the AG in to kind of translate that really, first of all, there was no problem in redacting the data so that it would be kind of block level, a street-block level identification, as opposed to specific street address, and to communicate that the form in which it should be provided should be in, again, standard tab-delimited or you know CSV format. Those were two very simple things but for some reason it took like months, and all this process to get it done. But once the AG stepped in it got resolved very quickly.<sup>405</sup>

Janine Anderson's case, however, does involve an authority's intentional decision to block access to a record. Anderson wrote to the attorney general's office in 2009 as a reporter for the *Racine Journal Times*. She was investigating an incident at the Racine County Jail, and she asked the AG for guidance as to whether the Department of Corrections had solid legal grounds to deny access to a report about the incident.

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<sup>405</sup> Minimally edited for clarity.

In a response letter, Assistant Attorney General Jennifer Sloan Lattis wrote that she had discussed the issue with Department of Corrections officials because Department of Justice attorneys “regularly represent and defend the DOC.” Lattis said the DOC decided to “reconsider its initial decision, release portions of the report if doing so [was] consistent with the statute, and clarify the reasons for denial.”

That discussion worked. Anderson said intervention by the AG triggered release of information that had been previously denied:

They contacted the DOC and talked with them, and I remember getting something that was released from DOC. They redacted some portions of things that were very medical, but they, there were a lot of like jail procedure issues that were in there as well, and some of those things ended up being released from what I remember. . . . We ended up getting some additional records from the jail including a videotape from the floor where this incident happened. So we were able to get a lot of the things that we hadn't had access to when the story initially broke.

But even when the AG's office resolves a dispute and finds access should be granted, authorities were not always willing to listen. Gail Peckler-Dziki discovered that when she asked the AG for assistance in accessing a website that an elected official was maintaining. The site was password protected, and Peckler-Dziki, a freelance journalist, received a tip that governmental business was being discussed on the site.

Attorney General J.B. Van Hollen responded with an informal opinion in December 2009, concluding that the site constituted a public record. Peckler-Dziki said the AG's response was helpful in getting access to what was happening on the site, but that the authority initially ignored the AG's opinion. The authority claimed that because the AG's response was merely advisory, she did not have to comply, Peckler-Dziki said.

When the attorney general responded, he said that it was an informal response. Well the individual who had the website decided that since [the attorney general] said it was informal, she did not have to follow it. . . . she eventually did follow it, not in very good grace. To this day she hates my guts, and talks bad about me whenever she can.

Jenny Nowak, who lives in Marathon County, also said that records she was trying to obtain were released to her after she contacted the AG's office. She was seeking records from a police department in connection to a traffic citation. Nowak raised an interesting point in her interview: She said she wasn't sure whether the AG's response was what prompted resolution, or whether the mere fact of going to the AG helped get the records released.

In my opinion, it prompted action. And again, I'm not sure that whether it was just my request, you know, to the attorney general, or if it truly was something that the attorney general did. That I don't know. But soon thereafter of making the request to the attorney general the records were released.

Some requesters reported that AG intervention resolved disputes even though they did not prevail – that the AG's response did not end up in their favor. When Kayla Heimerman was a reporter for the *Janesville Gazette*, she filed public records requests for e-mails about a proposed development in Lake Geneva. One of the people she requested e-mails from was a former city alderman who denied the request, saying because he no longer held office, he did not have any duties under the public records law.

Heimerman challenged that claim and asked the AG for an opinion as to whether the former alderman was obligated to produce the e-mails – a duty that would have been without question when the former official held office.

The AG responded unfavorably to Heimerman, finding that the former alderman was not subject to the public records law and thus had no duty to produce the e-mails. In my interview with her, Heimerman said that she perceived the AG's response as resolving the dispute despite the outcome. The following is a partial transcript of that conversation, with my initials as JA and Heimerman's as KH.

JA: You consider it resolved even though the opinion didn't necessarily go in your favor?

KH: Correct. We weren't going to push it farther at that point from what I understand.

JA: Okay. My next question is a multiple-choice question. To what extent was the attorney general's response helpful at resolving your dispute? Would you say not at all helpful, slightly helpful, moderately helpful, or very helpful?

KH: I guess I would say moderately helpful.

JA: Okay. And why is that?

KH: Well, partly because it did resolve the matter. So I'll give him the benefit of the doubt that he did help close the case on that. But because it didn't go the way that we felt it should go, and the way that it seemed like it could go, and to get us the win, you know, for the freedom of information, you know, I would only give it a moderate as opposed to a very.

Mark Pitsch, an assistant city editor for the *Wisconsin State Journal*, had a similar outcome. Pitsch had asked DOJ to review redactions that the state Department of Administration made to reports about how state agencies maintained and protected private information they collected about people. The AG's office reviewed the redactions and concluded they were permissible. While that result did not end in disclosure of the redacted information, Pitsch said he decided not to pursue the dispute any further, and

that perhaps “resolution” was not the right word to describe the disposition of the case.

But, he said:

I guess I think all that we could ask for was a fair review, and I take them at their word that they did conduct a review even though I think in the end I didn't get the resolution that I wanted. I trust that they conducted a fair review.

Requesters such as Pitsch and Heimerman, who accepted the attorney general's response and reported that it resolved the dispute even when they did not prevail, are important to this study. They help shed light on how people perceive the attorney general's office, particularly in terms of credibility and impartiality, which I will discuss later in a separate section.

*2. Requesters also reported instances when attorney general review did not resolve disputes.*

The attorney general's administrative review mechanisms did not always resolve disputes. Requesters generally reported that the attorney general's office was not helpful in the following types of cases: when the AG essentially affirmed the decision of the authority that the requester had challenged, when the AG did not take a position in a dispute or question, and when the AG declined to take action.

Geoff Davidian, a freelance journalist who at the time of his request was working on a story for *Milwaukee Magazine*, contacted the attorney general over a dispute with the Office of Director of State Courts. Davidian had requested data from a state courts database, and after receiving that data and examining it, he complained that some cases were missing. Davidian wanted the state courts office to either provide the missing data or refund the fee for responding to the records request.

The precise way that Davidian got in touch with DOJ is not entirely clear. Davidian sent a letter to the state courts office and copied the attorney general. He then got a call from Assistant Attorney General Alan Lee, and Davidian e-mailed Lee correspondence related to the dispute. Lee responded with a two-paragraph letter, in which he said that he discussed the dispute with a state courts official and found that the handling of the records request was “appropriate and complete.”

In an interview, Davidian said Lee’s response did not resolve the dispute. Davidian had hoped the AG would pay attention to the request, and, he said, prompt some kind of action. Davidian said that Lee’s response letter “may have been fair based on the information that he had.” But, Davidian said, “for the purposes of journalism, I’ll say it was unfair because it was wrong.” He continued:

The outcome was the wrong outcome. They didn’t take the time. They didn’t take the time to adequately address the problem. If they had adequately addressed the problem, they would not have come to the conclusion that they came to.

Davidian had considered suing, but he said he was not sure a state court would have been a viable venue, as the lawsuit would have been against the administrator of the state court system. And federal court, he said, would have been too costly.<sup>406</sup> Thus after the AG’s terse response letter, Davidian did not pursue the dispute any further.

Pam Warnke’s case reached the same outcome. The attorney general reviewed a disclosure dispute she had with the state Department of Corrections. Warnke, then a reporter for WAOW-TV in Wausau, wrote to the AG in September 2010 to appeal a denial of a records request. She had sought information about James Begay, a Wausau

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<sup>406</sup> I did not ask Davidian whether he thought federal court would have had jurisdiction to review the case.



man who had cut off a monitoring bracelet before allegedly raping a woman. Begay was wearing the monitoring bracelet because he was a juvenile sex offender, having been convicted of sexual assault as a teenager.

Warnke asked the DOC for documentation about which law enforcement agencies were notified that Begay had cut off his monitoring bracelet, how long Begay went unsupervised, and who was supposed to find him. The DOC denied the request citing Begay's status as a juvenile sex offender, even though he was 21 years old when the second rape allegation arose.

Warnke wrote to the AG that she was seeking information only about the second rape allegation, in which Begay was an adult. "I am not requesting any information regarding his criminal history as a juvenile," she wrote.

Assistant Attorney General Clayton Kawski wrote back to Warnke and affirmed the DOC's decision. He had reviewed Warnke's request, the DOC's response, and applicable law. He also spoke to a DOC official. Kawski's conclusion: the DOC's denial, he wrote, "was appropriate under these circumstances."

Warnke did not agree with the AG's response and she said she did not think it was fair. Like Davidian, she too gave up: "I had been denied so many times, by so many different agencies, that I left the case alone and didn't pursue anything further."

3. Requesters reported seeking attorney general help even when they did not expect any action.

One surprising finding from the interviews was that numerous requesters said they sought help from the attorney general even though they did not expect anything to

happen. Darla Meyers, a citizen requester from Hudson, said she requested assistance from the AG because she wanted to make sure there was a record of the dispute. Meyers wrote to the attorney general in two separate cases – one for the names and addresses of people who contacted state lawmakers about proposed legislation, and the other about access to a threat letter a police department was investigating. Meyers reported dissatisfaction with the attorney general’s office, which had affirmed denial of the requested records in both cases.

Now retired, Meyers formerly worked as a court reporter, transcribing what people said in courtrooms. She learned from that experience that keeping a record of disputes was important. She said that even though she disagreed with the AG’s responses to her requests, and thought they were unfair, she would very likely again seek assistance from the attorney general because such action would put the dispute “in the record.”

You learn that if ever there’s a situation that may be litigious in nature, you should always document it, make your proper documentation, notes, phone calls, and all the other information, as a point of reference.

Ted Cogley said he too did not expect the AG to help in any sort of meaningful way. While he acknowledged that the AG’s office did provide assistance in a narrow aspect of his dispute, he said the AG did not resolve the underlying issue. In the interview, Cogley, a citizen requester from De Pere, said he intended to contact the AG’s office again on a different matter, and I asked him why:

JA: So I’m curious why do you intend on going to the AG’s office when you – and I’m just trying to understand this – when you said that the AG’s office was not very helpful in your previous public records dispute.

TC: To make [the AG] aware. ... I know that they're probably not going to do anything, but so that they can know that this kind of a situation exists, they may be able to use it in their daily activities.

Cogley's rationale for contacting the AG's office is different from the reason Darla Meyers gave. Cogley said he intended to contact the AG's office to give notification of a problem. In explaining why he would do that, he recalled his service in the military: he said he collected raw information for commanding officers so "they can make informed choices about courses of action...so they can know what might be happening around them." Whereas Meyers saw personal utility in contacting the AG, Cogley said he thought the AG's office might benefit from knowing about his disputes and using that information to fulfill its mission.

Going to the attorney general despite unfruitful results can also mitigate risk. Alan Kesner, the Wauwatosa city attorney and a former assistant attorney general, said he felt he should ask the AG's office for assistance before elevating his dispute to litigation – even though he didn't expect any results. "There's always a chance," he said, that something could happen:

JA: So what were you hoping the AG's response would be?

AK: I don't even know that I was hoping for anything in particular. I expected they wouldn't do it, but I felt it was appropriate to ask, necessary to ask.

JA: Because even though you weren't expecting the AG to do anything, you thought that you should at least ask the AG for assistance before filing suit?

AK: Oh yeah. Give them the opportunity. Give 'em the opportunity.

JA: I see. But why, I'm curious, why did you feel you had to do that if you weren't expecting anything?

AK: Because there's always a chance. Always a chance, and they do it on a more regular basis.

4. Requesters often cited low cost of using attorney general.

Numerous requesters said they sought help from the attorney general because doing so did not cost them any money. Requesters cited this reason voluntarily; I did not specifically prompt them to talk about their financial resources. Requesters said that they could not afford to hire a lawyer, they did not want local taxpayers to foot legal bills, or, in the case of several media requesters, they did not believe that the disclosure dispute was significant enough to warrant litigation.

Anthony Varda, a Madison lawyer who had requested opened bids for a public works project, cited both the cost to him and taxpayers. Varda sought the bids from a local emergency medical services district board – not as a member of the general public, but as a member of the board itself. He said going to court would have been “politically unpalatable,” in part because that would mean the board could have to pay his legal fees. Varda also believed that the particular legal issue was already settled law in the state and, he said, “wouldn't have been useful precedent.” He ultimately got the records but well before the AG's office responded.

Several citizens reported that they could not afford to litigate, including Ted Cogley, who said going to court was not a realistic option. But Cogley also voiced frustration over having to enforce the public records law himself. “I'm looking for the system to function,” he said.<sup>407</sup>

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<sup>407</sup> Jenny Nowak also expressed this sentiment. She said: “There's a law, and they should follow the law. And so it was just prompting the entity to follow the law. So why should I as a taxpaying citizen spend my time, my money forcing an entity to comply with the law?”

It costs the average citizen, you know, money to hire a lawyer, to go through all of the rigmarole and so on. And you know when you're pretty much on a fixed income on my side, and with my wife being an hourly worker, you know, living paycheck to paycheck, it's cost prohibitive to actually get what the law says you're supposed to be getting.

Citizens Dale Neumann and Darla Meyers, both of northwestern Wisconsin, made similar points. Meyers said she couldn't afford to sue, and that she felt everyday people are often unable to challenge nondisclosure for that reason. She said she was hoping the attorney general would take her case because "as a taxpayer, we're paying for it anyway."

I'm kind of losing hope in that any common person could ever find relief. It seems like it needs to be an organization or a news organization that pursues the open records because they have attorneys on staff. I just don't see how like the regular Joe and June here and just a regular person, I don't know how they can ever pursue anything that they have a suspicion is not right. Cost, I think, is prohibitive to the regular taxpayer.

Meyers is right that news organizations have played an important role in litigating public-records cases, but journalists also have financial constraints. The reporters whom I spoke with noted that going to the AG was routine and one of the primary alternatives to going to court. That decision, about what venue to dispute the records request, invariably involved an assessment of the story's value, the reporters said.

Janine Anderson of the Racine *Journal Times* and Kayla Heimerman of the *Janesville Gazette* both cited both limited resources and low story value when explaining why their newspapers didn't file lawsuits. Said Heimerman:

To be real honest, I don't know that [litigating] something that our small of a paper would have been able to shell out the cash for, number one. Second of all, for all intents and purposes, this case and this community were kind of ancillary to our regular coverage. I mean yes, we covered Walworth County, but it's that community and that county is not nearly as much of a priority as Janesville or Rock County. So we might have

applied that test to talking about how to follow up. You know, how important is this really to our coverage?

Mark Pitsch, of the *Wisconsin State Journal*, made a similar comment:

You've got to calculate, you know, a, how important is this information? What do you think you're going to learn if you get those records? And, you know, if you think you're going to get something that's really important, then you've got to ask, if I go to court, am I going to win? And, you know, I guess in trying to answer those questions, we either concluded at one point that, okay, so the information is not so important that we're going to go to the mat over it. Or, if we concluded that it was, then we may have concluded that this is not where we're going to put our sort of financial-legal resources. . . . Once DOJ came to its conclusion, we didn't pursue it any further. I mean you've got to make judgments as to whether pursuing additional legal action is worth it or not, and it didn't seem to me at that point that it was worth, you know, an additional legal response or a story for that matter.

#### *Litigation as last resort*

In addition to financial reasons for going to the attorney general, several requesters said that they sought AG review as a precursor to filing a lawsuit, or that litigation should always be the last option in a dispute. Requesters reported that the AG's office could be a better initial step at escalating disputes as opposed to immediately going to court. Of the requesters interviewed, just one – Alan Kesner – went to court after the AG responded.

Bill Lueders, the president of the Wisconsin Freedom of Information Council, said “litigation is always, always, always the last resort.” Lueders cited the cost of taking a case through the state Supreme Court, which he said could easily range from \$60,000 to \$80,000. He recognized that under the public records law, requesters who prevail could get their attorney's fees reimbursed. But, he said, “there's never any guarantee you're going to win.”

Mark Pitsch of the *Wisconsin State Journal* identified a basic theory of how he approaches public records disputes. He said he generally tries to resolve dispute without having to take legal action, and that the attorney general’s office “would be a good place to start.” But he also said that he would not hesitate in filing a lawsuit under the right circumstances and sidestepping the attorney general.

Alan Kesner, the Wauwatosa city attorney, said he felt having the AG’s office “say no” before litigating was the most appropriate course of action. “Litigation is just a last, last ditch effort,” Kesner said. “It’s not the most efficient way of solving disputes.”

Gail Peckler-Dziki, a freelance journalist, cited both a general avoidance of litigation and an interest in saving money. “I think it’s better not to go to court,” she said. “Who wants to spend their money and go through the hassle?”

5. Requesters generally articulated respect for the attorney general’s office.

Most requesters whom I interviewed articulated, in different ways, a sense of respect for the attorney general’s office. That’s important, because exploring how people think about the AG’s office can shed light on the extent to which they perceive the AG as having credibility, integrity, and independence.

Among all requesters whom I interviewed:

- Most requesters reported that the AG’s response was fair. Cases in which requesters did not view the AG’s response as fair generally involved instances when the requester did not prevail in the dispute.
- Nearly all requesters said contacting the AG’s office was easy or not too complicated. Just two said the process was pretty complicated.
- Most requesters reported a positive experience with the AG’s office. Only three said their experience with the AG was poor; these three also said the AG’s

response was not fair.

- All requesters reported a likelihood of contacting the AG's office again. Most requesters said such action would be very likely, while others said somewhat likely. Five requesters added a condition to their response that contact would be made if appropriate or warranted by the situation. This finding is particularly interesting, because even those requesters who reported negative experiences with the AG, and who believed the AG did not respond in a fair manner, did not foreclose the possibility of seeking assistance again from the AG.

Several requesters said that one of the benefits of the attorney general's office was that it could be an independent eye: reviewing a dispute or answering a question without being tethered or linked to a particular side or outcome. This was important, requesters said, because authorities would be more likely to trust what the AG's office says.

Numerous requesters said they sought AG review for independent confirmation of who was right in the dispute or what the law required. Varda said he requested AG review even though the legal question was clear to him. "As a practicing attorney doing public records law for over 35 years, I knew what the answer was going to be," Varda said. "So it was more so that what I was telling them would be confirmed independently."

Janine Anderson made a similar point. She said that in her experience, authorities may attach credibility to the attorney general's office, or at least trust it more, than the newspaper's attorney.

Going to the AG's office is one of the first couple steps. It's them or the Wisconsin Newspaper Association has a legal hotline that we will also call for some kind of basic help on things. But the legal hotline, and even our own kind of privately hired attorneys, they don't necessarily – their opinions aren't really taken seriously all the time by the municipalities and, not really if we paid somebody for an opinion.

Anderson's insight is especially important in this study's context. She is not saying that the newspaper's lawyer can't be helpful at resolving disputes. Indeed, she said



later that authorities certainly take seriously private attorneys representing the newspaper when it files a lawsuit. But when litigation is not in play – when the power to affect an authority’s decision implicates persuasion to a greater degree than just compliance with a legal duty – the way an authority perceives the AG’s office becomes incredibly important.

Consider another example: Patricia Rose, the publisher of the *Clintonville Chronicle*. Rose said she found the AG’s office more helpful than the local district attorney, who she said held close ties to and was politically aligned with municipal leaders. Because local authorities considered the DA an ally, she did not expect the DA would be effective in obtaining compliance with the public records law. But, she said, the AG’s office has clout:

I think [local authorities] realize they have a large amount of camaraderie with the local district attorney, and so for that reason they are not threatened by the district attorney. So the only person they would be threatened by then would be the attorney general.

Mark Pitsch talked about the AG’s office in important terms. He said he wanted the AG’s office to “conduct a fair review” of his dispute, which he said he got, even though the attorney general’s review didn’t result in release of additional information. “I think the attorney general’s office takes these matters seriously,” Pitsch told me. “I think they give records questions serious thought.”

Pitsch also touched on his perception of the AG’s impartiality, stating: “I’m not sure in the end they always come down on the side that I think journalists would like.” In other words, he said, the AG’s office may not always decide in favor of the records requester. Indeed, the attorney general clearly doesn’t do that, as this study has shown.

6. Numerous requesters complained about lack of definitiveness of AG's responses.

A common complaint from interviewees was that the attorney general's office often hesitated to opine in a conclusive, yes-or-no way. That is, in many cases the AG's office would not take a position that one party was right and one party was wrong, but rather would hedge responses by citing a lack of information, contradictory or ambiguous legal authority, or a conflict of interest.

Mark Pitsch and Bill Lueders both raised this issue. Lueders said Attorney General J.B. Van Hollen has avoided drawing a bright line on two "critical issues" – allowable fees and the appropriate amount of time authorities have to respond to records requests. Lueders described an example from one of his requests:

If somebody writes the AG's office like I did and say, hey, Sauk County is charging fifty cents or a buck per page for records, they've just created a new policy where that is their per-records fee, isn't that a violation? [The attorney general doesn't] put out an opinion or a letter saying, 'yes, you're right, fifty cents a page is definitely too much. They can't be charging that. They're breaking the law.' But what they have done is they've reached out to the agency, and say, I presume, 'knock it off.'

But Lueders offered several reasons for why the AG's office may be disinclined to take hard positions or provide definitive, binary answers to questions. One reason is that DOJ officials simply may not have clarity as to how far their opinions can go.

Another reason: once a bright line is drawn, that line "becomes like a new standard,"

Lueders said.

I am not necessarily questioning the judgment of the AG's office in making that call. I think, you know, maybe that's the responsible thing to do. If you draw a line in the sand, then you draw a line in the sand at fifty cents a page. If you say, 'listen, there is no legal way that you can charge more than fifty cents per page for a copy. If you do, we're going to

consider that a violation of law.’ If the AG’s office were to say that, suddenly the cost of records across the state of Wisconsin would go up to fifty cents a page. . . . And so that is the danger of drawing the line is that people are going to step right up to it. They had that same thing happen with the ten-days standard. You know in the compliance guide for records the AG’s office says that generally speaking simple requests should be answered within ten days. So, the law says as practicable and without delay. It doesn’t say anything about five days or ten days or three days or twelve days. But when the AG’s office put in its compliance guide that generally speaking it should be within ten days, there were a lot of custodians across the state of Wisconsin who looked at that and they say, ‘ah, I have ten days before I need to respond,’ even if the goddamn thing is right in their desk or right in their hand, and all [they] have to do is make a copy and hand it over. They’ll say, ‘oh I’ve got ten days.’ And that’s, that’s an unfortunate result of trying to provide some sort of specificity in the interpretation.

Anthony Varda thought the answer to his dispute was crystal clear: Are opened bids for public works projects subject to release? “I couldn’t think of a more public public record,” Varda said. While the assistant attorney general who responded to Varda issued a fairly definitive answer, Varda thought the response had “too much equivocation.”

The law is much clearer than that. . . . I think that the attorney general’s opinion attempted to be Solomon-like in its decision although the law required it to come down on our side. I think it could have been emphatic.

Alan Kesner, who used to work in the Department of Justice, said the way the AG’s office issues opinions has shifted over time. For example, he said, former Attorney General Bronson La Follette’s administration often tackled legal issues with definitive, hard positions. Kesner said he noticed a change in the quantity and tenor of opinions when Jim Doyle became attorney general – namely, that Doyle’s administration issued fewer formal opinions and more informal correspondence. Kesner said he recalled that

the legal advice coming out of the AG's office under Doyle was more deliberative than Doyle's predecessors.

Kesner noted that attorneys general conceptualize their role in office differently, for example, between making decisions about what the law is or should be, and balancing the law among competing interests. Kesner cited Doyle's upbringing for why he may have had a different operational theory than La Follette:

Jim's dad was a well-known federal judge, so he had grown up with balancing positions pretty heavily when he came into office. So maybe it was more of a balancing on the background of the AG. Don Hanaway and Bronson La Follette were much more fire-brands one way or another as to what they had thought: 'I'm right and you're wrong, and that's it.'

7. Requesters reported that the attorney general often takes informal action to resolve disputes.

Consistent with the analysis of the DOJ correspondence, interviewees also reported that the attorney general's office often takes informal action to resolve disclosure disputes. Previous interviewees talked about this in the course of describing their cases, but interviewees also spoke directly about the way in which the AG's office has worked with parties to resolve disputes.

Janine Anderson recounted multiple instances in which the AG has helped mediate disclosure disputes. The attorney general's office, she said, "will often contact the state agency or the municipality and kind of help them understand better how they should be interpreting the statute that would be more in line with the actual intent of the law." Anderson said she could also remember situations in which the AG's office offered to write letters to an authority.

Anderson even recalled a dispute in which the attorney general's office offered to conduct public-records training for the Greendale Police Department amid complaints that it was redacting too much information.

We contacted the AG's office, and they offered to conduct an open records training with the department. The police turned that down and started releasing more information after I told them that that was on the table. But, you know, they've been willing to make phone calls to people or to write letters if needed, and it's been helpful in my experience.

Bill Lueders recognized that informal action such as calls and letters can help requesters resolve their immediate disclosure disputes, but he also identified several drawbacks to it. Informal resolution, Lueders said, generally does not generate the same kind of publicity and public awareness of a problem that a lawsuit brings. And, he said, informal action is seen – if at all – as less significant than litigation.

If at some point the AG's office were to bring an enforcement action, for say a custodian who takes too long to respond, that would have a lot of value in terms of establishing that the office thinks that it is possible to take too long, and that certain things are going to trigger its interest in that regard.

Lueders said going to court “would send a broader, bigger message” to custodians than informal action. “To an extent dealing with it diplomatically through channels is just as good,” Lueders said. “But in one respect it doesn't create as much clarity as does a more aggressive action.”

As I noted in chapter two, anecdotal evidence indicates that Attorney General J.B. Van Hollen's administration has not taken any formal legal action to enforce the public records law, instead preferring to educate authorities about their duties under the public records law, and informally resolving disputes, as the foregoing cases illustrate.

According to Lueders, Van Hollen's office may have come close to filing suit at one point, but the public officials in that dispute eventually backed down. But, Lueders said, Van Hollen has overwhelmingly preferred to stay out of the courtroom:

I know that [Van Hollen's] view on these things is that local government officials and state agency officials want to comply with the law but sometimes they screw up, and he doesn't want to use the resources of his office to be bringing legal actions against people who he thinks are basically committed to doing the right thing but sometimes screw up. That's how I understand his position, and it's not a bad position to have.

Anthony Varda said that the attorney general's preference for informal dispute resolution may in part be a political decision. The AG's office, Varda said, "has a political side to it, and they don't want to unnecessarily annoy people and be shown in a bad light if they're too hard on somebody who isn't following the strict letter of the law." Varda said the public records law is "inherently political": the people who are subject to the law are mostly politicians, public officials, and public employees, he said.

You know you've got board members, you've got elected public officials. I mean, it's inherently political when it comes to public records. They wouldn't have public records if they weren't public officials. So the attorney general, the attorney general's office, tries not to unnecessarily step on toes. And I don't take that as a criticism per se. I think that's, that's part of what they're trying to do here in, you know, at least pushing people towards, you know, following the law correctly. . . . If they were too adversarial, they might just get a, you know, get people's backs up and then we'd have more silly expensive lawsuits that the taxpayers get to finance both sides of.

Indeed, Varda said that in his case, he might have wished that someone in the attorney general's office had immediately called the authority holding onto the records he was seeking and asked, "what the hell are you guys doing? We're writing an opinion on this and it's not going to look good?" But Varda conceded that such action "may not be a very good political response."

Summary of interview findings.

The people featured above breathed life into this study. They spoke candidly about their engagement with the attorney general's office and how it affected their disclosure disputes. While their insights are not representative of all of the cases this study identified, the interviewees' experiences and perceptions are valuable for answering the research questions. That's because the interview component of this study is oriented toward sketching the contours of attorney general involvement in public records disputes. The study is designed to identify and expound on the capacities of the attorney general's office in reviewing public records disputes, particularly for citizens and the news media – not for all requesters in all cases.

In summary, analysis of the interviews suggests the following main findings:

1. Requesters said the attorney general was both helpful and not helpful in resolving disputes. Requesters who said the AG was helpful generally prevailed in their disputes, but some requesters who did not prevail also said the AG helped resolve their disputes. Those requesters who said the AG was not helpful generally did not prevail or did not receive a substantive answer from the attorney general's office.
2. Requesters reported seeking attorney general help even when they did not expect any action.
3. Requesters often cited, without specific prompting, the low cost of using the attorney general's office. Some requesters also said that litigation should always be a last resort, and that going to the attorney general is can be an initial step before escalating the dispute to court.
4. Requesters generally expressed respect for the attorney general's office.
5. Numerous requesters complained about the lack of definitiveness of AG responses.
6. Requesters reported that the attorney general often takes informal action to resolve disputes.

## CHAPTER 5: DISCUSSION

The previous chapter presented findings from the two different methods of data collection in this study: analysis of correspondence to and from the attorney general, and interviews with a sample of people who initiated that correspondence. This chapter attempts to merge and explain those findings. In the sections below, I apply a set of assessment standards to the attorney general's administrative review mechanisms; I identified these standards in Chapter 2 based on previous research. I then discuss the meaning and implications of the findings, and in so doing weave together both sets of data.

### A. Application of assessment standards

In Chapter 2, I identified a set of assessment standards for administrative review mechanisms. Those standards, in the form of questions, are repeated below in clusters and followed by corresponding answers based on this study's findings.

1. Binding or advisory: Does the mechanism have binding authority to compel the release of records, or can it offer only advisory opinions regarding the dispute?
2. Right to administrative review: Do record requesters have a legal right to administrative review, or is review at the discretion of the mechanism administrator?
3. Orientation: Is the mechanism oriented toward dispute resolution?

The answers to these questions are fundamentally structural: The attorney general's administrative review mechanisms are advisory only, record requesters don't have a legal right to administrative review, and the statutory language of the administrative review mechanisms are not oriented toward dispute resolution. While the



primary data collected in this study do not reverse these answers, the data help reveal how important these factors are as part of the administrative review process.

Yes, the attorney general's administrative review mechanisms are only advisory, but this study has shown that they can nonetheless be effective at prompting government authorities to release previously withheld records or take action that is helpful for a requester. Even though record requesters have no right to administrative review, this study found that the attorney general's office responded to nearly all of the requests. And despite the fact that, by statutory language, the administrative review mechanisms are not oriented toward resolving disputes, this study found the attorney general's office as a matter of practice appears to do just that: the AG's office often takes varying degrees of action to resolve disagreements between parties.

4. Oversight: Does the mechanism have any accountability measures built in like having to submit an annual report?
5. Political will: To what extent is there a commitment from people charged with administering the mechanism, and from political officials who may have some manner of oversight (e.g., funding), to support the mechanism's functions and goals?

There are few formal and structural oversight measures specifically built into the attorney general's administrative review mechanisms. The AG's office does not produce an annual report that would push out information about the quantity and nature of public records disputes it regularly handles. Such a report could enable the public to assess how the attorney general is handling records disputes.

Moreover, the attorney general is a constitutional officer and elected official. Absent limited executive power from the governor, broad funding decisions by the legislature, and judicial review by the courts, other branches of government are

constrained in how much official day-to-day oversight they have of what the AG's office does.

There are, however, forms of unofficial oversight: people and institutions that can shape the attorney general's actions through political persuasion. This style of oversight comes from a wide range of sources, including state legislators and other units of government, advocacy groups, the news media, and the public in general.

Freedom of information advocates and the news media in particular monitor the actions of the attorney general's office and, as this study showed, ask the AG to enforce the public records law. Such attention toward to the attorney general's office can put pressure on it to be responsive to the public's concerns.

Such pressure may impact the political will the attorney general has in administering the review mechanisms. While this study shows that there is little hesitation on the part of the AG's office to mediate and informally resolve disputes, there is a tendency by the AG to not initiate formal litigation.

In short, there is little external and formal oversight of the attorney general's administrative review mechanisms, but there are informal political pressures that have the capacity to hold the attorney general's office accountable in the court of public opinion. There is, however, a fine line between political persuasion as oversight and political persuasion as undue influence, the latter of which hampers the attorney general's ability to be independent, impartial, and credible. Those pressures may explain why the AG's office appears to overwhelmingly prefer one mechanism (Attorney General Advice) versus the other mechanism (Litigation Surrogate).

6. Resources: Are sufficient resources available to support mechanism functioning?
7. Time: How much time does it take for mechanisms to function?

To the extent this study can measure resources, it does so indirectly. I did not examine budgets to ascertain how much money the attorney general's office has dedicated to operating its administrative review mechanisms. Nor did I attempt to investigate how much time employees spend on administering the mechanisms. Nonetheless, there are some general indicators about resources from the data I collected.

One such indicator is time. This study found that overall, the attorney general's office responded fairly timely to requests – most in less than a month. While some requesters complained about the AG's response time even for arguably clear-cut disputes, and while in some cases the AG's office took substantially longer than a month, the overall timeliness of the AG's office suggests it is able to reasonably handle the caseload this study reviewed.

The attorney general's median response time of 23 days is particularly important when it is compared to the length of time other enforcement mechanisms can take to conclude, such as litigation.<sup>408</sup> In Wisconsin, circuit court judgment in less than a month seems highly unlikely. A state government defendant typically has 45 days to file an answer and a non-state government defendant has 20 days to file an answer,<sup>409</sup> though a court has discretion to shorten those time periods in mandamus actions.<sup>410</sup>

8. Legal complexity: Is the mechanism adequately navigable by a layperson (or, does navigation require advanced legal knowledge)?

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<sup>408</sup> *But see Dreps supra* note 18 (In one case out of Brown County, a circuit court found in favor of the *Green Bay Press-Gazette* less than two months after filing a public records lawsuit. The defendant did not appeal.)

<sup>409</sup> Wis. Stat. § 802.06.

<sup>410</sup> Wis. Stat. § 801.02(5).

Both sources of data indicate that using the attorney general's administrative review mechanisms is fairly easy. Requesters generally wrote e-mails or letters explaining their disputes, and that correspondence ranged widely in length, detail, and coherence. Requesters often attached relevant documents such as the records request and the authority's denial letter.

Overall, the structure of the process is fairly simple, and most people would not have difficulty fulfilling the necessary steps to initiate contact with the AG. The process may get more complex when requesters attempt to make legal arguments in support of their positions. Indeed, one requester, who was also a lawyer, reported that the process was pretty complicated. But this requester also said she spent a great deal of time conducting legal research and constructing arguments.

One important aspect of the legal complexity standard is the access the general public has to the underlying sources of authority the attorney general's office references in response letters. Often an assistant attorney general will include a citation to a case when explaining a legal principle. Most people probably don't know what the citation means or what to do with it. The attorney general's office should consider citing to more easily navigable sources, such as page numbers in the AG's compliance guides.

9. Perception: To what extent did requesters perceive the attorney general as independent, impartial and credible?

Scholars have found that administrative review mechanisms work effectively when mechanism administrators are free from undue control (independence), act in an unbiased and fair manner (impartiality), and have their decisions respected and believed by mechanism users (credibility). While not measuring those concepts directly, this study

explored how people perceived those concepts as applying to the attorney general's office.

As I noted in discussing the oversight assessment standard, the attorney general's office has some degree of formal independence because it is a constitutional office of the state and is an elected position. Whoever holds that office ultimately answers to one audience – electors. Thus, to a degree, the attorney general is perhaps structurally insulated from direct control by other units of government that may be the subject of complaints under the public records law.

But the attorney general's office does not operate in isolation, and indeed, the nature of an elected office might actually allow undue political influence to leak into decision-making. Moreover, the attorney general is deeply entwined in governmental operations: providing legal counsel to state officials, defending lawsuits against the state and leading law enforcement efforts with local and state agencies. Consequently, the AG's office is in close contact with governmental authorities and has an interest in maintaining a mutually beneficial relationship with them. That relationship may impact how the AG handles public records disputes and outcomes – potentially mitigating claims against a governmental authority and helping that authority save face, while at the same time assisting requesters to get what they're looking for or at least feel that their concerns have been taken seriously.

However, the AG's close relationship with governmental authorities is a double-edged sword. When requesters prevail or otherwise respect the outcome of a dispute in which the attorney general intervened, requesters may not mind or may believe that the

AG's connections with governmental officials was helpful. But those very same ties may breed distrust by requesters when they lose a dispute or do not respect the outcome.

At the same time, the people on the front lines of responding to requesters – namely, assistant attorneys general – may be more insulated from raw political persuasion than top officials and political appointees. There is a reasonable argument that career DOJ staffers who have served under numerous attorneys general of different political stripes could be considered more independent, impartial, and credible than the AG's office itself because of their experience and expertise. Though, I also recognize that supervising officials may very well direct staff to respond to correspondence with a particular outcome in mind.

Still, requesters interviewed in this study generally held favorable views of the attorney general's office. All of the requesters who said the attorney general helped them resolve their dispute also said the AG's response was fair, including some requesters who did not prevail. Authorities in numerous cases also listened to the attorney general and changed their positions. That finding is important, because it shows the capacity of parties to respect the attorney general's conclusions. Equally important, some requesters reported that the attorney general did not help resolve their disputes and did not act fairly. Still, all requesters said they would consider returning to the attorney general in future disputes – an indirect but illuminating finding of respect toward the AG's office.

In summary, the attorney general's office has meaningful structural independence from undue influence, but in reality, the AG has deep ties and relationships to governmental authorities that may color the way the office approaches public records

disputes. Those connections could be helpful for requesters who are clearly right in a dispute, because the AG's office likely has established trust with government officials. They know the AG is not out to get them and may willingly comply to take corrective action. But those very same relationships mean that the AG cannot, by definition, be fully impartial in disputes. At the same time, the requesters interviewed generally respected the attorney general's office, including some who did not prevail in their disputes, which suggests they viewed the AG as a credible and fair arbiter. Authorities in the cases in which I interviewed requesters also appeared to respect the AG's positions, except in one instance in which the authority did not immediately grant access to a record.

**B. Findings are consistent with legislative intent.**

This study's findings suggest that the legislative intent for codifying the attorney general's administrative review mechanisms – to help people unable to hire legal counsel – has to some extent worked, or has at least shown capacity to work. Evidence for that claim takes two forms.

First, most of the users of the AG's office during the time period under study were people from all across the state who were unaffiliated with an entity, government, or cause, and were not lawyers. Many of the requesters whom I interviewed said that they went to the AG's office because they could not afford to hire an attorney. Those users are very similar to the kinds of people Lynn Adelman described as the target population for the administrative review mechanisms.

Second, analysis of correspondence and interviews with requesters shows that the AG's office has attempted to help parties resolve disputes in ways not specifically

contemplated by the statutory language of the administrative review mechanisms. That was not the situation in every case, of course, but it was not rare, either. That finding is especially important in light of the fact that the AG's office denied all requests for mandamus actions, and that nothing in the statutory language of the administrative review mechanisms requires the AG to work toward resolving disputes.

**C. The attorney general's office overwhelmingly uses informal means to resolve public records disputes over formal legal action.**

The attorney general's office rarely takes formal legal action to enforce the public records law. In none of the cases this study reviewed did the attorney general file a mandamus action on behalf of a records requester. In response to such requests, the AG's office would often say that the particular dispute was best dealt with by a local district attorney, that the dispute did not implicate statewide concerns, or that the Department of Justice would have a conflict of interest in filing suit because the defendant in the litigation would have been a state agency, which the DOJ would have been tasked with representing.

However, the study also found that the attorney general's office has often worked to informally resolve disputes through mediation and conciliation – action not explicitly contemplated in the statutory language of the attorney general's administrative review mechanisms. That does not mean what the attorney general's office is doing is not authorized under Wis. Stat. § 19.39; the language is arguably broad enough to include giving advice to each party in a dispute.



**D. Complaints about the attorney general's lack of definitiveness are understandable and warranted, but there is also a compelling counter argument.**

At times the attorney general's office responded to requests with a clear and direct answer. But more often, responses were rife with equivocation. That is understandably frustrating for requesters who, having asked the attorney general for clarity, receive anything but.

However, as Bill Lueders noted, there are compelling reasons why opining in more concrete and definitive ways may not be the best course of action – at least when the plain language of the law and court opinions is not sufficiently clear, and when the facts of the case are lacking or in dispute.

This problem in particular changed how I think about the attorney general's office. The AG is not a court, and DOJ officials responding to requests are not required to rule for or against a particular party. In many cases, the outcome of a dispute under the public records law can hinge on the specific facts, which may not be immediately available.

## CHAPTER 6: CONCLUSION

### A. Recitation of principal findings.

This study initially questioned whether people seeking information under Wisconsin's public records law could obtain meaningful review of a disclosure dispute without having to litigate. The foregoing data suggest they can, though the findings are not uniformly positive.

The study posed three big questions: How do the attorney general's administrative review mechanisms operate in practice, to what extent are they effective at resolving disclosure disputes, and do the mechanisms actually help people who cannot afford to hire a lawyer to litigate a dispute? To get answers, I analyzed correspondence in administrative review cases and extracted a litany of data, including the quantity and nature of cases, the identities of the requesters, the key issues underlying disputes and questions, and what types of action the attorney general took. I also interviewed 17 requesters to understand their disputes, their perceptions of the attorney general's involvement, and the outcomes of their cases.

The findings reveal that the attorney general's office handled more than 304 cases in the six years under study. People unaffiliated with an entity and who were not confined to an institution accounted for the single-largest share of requesters. Most requesters filed just one case, were not lawyers, and sought advice from the attorney general as opposed to formal legal action. Most authorities were local units of government as opposed to an arm of the state of Wisconsin. Law enforcement agencies accounted for the single-largest share of authorities.

The cases the AG dealt with spanned a wide range of issues, but the most common issue concerned whether access should be granted or not to a particular record. The attorney general was relatively timely in responding to requests, and sought to resolve disputes between the parties in many of the cases.

The findings also indicate that the attorney general has the capacity to play a meaningful role in helping everyday citizens, and others, use the public records law and challenge improper government secrecy. That role takes place particularly at the local level, and is broader and richer than the limited statutory language that authorizes the attorney general's administrative review mechanisms. In cases in which the AG's office decides to play such a role, this study shows the impact can make a difference.

But the study has also found that the attorney general's office took no formal legal action to enforce the public records law in the time period under study. That action is consistent the anecdotal data presented in chapter two showing that the AG's office and district attorneys rarely take such formal legal action, instead preferring to resolve disputes informally and to focus on education rather than litigation.

Avoiding court when possible is no doubt prudent and reasonable, but the fact that the attorney general almost never uses litigation in public records disputes raises questions about whether the ability of authorities to deny access to records and the remedies available to the public are properly balanced. If the Litigation Surrogate mechanism is not realistically viable, then the public's actual ability to enforce the public records law also becomes less viable.

## **B. Recommendations.**

### *1. The attorney general should adopt, and make publicly available, written procedures for how it will respond to administrative review requests.*

The attorney general's office provides little guidance as to how people should structure their requests, what information to include, and what to specifically ask for.<sup>411</sup> The AG's office should adopt written procedures for how it will respond to administrative review requests, and make those procedures available to the public.

While most interviewees reported that contacting the attorney general was not a complicated process – writing a letter or e-mail and sending it is generally not a complex task for the average person – analysis of the correspondence revealed that requests ranged widely in format, clarity, and complexity.<sup>412</sup>

Further, this study found that there were significant disparities in how the attorney general's office responded to requests. Sometimes the response author contacted the authority to get more information; that didn't always happen, and in some cases the author declined to opine citing a lack of information. Sometimes the response author copied the authority in response letters, but not always. Some response letters contained an exhaustive legal analysis; sometimes the letters were tersely worded or hardly offered meaningful advice.

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<sup>411</sup> The attorney general's website offers minimal guidance about how to write requests, what the review process entails, or what to expect. The site states, in relevant part, "When writing, please clearly identify whether your concern relates to open meetings or public records, so that your correspondence is routed appropriately. Also, please enclose copies of related correspondence and other documents that will assist in understanding your concerns." Wisconsin Department of Justice, *Open Government*, available at <http://www.doj.state.wi.us/dls/open-government> (last accessed December 8, 2013). The attorney general's 2012 compliance guide on the public records law makes no mention of the public's ability to seek guidance from the AG, except for a copy of the statutory language of the public records law in the guide's appendix.

<sup>412</sup> Though one requester, Chan Stroman, said she found the process to be pretty complicated. Stroman, a lawyer, was seeking administrative review for the first time. She said she might have put more work into the request than was necessary, but she said she "didn't have any basis of comparison."

Such procedures could, for instance, follow this process: Someone files a request with the AG, the authority has an opportunity to reply within a certain period of time, and then the AG's office responds and copies all parties. The attorney general's office could even develop a template document for what requests should look like.

If the attorney general's office adopted procedures for how people should write requests and what happens once those requests are submitted, the public – and authorities – would know what to expect and could be engaged with the attorney general's office in a more thoughtful and efficient manner. Providing more guidance to requesters on how to make their requests would also benefit the attorney general's office. Assistant attorneys general could respond more quickly to requests that have all necessary information and are written in a concise and focused manner.

2. The attorney general should regularly report caseload statistics.

The attorney general should report on a regular basis, such as every quarter, statistics about the administrative review mechanisms. Such data would be similar to the information I collected from the 304 cases, such as the quantity and types of cases, identities of the parties, issues being disputed, and relevant AG action.

A reporting system is important because, as this study has shown, the attorney general's office is a key player in the public records law. The office is on the front lines of applying the law, and has the capacity to shape how the law operates and how courts interpret the law. The public also has a right to know how the Department of Justice handles public records disputes.

Administrative review mechanisms in other states issue such reports, including New York,<sup>413</sup> Pennsylvania,<sup>414</sup> Rhode Island,<sup>415</sup> and Indiana.<sup>416</sup>

3. The attorney general should make a publicly available database of correspondence.

The attorney general should actively publish correspondence containing important or noteworthy advice. While the AG's office has posted some correspondence before intermittently, the office has not done so recently and on a routine basis. That should change.

As noted, the attorney general plays an important role in how the public records law works: authorities look to the AG for guidance in complying with the law, the public sometimes seeks help from the AG to resolve disputes, and courts view the AG as having a unique role in interpreting the law. Everyone should have easy access to the materials containing the AG's work in the public records arena, namely, written correspondence and opinions. Moreover, posting such records online might reduce the number of requests for assistance people send to the attorney general's office if they can find the answers with the click of a mouse.

This is not a new concept. Other states' administrative review mechanisms regularly make available online copies of correspondence and informal opinions. For

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<sup>413</sup> State of New York, Department of State, Committee on Open Government, *Report to the Governor and the State Legislature*, December 2012, available at <http://www.dos.ny.gov/coog/pdfs/2012AnnualReport.pdf> (last accessed December 8, 2013).

<sup>414</sup> Pennsylvania Office of Open Records, *News*, available at [http://openrecords.state.pa.us/portal/server.pt/community/open\\_records/4434/news/462344](http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/news/462344) (last accessed December 8, 2013) (listing links to annual reports).

<sup>415</sup> Hammitt, *supra* note 265, at 16.

<sup>416</sup> *Id.*, at 8.

example, the Indiana Public Access Counselor's website has a comprehensive archive of opinions about the state's open government laws.<sup>417</sup>

### **C. Limitations of research.**

While this study offers several contributions to the public's understanding of the attorney general's administrative review mechanisms, the study also has important drawbacks. First, the sample of interviewees was not a representative sample of the cases in this study. As such, I cannot claim that insights from interview subjects are representative of all users of the attorney general's administrative review mechanisms. Instead, the interviewees merely offer illustrative examples of varying ways in which attorney general involvement in public records disputes have played out, and how the requesters in those disputes perceived the attorney general's office.

I also could have investigated case dispositions more deeply. I found it difficult to classify the outcome of a large number of cases in a binary way because the attorney general's responses in those cases were not definitive. Instead, I chose to focus on more objective ways of analysis, such as whether there was evidence that the attorney general had been in contact with the respondent authority in the dispute, or whether the attorney general had copied the response letter to the authority.

This study was also limited by the age of the cases. I sought to review a body of cases that included different attorneys general in office. That resulted, however, in analyzing cases as far as back as 2001 and 2002. That far back made finding respondents' contact information more difficult, and some of the respondents whom I interviewed

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<sup>417</sup> Indiana Public Access Counselor, *Rules and Opinions*, available at <http://www.in.gov/pac/> (last accessed December 8, 2013).

from that time period did not remember the details of their cases as well as respondents from more recent cases.

#### **D. Opportunities for future research.**

This study adds to a small body of research on administrative review mechanisms. More scholarship is needed – on administrative review mechanisms generally and on Wisconsin’s mechanisms in particular. Specifically, further research should explore the role district attorneys play in public records disputes, as well as the ways in which both the attorney general and district attorneys review open meetings disputes.

More research should also focus on other ways the attorney general’s office interacts with people about the public records and open meetings laws. My understanding is that the attorney general’s office uses software to track or log telephone calls from the public about the public records and open meetings laws. Data from that software could help reveal the true volume of inquiries the attorney general’s office receives.

Lastly, the findings of this study are a mixed bag for the public records enforcement landscape in Wisconsin. On the one hand, this study found that the attorney general’s office has the capacity to help common people resolve disclosure disputes in an informal and accessible way, though this study did not squarely address the extent to which that actually happens.

But the study also found apparent concerns with how the attorney general’s administrative review mechanisms are structured. By design, the attorney general’s office is not an independent adjudicator; it is the state’s legal counsel and top law enforcement agency. The AG’s office has relationships with governmental units and public officials at



both the state and local levels – and has an interest in maintaining those relationships. Such connections ostensibly degrade the ability of the attorney general’s office to act independently and impartially. As one requester said in an interview in reference to the attorney general’s office: “Your lawyer is not going to sue you.”<sup>418</sup>

Further study should focus on how the relationships the AG’s office has with other authorities shapes administrative review outcomes, and whether such relationships are in the best interest of the public.

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<sup>418</sup> Interview with Geoff Davidian.

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## APPENDIX A: DEFINITION OF ISSUES

I coded each case for the principal public-records issue(s) the requester raised to the AG. If a definition below applied to any of the principal issues in the case, I coded the case as implicating the corresponding issue.

Issue	Definition
Access	<p>A case in which a principal issue was whether a record requester had a right of access to a record.</p> <p>The principal issue here is strictly about whether a record should be released or not. Access issues include record requesters who asked the AG to review the validity of the denial of a record request, and authorities that asked the AG whether a particular record should be released.</p>
Delay/response time	A case in which a principal issue was about an authority's response time, or lack of response, to a public records request.
Fee	A case in which a principal issue was about a fee associated with a public records request.
Other	A case in which no other applicable issue definition applied.
Definition	<p>A case in which a principal issue was about the definition of a word or phrase under the public records law.</p> <p>This issue applied only when a requester had raised, directly or in effect, the definition of a word or phrase that is defined in the public records law. This issue did not apply to cases in which the AG's response might have included a peripheral reference to a definition.</p>
Existence/Insufficient response	<p>A case in which a principal issue was about the existence of a record or the sufficiency of the records an authority produced.</p> <p>This issue applied when a requester asserted the authority did not produce records that the requester believed should have been produced. E.g., when a requester challenged an authority's claim that records did not exist or could not be located.</p>
Record retention	A case in which a principal issue was about an authority's obligations to preserve records – in general and after a public records request.

Authority's policy and/or notice	A case in which a principal issue was about an authority's public records policy and/or an authority's public records notice.
Record format	A case in which a principal issue was whether an authority must produce, or permit duplication of, a record in a particular format.
Accuracy of record	A case in which a principal issue was about the accuracy of a record.
Record destruction	A case in which a principal issue was whether an authority improperly destroyed a record.
Record subject notification	A case in which a principal issue was about an authority's practice (or lack thereof) of notifying record subjects about a public records request.
Limitations on record requester	A case in which a principal issue was about limitations imposed on people to file record requests.
Authority's response procedures	A case in which a principal issue was about the way an authority processed a records request.

## APPENDIX B: DEFINITION OF REQUESTERS

I coded each case for the type of requester. If a definition below applied to any of the requesters in the case, I coded the case as initiating from the corresponding requester.

<b>Requester</b>	<b>Definition</b>
Citizen	People who wrote to the attorney general without explicitly identifying themselves as being affiliated with an organization or unit of government, and were not in prison
Incarcerated/committed	People who were in prison, jail, or were committed to a mental-health or treatment facility.
Media	People who wrote requests in their capacity as journalists or were working for a news organization.
Authority	People who wrote requests in their capacity as “authorities” under the public records law.
Business	People who wrote requests from businesses.
Government	People who were members of federal, state, or local government who were writing in their capacity as record requesters.
Law firm	People who were writing in their capacity as a member of a law firm
Political-advocacy	People who were writing in their capacity as a member of a political or advocacy organization
DA—administrator	People who were district attorneys or assistant district attorneys writing in their official capacity to administer public records disputes under Wis. Stat. § 19.37(1)(b).



## APPENDIX C: INTERVIEW QUESTIONS

I asked each interviewee the questions below, though I often probed beyond some questions to more deeply understand requesters' experiences. In questions with multiple-choice answers, some interviewees did not always feel comfortable selecting a choice and instead offered an original response. In such cases, I still recorded the response the interviewee offered.

1. What prompted you to contact the attorney general's office in these disputes?
2. What did you hope the attorney general's response would be?
3. Yes or no: Were your disputes ultimately resolved?
4. To what extent was the attorney general's response helpful at resolving your disputes?
  - 1=Not at all helpful
  - 2=Slightly helpful
  - 3=Moderately helpful
  - 4=Very helpful
5. What did you do, if anything, after receiving the attorney general's responses?
6. To what extent did you agree or disagree with the attorney general's responses?
  - 1=Agreed entirely
  - 2=Agreed in part and disagreed in part
  - 3=Disagreed entirely
  - 4=Other
7. In your opinion, were the attorney general's responses to your requests fair?
  - 1=Yes
  - 2=No
8. To what extent did you find contacting the attorney general's office an easy or complicated process?
  - 1=Really easy
  - 2=Not too complicated
  - 3=Pretty complicated
9. Overall, how would you rate your experience with the attorney general's office?

- 1=Excellent
- 2=Good
- 3=Fair
- 4=Poor

10. My next question is about litigation. Aside from the fact that you had a legal right to sue in this dispute, do you think as a practical matter that you could have or would have gone to court?

- 1=Yes
- 2=Maybe
- 3=No
- 4=Not applicable

11. Have you ever sued in a public-records dispute?

- 1=Yes
- 2=No

12. How likely is it that you would contact the attorney general's office again when a public-records dispute or question arises?

- 1=Very likely
- 2=Somewhat likely
- 3=Not too likely
- 4=Not at all likely

13. In your opinion, should the attorney general's office be able to levy fines or issue enforcement actions against those who do not comply with the public records law?

- 1=Yes
- 2=No

14. How would you rate your knowledge of Wisconsin's public records law?

- 1=Not at all knowledgeable
- 2=Slightly knowledgeable
- 3=Somewhat knowledgeable
- 4=Moderately knowledgeable
- 5=Extremely knowledgeable

## APPENDIX D: TABLE OF CASES

Below is a table of the cases this study found and analyzed. Data in the table include:

Column 1: Running count of cases  
 Column 2: First name of requester  
 Column 3: Last name of requester  
 Column 4: Year attorney general issued response  
 Column 5: Requester type (as defined previously)  
 Column 6: County where request originated from  
 Column 7: Request type (as defined previously)  
 Column 8: Case type\*

\*For the purposes of this table, there are four types of cases:

1. A case in which there was one requester who filed one request
2. A case in which there was one requester who filed multiple requests
3. A case in which there were multiple requesters who filed one request
4. A case in which a proxy filed a request on behalf of someone else

The table is sorted by the last name of the requester.

<b>Table 16. Table of cases.</b>							
<b>No.</b>	<b>First name</b>	<b>Last name</b>	<b>Response year</b>	<b>Requester type</b>	<b>Requester county</b>	<b>Request type</b>	<b>Case type</b>
1	Jean	Aeder Gort	2007	Citizen	Manitowoc	LSAG	1
2	Carlton	Alt	2007	Political-Advocacy	Milwaukee	AGA	1
3	Carlton	Alt	2010	Political-Advocacy	Milwaukee	AGA	1
4	Ken	Anderson	2001	Citizen	Vilas	AGA	1
5	Sheila	Anderson	2007	Citizen	Sauk	AGA	1
6	Jonathan	Anderson	2008	Citizen	Milwaukee	LSAG, AGA	1
7	Janine	Anderson	2010	Media	Racine	AGA	1
8	Danyel	Areff	2008	Citizen	Out of state (IL)	AGA	1
9	Bradley	Ayers	2009	Citizen	Polk	AGA	1

No.	First name	Last name	Response year	Requester type	Requester county	Request type	Case type
10	William	Barth	2002	Media	Rock	LSAG	1
11	Scott	Bauer	2008	Media	Dane	AGA	1
12	John	Beales	2008	Citizen	Sheboygan	AGA	1
13	John	Beales	2008	Citizen	Sheboygan	AGA	1
14	Dennis	Becker	2008	Citizen	Waukesha	AGA	1
15	Harley	Bettendorf	2002	Business	St. Croix	AGA	1
16	Lynn	Bever	2008	Citizen	Iowa	AGA	1
17	David	Bjerkaas	2009	Committed person	Chippewa	AGA	1
18	Linn	Bjornstad	2002	Business	Dane	LSAG	1
19	Rick	Bogle	2010	Citizen	Dane	AGA	1
20	Kevin	Boneske	2007	Citizen	Oneida	LSAG	1
21	Edward	Borski	2007	Political-Advocacy	Sauk	AGA	1
22	Bob	Bott	2001	Authority	La Crosse	AGA	1
23	Randolph	Boulden	2008	Incarcerated person	Brown	LSAG	1
24	Francis	Bradac	2001	Citizen	Polk	LSAG	4
25	Carol	Bramsreiber	2001	Citizen	La Crosse	AGA	1
26	Robert	Branam	2007	Incarcerated person	Brown	AGA	1
27	Anthony	Brandon	2009	Incarcerated person	Out of state (NY)	AGA	1
28	Scott	Bretl	2009	Business	Milwaukee	AGA	1
29	Scott	Bretl	2009	Business	Milwaukee	AGA	1
30	Jeremy	Brett	2001	Government	Dane	AGA	1

No.	First name	Last name	Response year	Requester type	Requester county	Request type	Case type
31	Wayne	Brewer	2010	Incarcerated person	Grant	AGA	1
32	Stephanie	Brien	2008	Media	Racine	AGA	1
33	Larry	Brown	2009	Incarcerated person	Dodge	LSAG	1
34	Kayla	Bunge	2010	Media	Rock	AGA	1
35	Terrance	Burns	2009	Incarcerated person	Dodge	LSAG	1
36	James	Byrd	2001	Citizen	Dane	AGA	1
37	Maynard	Carlson	2008	Citizen	La Crosse	LSAG, AGA	1
38	Terry	Carstens	2009	Citizen	Waukesha	AGA	1
39	John	Castellano	2007	Incarcerated person	Racine	LSAG	1
40	John	Castellano	2008	Incarcerated person	Racine	LSAG	1
41	Michael J.	Caylor	2007	Citizen	Lincoln	AGA	1
42	Jeffrey	Christensen	2001	Citizen	Milwaukee	AGA	1
43	Chuck	Claybaugh	2008	Citizen	Winnebago	AGA	1
44	Chuck	Claybaugh	2008	Citizen	Outagamie	AGA	1
45	Chuck	Claybaugh	2009	Citizen	Outagamie	AGA	1
46	Carol	Coccia	2008	Citizen	Walworth	AGA	1
47	Ted	Cogley	2007	Citizen	Brown	AGA	1
48	Janet	Cogley-Clymber	2007	Citizen	Brown	AGA	1
49	Dean	Collins	2007	Authority	Waukesha	AGA	2
50	Andrew	Cook	2010	Law firm	Dane	AGA	1

No.	First name	Last name	Response year	Requester type	Requester county	Request type	Case type
51	Peter	Culp	2002	Law firm	Outagamie	AGA	1
52	Christopher	Cummings	2009	Incarcerated person	Out of state (PA)	AGA	1
53	Marty	Curtiss	2008	Political-Advocacy	Douglas	AGA	1
54	Robert	Czaplicki	2009	Citizen	Dodge	AGA	1
55	Richard	Daly	2007	Citizen	Kenosha	LSAG, AGA	1
56	Geoff	Davidian	2009	Media	Milwaukee	AGA	1
57	David	Davies	2009	Citizen	Columbia	AGA	1
58	Jefferson	Davis	2008	Citizen	Waukesha	AGA	1
59	Jeff	Decker	2001	Citizen	Brown	LSAG, AGA	1
60	Richard	deMoya	2008	Citizen	Dane	LSAG	1
61	Richard	deMoya	2008	Citizen	Dane	AGA	1
62	Richard	deMoya	2009	Citizen	Dane	AGA	1
63	Richard	deMoya	2009	Citizen	Dane	LSAG	1
64	Richard	deMoya	2009	Citizen	Dane	LSAG	1
65	Richard	deMoya	2008	Citizen	Dane	LSAG	2
66	Richard	deMoya	2010	Citizen	Dane	LSAG	2
67	Nancy	Dhatt	2008	Authority	Barron	AGA	4
68	William	Dieck	2009	Citizen	Langlade	AGA	1
69	William	Dieck	2009	Citizen	Langlade	LSAG, AGA	1
70	Susan	Disbrow	2007	Citizen	Rusk	AGA	1
71	John	Doe 1 (Name	2007	Citizen	Milwaukee	AGA	1

No.	First name	Last name	Response year	Requester type	Requester county	Request type	Case type
		redacted)					
72	John	Doe 2 (Name redacted)	2007	Citizen	Langlade	AGA	1
73	Edward	Dombroski	2009	Citizen	Marathon	LSAG	1
74	James	Donato	2008	Media	Out of state (CO)	AGA	1
75	Mary	Dunn	2009	Authority	Lincoln	AGA	1
76	James	Duvall	2001	Authority	Buffalo	AGA	1
77	Phil	Dziki	2001	Citizen	Kenosha	AGA	1
78	Thomas	Eagon	2002	Administrator	Portage	Other	1
79	Thomas	Eagon	2009	Authority	Portage	AGA	1
80	Anneliese	Emerson	2010	Citizen	Dane	AGA	1
81	James	Engel	2008	Citizen	Eau Claire	AGA	1
82	Darrell	Enix	2010	Citizen	Marinette	AGA	2
83	Michelle	Ericksmoen	2001	Authority	Jackson	AGA	1
84	Billy	Evans	2009	Incarcerated person	Grant	LSAG	1
85	Jason	Faber	2008	Incarcerated person	Winnebago	LSAG	1
86	Ramona	Flanigan	2001	Government	Rock	AGA	1
87	Phil	Frei	2007	Authority	Dane	AGA	3
88	Anne	Freye	2008	Government	Columbia	AGA	1
89	Sue	Gerber	2009	Citizen	Green	AGA	1
90	Sue	Gerber	2009	Citizen	Green	AGA	1
91	Mary	Glass	2009	Citizen	Milwaukee	AGA	1

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92	Roger	Golemb	2007	Citizen	Green	AGA	1
93	John	Granzow	2009	Business	Milwaukee	AGA	1
94	John	Granzow	2010	Business	Milwaukee	AGA	4
95	Mike	Grindemann	2008	Incarcerated person	Racine	LSAG	1
96	Amber	Guevara-Foss	2009	Citizen	Calumet	AGA	1
97	Kendall	Hallett	2008	Citizen	Dane	LSAG	1
98	Leslie	Hamilton	2007	Law firm	Dane	LSAG	1
99	Ron	Hansen	2008	Political-Advocacy	Washington	LSAG	1
100	Catherine	Heder	2008	Authority	Milwaukee	AGA	1
101	Patrick	Helton	2007	Incarcerated person	Dane	AGA	1
102	Patricia	Herdrich	2010	Authority	Washington	AGA	1
103	Lynn	Hicks	2002	Media	Portage	AGA	1
104	Timothy	Hill	2001	Incarcerated person	Racine	LSAG	1
105	Christopher	Hinkfuss	2010	Law firm	Brown	AGA	1
106	Christopher	Hinkfuss	2010	Law firm	Brown	AGA	1
107	Kimberly	Hinko	2009	Citizen	Juneau	AGA	1
108	Sandra	Hoesel	2010	Citizen	Sheboygan	LSAG	3
109	Jack	Hohrein	2008	Citizen	Milwaukee	AGA	1
110	Aaron	Holbrook	2001	Media	Dodge	AGA	1
111	Don	Holt	2007	Citizen	Milwaukee	AGA	1
112	Peter	Holzberger	2001	Citizen	Milwaukee	AGA	1



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113	Mary	Horsley	2010	Citizen	Washington	AGA	1
114	Cherubim	Hurdle	Unknown	Citizen	Out of state (IA)	AGA	1
115	Zygmund	Jablonski, Jr.	2010	Business	Ashland	AGA	1
116	Zygmund	Jablonski, Jr.	2010	Citizen	Ashland	AGA	1
117	Robert	Jacobs	2001	Government	Milwaukee	AGA	1
118	John	Jensen	2001	Citizen	Dodge	AGA	1
119	John	Jensen	2007	Citizen	Dodge	AGA	1
120	Roth	Judd	Unknown	Authority	Dane	AGA	1
121	Michael	Kent	2001	Government	Jefferson	AGA	1
122	Alan	Kesner	2002	Government	Milwaukee	LSAG	1
123	Daniel	Kiefer	2001	Citizen	Winnebago	AGA	1
124	Tom	Kiesgen	2009	Citizen	Price	LSAG, AGA	1
125	Richard	Kirklewski	2009	Citizen	Dane	LSAG	1
126	Gordon	Knuth	2007	Citizen	Ozaukee	AGA	1
127	James	Kosek	2001	Government	Green	AGA	1
128	Kenneth	Kraemer	2010	Citizen	Milwaukee	AGA	1
129	Nick	Kraninger	2001	Business	Ozaukee	AGA	1
130	Russ	Krikpatrick	2002	Citizen	Milwaukee	AGA	1
131	Audrey	Krovchuk	2002	Citizen	Juneau	AGA	1
132	Robert	Kunferman	2008	Citizen	Dane	AGA	1
133	Robert	Kunferman	2009	Citizen	Eau Claire	AGA	1
134	Lawrence	Lacenski	2007	Citizen	Brown	AGA	1
135	John	Laes	2002	Citizen	Brown	LSAG	1

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136	Nanette	Lahn	2007	Citizen	Trempealeau	AGA	1
137	Nanette	Lahn	2007	Citizen	Trempealeau	AGA	4
138	Lakeland Times	Lakeland Times	2007	Media	Oneida	AGA	4
139	Frank	Larsen	2008	Incarcerated person	Winnebago	AGA	1
140	Roger	Larson	2009	Citizen	Green	LSAG	1
141	Larry	Last	2010	Citizen	Winnebago	LSAG	1
142	Larry	Lathrop	2002	Citizen	Dane	AGA	1
143	Alfred	Lembrich	2002	Citizen	Rock	AGA	1
144	Chris	Lewis	2007	Citizen	Wood	AGA	1
145	Tammy	Link	2007	Citizen	Milwaukee	AGA	4
146	Thomas	Lisack	2009	Citizen	Portage	AGA	1
147	Jay	Loeffler	2001	Government	La Crosse	AGA	1
148	Larry	Lokken	2002	Citizen	Eau Claire	AGA	1
149	Bill	Lueders	2008	Media	Dane	LSAG, AGA	1
150	Bill	Lueders	2009	Media	Dane	AGA	1
151	Fritz	Luensman	2009	Citizen	Sawyer	AGA	2
152	Richard	Lundeen	2008	Citizen	Polk	LSAG, AGA	1
153	Scott	Lychnouski	2002	Government	Columbia	AGA	1
154	Barbara	Majewski	2002	Citizen	Florence	AGA	1
155	Donald	Marshall	2001	Incarcerated person	Racine	AGA	1
156	Stephen	Matty	2008	Authority	La Crosse	AGA	1

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157	Todd	Mau	2009	Citizen	Shawano	AGA	1
158	Linda	May	2008	Citizen	Milwaukee	AGA	1
159	Ginny	Maziarka	2008	Citizen	Washington	LSAG	2
160	Alan David	McCormack	2009	Incarcerated person	Dodge	LSAG	1
161	Steven	McLean	2001	Authority	Sheboygan	AGA	1
162	Media coalition DPPA	Media coalition DPPA	2008	Media	Columbia, Dane, Milwaukee, Rock	AGA	4
163	Louis	Merck	2010	Citizen	Unknown	AGA	1
164	Steven	Meyer	2007	Citizen	Outagamie	AGA	1
165	Judith	Meyer	2007	Media	Out of state (ME)	AGA	1
166	Darla	Meyers	2008	Citizen	St. Croix	LSAG	1
167	Darla	Meyers	2008	Citizen	St. Croix	LSAG	1
168	Stephanie	Miller	2010	Citizen	Dane	LSAG	2
169	Cynthia	Mintner	2001	Government	Ozaukee	AGA	1
170	Gwen	Moore	2001	Government	Milwaukee	AGA	1
171	Richard	Moore	2002	Media	Oneida	AGA	1
172	Richard	Moore	2008	Media	Oneida	AGA	1
173	Vernon	Moore	2010	Citizen	Price	AGA	1
174	Daniel	Morehouse	2008	Citizen	Columbia	LSAG	1
175	Jason	Mork	2009	Authority	Buffalo	AGA	1
176	Chris	Moses	2010	Incarcerated person	Out of state (MN)	AGA	1

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177	Brian	Mosher	2002	Citizen	Dane	LSAG	1
178	Dr. Michael G.	Mudrey, Jr.	2007	Government	Dane	AGA	2
179	Marvin	Muhlhausen	2002	Media	Pierce	AGA	1
180	Jean	Murphy	2008	Citizen	Juneau	AGA	1
181	Michael	Murphy	2008	Citizen	Winnebago	AGA	1
182	Name unknown	Name unknown	2008	Unknown	Unknown	LSAG	4
183	Dale	Neumann	2001	Citizen	Chippewa	LSAG, AGA	1
184	Janice	Newsome	2010	Government	Douglas	AGA	1
185	Jenny	Nowak	2009	Citizen	Marathon	LSAG	1
186	Jenny	Nowak	2009	Citizen	Marathon	LSAG	1
187	Daniel	O'Connell	2007	Government	Waupaca	AGA	1
188	Daniel	O'Connell	2010	Government	Waupaca	AGA	1
189	Kevin	O'Neill	2002	Incarcerated person	Out of state (KS)	LSAG	1
190	Monica	Olson	2008	Citizen	Waukesha	AGA	1
191	Susan	Parmelee	2008	Business	Waupaca	AGA	1
192	Patricia	Patros-Hanson	2008	Business	La Crosse	AGA	2
193	Joseph	Pavlas	2010	Citizen	Wood	AGA	1
194	Julie	Payne	2009	Business	Walworth	AGA	1
195	Mickaiah	Payton	2008	Citizen	Jefferson	AGA	1
196	Bill	Peck	2001	Business	Brown	AGA	1
197	Bill	Peck	2007	Business	Brown	AGA	1

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198	Bill	Peck	2009	Business	Brown	AGA	1
199	Bill	Peck	2009	Citizen	Brown	AGA	1
200	Gail	Peckler-Dziki	2009	Media	Kenosha	AGA	1
201	Pamela	Pedersen	2008	Citizen	Oneida	AGA	3
202	Paul	Penkalski	2008	Citizen	Dane	AGA	1
203	Paul	Penkalski	2009	Citizen	Dane	AGA	1
204	Paul	Penkalski	2010	Citizen	Dane	AGA	1
205	Jim	Pepelnjak	2002	Media	Milwaukee	AGA	1
206	Fredrick	Pharm	2001	Incarcerated person	Winnebago	AGA	1
207	George	Piper	2002	Citizen	Vernon	AGA	3
208	Mark	Pitsch	2009	Media	Dane	LSAG, AGA	2
209	Ann	Polomis	2002	Citizen	Door	AGA	1
210	Tom	Ponchik	2008	Incarcerated person	Brown	LSAG	1
211	Ronald	Preder	2009	Citizen	Sheboygan	AGA	1
212	John	Quirk	2008	Authority	Portage	AGA	1
213	Carl	Rady	2001	Citizen	Lincoln	AGA	1
214	Thomas	Ragatz	2001	Citizen	Dane	AGA	1
215	Eric	Rainbolt	2007	Incarcerated person	Fond du Lac	AGA	1
216	Frank	Ratcliff	2010	Incarcerated person	Columbia	AGA	1
217	Jennifer	Reisinger	2007	Citizen	Sheboygan	AGA	1
218	Todd	Richmond	2008	Media	Dane	AGA	1

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219	Jeffrey	Ripp	2008	Citizen	Dane	AGA	1
220	Reid	Rocheleau	2009	Citizen	Portage	AGA	2
221	Gene	Roets	2009	Citizen	Marathon	AGA	1
222	Lynn	Romero	2009	Citizen	Racine	AGA	1
223	Patricia	Rose	2010	Media	Waupaca	AGA	1
224	Sylvia	Rudek	2001	Citizen	Out of state (IL)	AGA	1
225	Robert	Rymer	2007	Incarcerated person	Dodge	AGA	1
226	Joseph	Sabol	2007	Citizen	Racine	AGA	1
227	Jean	Sage	2007	Citizen	Dodge	LSAG	1
228	Louis	Sanchez	2009	Incarcerated person	Dodge	AGA	1
229	Connor	Savada	2001	Incarcerated person	Sheboygan	LSAG	1
230	Alexis	Scheel	2010	Media	Milwaukee	AGA	1
231	Tara	Schipper	2001	Administrator	Walworth	Other	1
232	Tim	Schlafer	2007	Business	Outagamie	AGA	1
233	Richard	Schlei	2008	Citizen	Washington	AGA	1
234	Joann	Schrauth	Unknown	Media	Fond du Lac	AGA	1
235	Steve	Schude	2008	Citizen	Washington	AGA	1
236	Gretchen	Schuldt	2007	Political-Advocacy	Milwaukee	LSAG	1
237	Jonathan	Schuster	2010	Citizen	Brown	LSAG	1
238	Sid	Schwartz	2001	Media	Rock	AGA	1

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239	Kenneth	Schwartz	2002	Citizen	Fond du Lac	AGA	1
240	Randy	Scott	2007	Citizen	Kenosha	AGA	1
241	Lisa	Seiser	2010	Media	Walworth	AGA	1
242	Orville	Seymer	2008	Political-Advocacy	Milwaukee	AGA	1
243	Catherine	Shallue	2008	Citizen	Manitowoc	AGA	1
244	Shapiro	Shapiro	2001	Citizen	Out of state (RI)	AGA	1
245	Robert	Shear	2008	Citizen	Wood	AGA	1
246	Robert	Shear	2008	Citizen	Wood	AGA	1
247	Richard	Shear	2008	Citizen	Wood	AGA	1
248	Wayne	Sherry	2002	Authority	Vernon	AGA	1
249	Susan	Shoemaker	2008	Citizen	Rock	LSAG	2
250	Michael	Smith	2002	Citizen	Grant	AGA	1
251	Theresa	Smith	2010	Citizen	Florence	LSAG	1
252	Michael	Smith	2007	Citizen	Grant	LSAG	2
253	Leslie	Solin	2008	Citizen	Douglas	AGA	3
254	George	Stanley	2007	Media	Milwaukee	AGA	1
255	Russell	Steeber	2008	Citizen	Manitowoc	AGA	1
256	Dana	Stellingworth	2001	Citizen	Lincoln	AGA	1
257	Chan	Stroman	2007	Citizen	Dane	AGA	1
258	Harrison	Sturgis, Jr.	2007	Citizen	Winnebago	AGA	1
259	Harrison	Sturgis, Jr.	2008	Citizen	Winnebago	AGA	1
260	Charles	Suhr	2007	Citizen	Vernon	AGA	1
261	Charles	Suhr	2007	Citizen	Vernon	AGA	1

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262	Joseph	Sundermeyer	2009	Incarcerated person	Dodge	AGA	1
263	Gregory	Swanson	2007	Citizen	Dane	LSAG	1
264	Rick	Talford	2007	Citizen	Pierce	LSAG, AGA	1
265	Sandra	Taylor	2007	Government	Out of state (MD)	AGA	1
266	Aaron	Taylor	2010	Citizen	Out of state (IN)	LSAG	1
267	Linda	Terry	2010	Citizen	Kenosha	AGA	1
268	Barbara	Tetzlaff	2009	Citizen	Wood	AGA	3
269	Dennis	Thiel	2009	Committed person	Juneau	LSAG	1
270	Cindy	Thompson	2008	Citizen	Waupaca	AGA	1
271	Ronnie	Thums	2010	Incarcerated person	Jackson	LSAG	1
272	Andrew	Torstenson	2010	Incarcerated person	Winnebago	AGA	1
273	Randolph	Toth	2002	Citizen	Out of state (NM)	AGA	1
274	Robert	Tregoning	2007	Citizen	Outagamie	AGA	3
275	James	Turner	2002	Citizen	Rock	LSAG	1
276	Ray	Vander Perren	2009	Business	Brown	LSAG	1
277	Jeremiah	Vangen	2009	Authority	Washington	AGA	1
278	Anthony	Varda	2007	Government	Dane	AGA	1
279	Anthony	Varda	2001	Citizen	Dane	AGA	4
280	Van	Vergetis	2009	Citizen	Unknown (redacted)	AGA	1



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281	Village of DeForest	Village of DeForest	2008	Authority	Dane	AGA	4
282	Frank	Volpintesta	2002	Authority	Kenosha	AGA	1
283	Gregg	Walker	2010	Media	Oneida	AGA	1
284	Elizabeth	Walton	2009	Citizen	Eau Claire, Chippewa	LSAG	3
285	Walter	Ward Jr.	2008	Business	Milwaukee	AGA	1
286	Robert	Warnish	2002	Citizen	Chippewa	LSAG	1
287	Pam	Warnke	2010	Media	Marathon	AGA	1
288	Mary	Weigand	2009	Citizen	Washington	AGA	1
289	Stephen	Weissenberger, Jr.	2008	Committed person	Juneau	AGA	1
290	Maribeth	Welchman	2009	Citizen	Waukesha	AGA	1
291	Jean	Wielgus	2010	Citizen	Brown	AGA	2
292	Bill	Wiesmueller	2002	Citizen	Sheboygan	AGA	1
293	Lindsay	Wikel	2008	Citizen	Milwaukee	AGA	1
294	Paul	Williams	2002	Citizen	Kenosha	AGA	1
295	Margaret	Wilson	2002	Citizen	Out of state (IL)	AGA	1
296	Jon Freeman	Winant	2009	Committed person	Juneau	LSAG, AGA	1
297	Jim	Winter	2009	Media	Dane	AGA	1
298	Wisconsin Land Title Association	Wisconsin Land Title Association	2001	Political-Advocacy	La Crosse	AGA	4
299	Gerald	Wise	2010	Citizen	La Crosse	AGA	1
300	Jennie	Wisniewski	2007	Citizen	Jefferson	AGA	1

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301	Jim	Zellmer	2010	Citizen	Dane	AGA	1
302	Michael	Zimmerman	2008	Business	Brown	AGA	1
303	Darwin	Zwieg	2007	Authority	Clark	AGA	1
304	Darwin	Zwieg	2007	Administrator	Clark	Other	1