Police and Fire
Commission Meeting

May 6, 2020
6:15 PM

River Falls City Hall
Council Chambers
222 Lewis Street
River Falls, WI
**Please note that due to the ongoing COVID-19 public health emergency, some or all members of this governing body may attend via telephone or internet. The City Council Chambers will be open to the public but limited to 10 attendees or less due to social distancing. (To access, use the lower level doors.) If you wish to watch the meeting, for your personal safety and the safety of our community, you are invited to do so from your home. You can see the meeting by visiting this link:  https://tinyurl.com/y78738o7

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**NOTE: OFFICIAL ACTION MAY BE TAKEN ON ANY AGENDA ITEM**

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**Agenda**

Call Meeting to Order
Roll Call
Approval of Minutes: September 3, 2019 Regular Meeting
Approval of Minutes: December 4, 2019 Workshop

**Police Department**

1) Action on Removal from Probation for Officer Jordan Hemker (effective 5-17-2020)

Adjournment

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*Posted: May 5, 2020 at 11:30 am*
Meeting called to order at 5:56 p.m.

Commission Members Present: Mark Sams, Dick Rinehart, Randy Zimmermann, Jon Longsdorf

Staff Present: Gordon Young, Mayor Dan Toland

Absent: Grant Hanson

Approval of Minutes: Regular Meeting Minutes from March 6, 2019
MSC Zimmermann/Rinehart Unanimous.

1) Election of President and Vice President of Police & Fire Commission
   Zimmermann moved current officers (Sams-President/Hanson-Vice-President), if willing, continue with additional year of office.
   MSC Zimmermann, Rinehart to re-appoint current officers to another year. Unanimous

2) Approval of revised Police & Fire Commission Police Department Rules of Procedure
   Discussion of updated Rules of Procedure in packet that were made upon review and most were at the request of labor attorney or to be in line with current practices.
   Zimmermann questioned what prompted the changes? Young explained Rules of Procedure were reviewed by labor attorney prior to an employee resigning. Rinehart expressed perhaps it could be reviewed annually.
   Discussion continued regarding the wording changes with some questions as to why changes were made. Request was made to have the attorney provide a memo to the Commission regarding the changes.
   MSC Rinehart/Zimmermann to appointment, Sams, Rinehart & Longsdorf voted in favor; Zimmermann abstained from voting

3) Appointment of candidate Cody Tomlinson from Eligibility List to vacant Police Officer position upon successful completion of conditional offer requirements,
   Young memo in packet. Tomlinson is currently in Academy and is a member of the Police Reserve program.
   MSC Zimmermann/Rinehart to appointment upon completion of conditional offer requirements. Unanimous
4) Other Discussion

Zimmermann commented that commission has not received orientation with the City Attorney and is trying to grasp what Commission’s responsibilities are. He would like to see a job description as a Police & Fire Commission member. He feels as commissioner handicapped in the acquittal of responsibilities. Would like to see commission have more opportunity to digest changes and discuss prior to voting.

Sams indicated he had attended a training when he first was appointed as a Commission member. Request was made to have new members attend that or a similar training.

Adjournment: **MSC Rinehart/Zimmermann.** Meeting adjourned at 6:36 p.m.

Respectfully Submitted,

Ailene Splittgerber
Recording Secretary
POLICE & FIRE COMMISSION
WORKSHOP REGARDING COMMISSION
ROLE AND RESPONSIBILITIES
December 4, 2019 @ 6 p.m.
River Falls City Hall Training Room
222 Lewis Street
River Falls, WI

Commission Members Present: Mark Sams, Grant Hanson, Dick Rinehart, Jon Longsdorf, Gary Donath

City Staff Present: Police Chief Gordon Young, Fire Chief Scott Nelson, EMS Director Jason Stroud, Police Sgt. Matthew Kennett, Police Sgt. Scott Bangert

Workshop commenced at 6:01 p.m.

Police Chief Young introduced Attorney Ryan Heiden, from vonBriesen Law Firm in Milwaukee and made introductions. Talked about succession planning.

Heiden provided overview of outline for Police & Fire Commission (PFC) workshop, attached. Heiden stressed several times the the importance of teamwork and the Commission together for the good of the department, with the end goal being the betterment of the department.

He indicated the four core functions of the PFC.
1. Hire the Chiefs – by rules of procedures work with City Administrator & Human Resources, but by statute has the power to choose.
2. Creation of hiring lists from which the Chief will appoint.
3. Approve Chief’s appointments.
4. Discipline of employees - including Chiefs

Heiden reviewed the appointment process, indicating the PFC is responsible for appointing Chiefs, but not subordinate staff.

The Appointment process was discussed, including probationary period. Promotions were also discussed. Heiden indicated the Chief has authority to promote most qualified over most senior.

Heiden discussed the hiring process. Recommended utilizing the same process used to hire current police chief when it’s time to hire a new fire chief.

Heiden then outlined the process for disciplinary actions upon a subordinate’s appeal to the PFC. Exclusive jurisdiction for disciplinary action, subordinate’s appeal to PFC. He referenced the rules of administration and Wisconsin State Statute 62.13 rules for administration and tests for just cause located therein. Heiden stated if the Tests in § 62.13(5)(em) been met, the PFC should issue written finding of fact and order whether accepting penalty, reduce or increase penalty, or throwing out charge.
The difference between charges and complaints was touched upon and who may file a charge.

- Charges are formal document filed with PFC, filed by PFC, independent member, by mayor or by aggrieved individual.

- Complaint is akin to a customer service complaint and can be filed by anyone. The complaint, if serious enough, could turn into charges. Important thing to note is under PFC rules, PFC is not involved in complaint process and is prohibited from being both witness and jury. If PFC member is involved in the complaint, to avoid bias, they cannot then serve on disciplinary hearing as they would be a witness.

PFC members are responsible to file charges.

Chief Young asked a clarifying question if the complaint is made to the Chief, who then, Chief investigates and then suspends and employee does not challenge it, does PFC need to be told?

Heiden’s reply was that the contract would need be checked for what penalties can be imposed and then Chief must submit report to PFC regarding the suspension. If employee does not appeal suspension, PFC cannot challenge. If employee appeals, it will come before PFC to determine. PFC can then impose penalty or can increase or decrease penalty.

Other items explained during Discussion of the Discipline Process:

Due Process – property interest in contract (collective bargaining) If you treat people like they have just cause protections, then they do. Before they lose the job, they must be given a certain amount of process (the hearing) before discipline is given. Laudermill hearing – employees are presented evidence, allowed to give their side,

Weingarten Rights & 164 rights.
Law Enforcement Officers (LEO) are entitled to representative if they so choose. It’s the employee’s option to bring who they want to represent them. If they ask for representative, we must allow it.

Right to notice – all LEO (& Chiefs) right to be given notice of the investigation. Notice must be rather specific (time and date incident happened) cite report #, specific conduct they believed to have engaged in. Challenge decision to discipline could end up making all initial investigation not admissible and re-investigation would need to take place.

Garrity rights – public employee forced to give answers to public employer If you force an employee to answer – anything they say, and any evidence post order is not admissible in court (cannot incriminate for law enforcement). Investigate as far as you can beforehand gather as much evidence before Garrity situation. Protect information by giving to DA/outside investigating agency before Garrity situation.

Dismissals for non-disciplinary reasons, such as being medically unable to do job or a felony conviction, which prohibits the ability to carry a gun), are done by the Chief.
Appeals of PFC Decisions were discussed. PFC appeals go to Circuit Court. The appeals cannot be made to an arbitrator by statute by the methods indicated in K.2.a and K.2.b in the attached document.

Heiden touched on conflicts of power between elected leaders and PFC. He advised focusing on the good of the service to get past these conflicts. Work together within the construct of what is best for police or fire department within the abilities and interest of the City. There sometimes is no clear legal answer when these issues arise.

Heiden advised taking a critical look during hiring to avoid disciplinary problems. Look for traits that may indicate wither a contempt of subordination and truthfulness/integrity. Due to the paramilitary structure of the departments, it is critical for subordinates to rely on one another, knowing they will comply with a lawful order.

Heiden advised both integrity and truthfulness are critical within both fire and police organizations. If someone is untruthful, concept of becoming a Brady cop or firefighter could apply. Heiden further explained if someone lies and must testify during their job, the issue arises where Chief is required to notify the DA and federal prosecutor that this person is known as untruthful. That person is added to a BRADY list, the DA must tell prosecutor and defense attorneys that person is known to be untruthful, which undermines case.

Heiden then gave an overview of public records law.

He advised the PFC that they are the custodians of any records they create as commissioner. As such they have the responsibility to analyze request and determine if you must disclose records in response to a request for records.

Heiden stated there is a broad presumption of access. Start with the presumption that you will have to turn it over in totality or in vast majority.

Definition of record is broad. The substance of a record makes it a record, not the format. Ask the question, “Does it relate to PFC duties?”

Request can be made orally or in writing. Request for record must be reasonable scope of time and subject matter. (If the scope of the request is large, i.e. multiple years, you can ask to limit to reduce request. Requests for records should be responded to in a reasonable time. The Department of Justice (DOJ) indicated 10 days if the request is simplistic and straight-forward.

If you decide to disclose records, review to see if it contains personal identifying info of elected local public officials. If the matter is related to them, there is an obligation to provide public official with opportunity to inspect and provide augmented supplement (within five days days). The augmented supplement would be disclosed with record. Provide notice to official by hand delivery or certified mail.
If the record is a discipline or personnel record, give notice to the employee and give them 10 days to review and issue an objection or challenge to the production of the record. Provide notice to employee by hand delivery or certified mail.

The requestor can inspect record. Only if they ask for a copy do you have to give them a copy. Fees for copying can be imposed. Make sure not to overcharge. Time spent to locate the record can only be charged if it costs $50 or more to locate the files. Does not have to be the actual costs and would consider the lowest paid qualified person to find the file (support staff vs. Chief’s wage)

Heiden indicated there were three ways to deny a request

1. If statute says you cannot turn over record – he suggested the Public Records Compliance Guide by the WI Attorney General as a resource.
2. If statute is not available – has a court decision been made
3. Final option is to look to the balancing test: the public’s strong interest in disclosure vs public’s strong interest in non-disclosure (i.e. revictimization outweighs interest to disclose). When weighing the balancing test – do not look at the City’s interest or the employee’s interest, look at the broader public’s interest. Is there a certain interest in keeping confidentiality?

A guide for approving or denying records requests was provided in the handout Heiden provided at the beginning of the meeting.

If a denial is being issued, it must be in writing citing reason for denial, including specific statute or balancing test result or argument. Be specific and expansive with the denial. Heiden also indicated under the records laws, there could be substantial damages if the records denial is challenged.

Common records issues:
Personal notes/notes on a notepad. If you are the originator and the only reason for taking note was for personal recollection not using for duty – do not have to turn it over. If you are taking notes, don’t bring them to meetings or share with others. Keep it a personal note.

Drafts documents shared within the work group refer to page 11 of the attached training for determination if it must be disclosed or not.

Email. Heiden issued a reminder that a record is determined by substance, not format. Messages sent by personal phones by text, social media account about PFC duties are records and correspondence that is applicable to PFC duties, must be retained.

He advised using city e-mail account and not personal e-mail accounts for commission business.

The final portion of Heiden’s presentation was regarding the Open Meetings Law

Meetings of the PFC are held in open session, although there are limited exceptions for a meeting to be held in closed session.
Meetings must have a purpose to gather, to exercise the responsibilities or duties of the PFC. A quorum of one-half or more must be members present in order to bind the body.

Meetings can come when there are sufficient number of members present to determine the course of action for the PFC. Issues may come about if you have a negative quorum or supermajority. If enough people present who say they are not going to vote, two PFC members present at meeting would be a negative quorum.

Walking Quorum is when individual subgroups come to a tacit or express agreement to act on a certain way during a meeting. If this occurs, a meeting took place in violation of open meeting policy.

If a quorum of members is present, it is presumed the meeting is to exercise the duties of the PFC.

Heiden advised it is best to not discuss PFC business in any public or private setting, rather to keep it within the meeting.

Proper notice must be given of the meeting date, time, location and what specific items will be discussed. Notice must be posted at least 24 hours in advance, and in at least one location likely to be seen by the public. It is recommended to post in at least three locations. Notice must also be given to the official newspaper. The notice must contain the time, date and location of the meeting, along with a specific agenda. If public comments will be heard, that must be included on the agenda. If a closed session is included on the notice, the public notice must include notification that the PFC may or will reconvene in open session. If not notice is given, open session cannot be held within twelve hours of the closed session.

There are very few open session exceptions which allow a closed session.

If deliberating disciplinary action in closed session, the PFC must reconvene in open session to give judgment. Consideration of dismissal or demotion can be held in open session if the employee being requests the discussion be moved to open session, even if discussion started in closed session.

There are penalties and forfeitures that can be assessed for each violation of the open meeting law.

The workshop ended at 7:35 p.m.

Respectfully Submitted,

Ailene Splittgerber
Recording Secretary
THE DUTIES, RESPONSIBILITIES
AND POWERS OF THE
POLICE AND FIRE COMMISSION

City of River Falls
I. **POWERS OF CITY COUNCIL. Wis. Stat. 62.11(5).** Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

II. **POWERS OF THE MAYOR. Wis. Stat. 62.09(8).**
(a) The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.

(d) Except in cities that have adopted s. 62.13 (6), the mayor shall be the head of the fire and police departments, and where there is no board of police and fire commissioners shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.

III. **POWERS OF THE POLICE CHIEF. Wis. Stat. 62.09(13).**
(a) The chief of police shall have command of the police force of the city, or the chief of a combined protective services department created under s. 62.13 (2e) [a] l. shall have command of the combined protective services force, under the direction of the mayor. The chief shall obey all lawful written orders of the mayor or common council. The chief and each police officer or combined protective services officer shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables; shall arrest with or without process and with reasonable diligence take before the municipal judge or other proper court every person found in the city engaged in any disturbance of the peace or violating any law of the state or ordinance of the city and may command all persons present in that case to assist, and if any person, being so commanded, refuses or neglects to render assistance the person shall forfeit not exceeding $10. They shall collect the same fees prescribed for sheriffs in s. 814.70 for similar services, unless a higher fee is applicable under s. 814.705 (1) (b).

IV. **A CAREFUL WALK THROUGH § 62.13, WIS. STATS: WHO IS RESPONSIBLE FOR “RUNNING” THE POLICE DEPARTMENT?**

A. By statute, the PFC has four core functions:
1. Hire the chief [62.13(3)]
2. Create hiring lists [62.13(4)(c)]
3. Approve the chief’s appointments [62.13(4)(a)]
4. Discipline employees (including the chief) [62.13(5)]
B. This PFC does not have optional powers. The PFC does not have the power under Wis. Stat. 62.13(6) to:
   1. Organize and supervise the fire and police departments.
   2. Prescribe rules and regulations for the control and management of the Police and Fire Department.
   3. Contract for and purchase apparatus and supplies.
   4. Audit bills before paid by the city treasurer.

V. CORE FUNCTION OF THE PFC: THE APPOINTMENT PROCESS (Hiring and Promotions)

A. The PFC appoints the Chiefs—the PFC does not appoint anyone else.

B. The Chiefs appoint “subordinates,” to be “made by promotion when this can be done with advantage, otherwise from an eligible list.” § 62.13(4)(a).

C. Kaiser v. Board of Police and Fire Commissioners, 104 Wis. 2d 498 (1981) considers the probationary period to be part of the hiring process; no due process or commission approval required for the chief’s decision to remove during probation.
   1. How the probationary period is structured is set forth under relevant collective bargaining agreements or department policy.

D. Under Glendale Professional Policemen Association v. Glendale, 83 Wis. 2d 90 (1978) the labor contract can limit the chief’s discretion on promotions by imposing qualifications the chief must consider when determining who to promote (e.g., the Chief must promote the most qualified senior employee).
   1. However, chiefs always reserve the right to promote the most qualified individual.

E. Since the PFC “approves” the chiefs’ appointments of subordinates, but may not appoint on its own: The possibility of a standoff.

F. Common problem zones.
   1. Negligent hiring
   2. Antidiscrimination
   3. Lawful employment inquiries
   4. ADA Compliance (medical information)
a) To minimize these issues, it is generally advisable that those involved in the hiring process receive adequate training on labor and employment considerations that arise during the hiring process.

VI. CORE FUNCTION OF THE PFC: THE DISCIPLINE PROCESS

A. The PFC has exclusive jurisdiction of disciplinary suspensions, demotions and discharges; however, as discussed further below, the chief may implement suspensions unilaterally under certain circumstances.

B. The process is the same for chiefs and subordinates. *Jackson v. Standish.*

C. There is a difference in the law between “charges” under § 62.13(5) and “complaints” under § 66.0511(3), Wis. Stats. A citizen complaint process exists for good reason so understanding how to handle citizen “concerns” to effectively address those concerns is important.

1. The PFC does not want to be involved in the investigation of citizen complaints; these matters should be reserved to the Chief or, if involving the Chief, an outside law enforcement organization. This is because a witness in an investigation cannot also serve as the jury.

2. If a PFC member files “charges” against a subordinate, that PFC member may not also sit with the PFC during the hearing or deliberations regarding those charges. *State ex rel. Heil v. Green Bay Police and Fire Com’n,* 2002 WI App 228.

3. If a member of the PFC is a witness to the underlying alleged misconduct forming the basis for charges before the PFC, that member must recuse themselves from the hearing and deliberations on those charges. *State ex rel. Alba v. City of Waukesha Bd. of Police and Fire Com’n,* 2015 WL 5022580 (Wis. Ct. App. 2015)(holding the PFC could not hold an evidentiary disciplinary hearing on an allegation related to a subordinate’s alleged untruthful answers during the interview process conducted by the PFC).


E. The PFC may adopt “further rules for administration of this subsection.” § 62.13(5)(g).
F. Even if rules of employee behavior can be created by the PFC, specific delegation of authority to the chief to create rules/policies/SOP’s on his or her own authority is incumbent for credibility of the Chief.

G. Due Process—what is it and what isn’t it?

H. Weingarten rights, Rights to Notice and Representation, and Garray rights—why the PFC needs to know what these are.

1. Weingarten rights – when an employee reasonably believes a meeting is going to lead to disciplinary action, they are entitled to a representative during that meeting.

2. Chapter 164, Wis. Stats. – Rights to Notice – all law enforcement officers subject to interrogation that may lead to disciplinary action must be informed of the nature of the investigation prior to any interrogation.

3. Chapter 164, Wis. Stats. – Rights to Representation – all law enforcement officer subject to interrogation that may lead to disciplinary action may be represented by a representative of his or her choice, who may be present at all times during the interrogation.

4. Garray Rights – if a law enforcement officer is given no real choice between remaining silent and waiving their Fifth Amendment right against self-incrimination, Garray applies. This generally arises when an officer is ordered to answer questions under the threat of insubordination if they fail to comply. Any information or evidence gained by the Department after Garray applies cannot be used in criminal proceedings against the officer.

I. Miscellaneous powers of the PFC in discipline cases.

1. PFC may file charges. PFC Member may file charges. Aggrieved person may file charges

2. Suspend subordinates (if the chief does not) pending the hearing. Commonly referred to as administrative leave

3. Suspend the chief if charges are by the PFC or Mayor. Again, commonly referred to as administrative leave.

4. If the chief suspends for disciplinary reasons, then the PFC is powerless unless the subordinate requests a hearing.

5. Issue Subpoenas (exclusive power to do so?)
6. Hold a hearing for disciplinary purposes.

7. Apply the Seven Tests

8. Determine a penalty based on “the good of the Service”

9. Issue written Findings, Determinations, and Order

J. Removals for non-disciplinary reasons: Who does it?

K. Appeals of PFC decisions

1. The PFC is an independent legal entity, with the capacity to sue or be sued in furtherance of its statutory obligations. *Racine Fire and Police Commission v. Stanfield*, 70 Wis. 2d 395.

2. Two avenues of appeal are common.
   a) Direct statutory appeal under § 62.13(5)(i), issue is whether there is just cause, based on the evidence presented to the PFC.
   b) Petition for writ of certiorari; the issues are whether the PFC proceeded on an incorrect theory of law, was biased, violated due process, or several other legal rights of the accused.

3. Grievance arbitration under a labor contract violates the PFC’s statutory powers, is illegal, and is not available as an avenue of appeal to the employee. *Janesville v. WERC*, 193 Wis. 2d 492 (1995).

VII. COMMON CONFLICTS OF POWER BETWEEN THE ELECTED LEADERS AND PFC CAN ARISE FOR WHICH THERE ARE NO WELL-SETTL ED LEGAL AND PRACTICAL ANSWERS, FOR EXAMPLE:

1. Appointments and approvals in the face of restricted purse strings

2. Policy development/Rule promulgation

3. Conflicting directives to the Chiefs

4. Reports of community police activity and fire activity

5. Micromanagement of daily decisions by the Chiefs

6. Collective bargaining strategy and coordination
7. Evaluations of the Chiefs

8. Budgeting (totals and line items)

B. What are the answers?

1. Focus on the good of the service, that is the good of the police service and the good of the fire service. Police and Fire services require respect for high standards of professionalism, paramilitary command, honor, integrity, and the absence of political disruption in order to be effective and serve the interests of the entire community.

2. The Council, Mayor, the PFC, and the Chiefs must communicate and work together to ensure the good of the service is being served consistent with the abilities and interests of the City.

VIII. OTHER TAKEAWAYS

A. Imperative to understand that integrity and subordination are two of the absolutes within the law enforcement profession, particularly due to the paramilitary structure and the absolute need for public trust.
I. WISCONSIN'S PUBLIC RECORDS LAW

1. One of the most important jobs of the custodian of records is to maintain and provide the public with access to records. Wisconsin’s Public Records Law (Sections 19.31–.39, Wis. Stat.).

2. Section 19.31, Wis. Stat. states:

   [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of 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 exceptional cases may access be denied.

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

B. What is a Record Subject to Disclosure?

Definition of Record § 19.32(2), Wis. Stats.

“Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. “Record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. “Record” does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

C. THE REQUEST FOR RECORDS
1. The requester may make a request orally or in writing.

2. The request must have a “reasonable limitation as to subject matter” and “length of time represented by the record.” WIS. STAT. § 19.35(1)(h).

3. The request can be made in person, through the mail, and through most communicable means. Consider the following request received on a paper towel:

   Yo! Sheriff, I'm a pris'ner at KMCI, ya see, and I want you to give me photocopies of your dept.'s latest armory inventory records that contain the make, model, and amount of every type of gun used by your dept. Yo! Be good to this homeboy and obey me by 9-29-90.


4. If requester appears personally, the authority may, at its option, permit the requester to either photocopy the records themselves or provide them with a readable copy.

D. A Step-By-Step Analysis for Approving or Denying Records Requests

1. The custodian’s decision must be made “as soon as practicable and without delay.”

2. Does the request have an unreasonable limitation as to subject matter and length of time?

3. Does it meet any of the statutory exceptions or common law exemptions?

4. Does it meet any of the Open Meetings exemptions under section 19.85, Wis. Stat. and can the custodian show that there is a “need to restrict public access” at that time?

5. Does the public’s interest in not disclosing the record outweigh the public’s interest in disclosing the record?

6. If you decide to disclose:

   a) Are they the records of a “local public official?” If so, give notice to the local public official and an opportunity to “augment” the record.

   b) Are they discipline or personnel investigation records of an “employee?” If so, give notice to the employee and the opportunity to challenge.
7. Approving and Charging for the Records Request
   a) The authority may impose a fee for copying that does not exceed the actual, necessary and direct cost of reproduction, photographing, and transcription of the record. Wis. Stat. § 19.35(3)(a).
   b) Fees for copying may include a component for labor expenses actually, necessarily and directly incurred in connection with reproduction of records. Wis. Stat. § 19.35(3)(b).
   c) Authority may impose fees for locating a record if, and only if, the actual and necessary cost is $50 or more. Wis. Stat. § 19.35(3)(c).

8. Denying the Request
   a) Specific rules apply to whole or in-part denials.
      i. If some of the information is subject to disclosure, then the information has to be provided with the information not subject to disclosure redacted from the record.
      ii. If the request is made orally, the authority can deny the request orally unless a demand for a written statement is made within 5 days by the requester.
   b) Denial Letter – The Custodian’s denial must state the specific reasons for refusal. The custodian may not simply cite the public records statute, claim the information is confidential or that the release would be contrary to the public interest.

E. Common Public Records Issues Faced by Police & Fire Commission Members

1. Personal Notes. The Attorney General has stated that any exclusion of material prepared for the originator’s personal use is to be construed narrowly. The Attorney General has also stated this exclusion may be invoked where a person takes notes for the sole purpose of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes, but the sole purpose for such verification and retention continues to be to refresh one’s recollection at a later time, the notes continue to fall within the exclusion. However, if one’s notes are distributed to others for the purpose of communicating information or if notes are retained for the purpose of memorializing agency activity, the notes go beyond mere personal use and would

2. Drafts

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

b) Whether a document is in preliminary form and therefore not a final document is not determinative of whether it is a record. When a draft document is prepared or reviewed by the originator, and is then shared with other departments, and when practices and procedures are implemented as a result of that document, the document is no longer a draft, but is a record subject to the requirements of the Public Records Law. Fox v. Bock, 149 Wis. 2d 403, 438 N.W.2d 589 (1989).

c) Drafts of documents prepared for one’s superior may no longer fall within the draft exclusion if the documents are distributed to others before being submitted to or approved by the superior. 77 Op. Att’y Gen. 100 (1988).

d) Drafts of documents prepared by an employee but not shared with any other party may also fall within the “drafts” exception. 72 Op. Att’y Gen. 99 (1983).

3. Purely Personal Property. Materials which are purely the personal property of the custodian and have no relation to his or her office. What about the intermingling of personal and official business in records? Don’t do it.

4. Records Received from Other Agencies. The Attorney General has expressed the opinion that copies of documents received by a public agency from another agency for purely informational purposes and concerning matters not affecting functions of the recipient agency do not have sufficient connection with functions of that office to qualify as public records. Such copies would therefore not have to be preserved or disclosed. 72 Op. ATT’Y GEN. 99 (1983).

5. Email. Drafters of email and Custodians of Records must remember that Email is a record format that is subject to disclosure. It is the content of the record rather than its format that determines whether it is a record subject to disclosure. Letter to Dan Benson from Attorney General (March 12, 2004). Email retention time periods are the same as other records unless otherwise designated by law. Email in a private email

City of River Falls Police & Fire Commission – Attorney Ryan P. Heiden
Page 11 of 21
account may still be a record subject to disclosure if they relate to the office of the sender or receiver. *Open Meetings Law Considerations.*

6. **Records relating to and identities of Applicants and Final Candidates.**  
   Wis. Stat. § 19.36(7)(a)–(b).

   a) Except for those constituting final candidates, the identities of applicants for public positions of employment are exempt from disclosure under Wis. Stat. § 19.36(7)(b), provided the applicant indicated in writing to the authority that they do not wish for their identity to be revealed.

   b) For municipal entities, final candidates are:

      i. Those that are seriously considered for appointment to a “local public office” and submitted for final consideration to an authority; **AND**

      ii. If there are 5 or more applicants for the office or position, they are considered to be within the top 5 most qualified candidates for the position; **OR**

      iii. If there are fewer than 5 applicants for the office or position, all applicants are “final candidates” **OR**

      iv. If an appointment is to be made from a group of more than 5 applicants considered the most qualified for an office or position, each applicant in that group constitute “final candidates.”

   c) Under the Public Records Law’s balancing test, some personal contact information and other information of job applicants is also arguably subject to non-disclosure due to the public policy considerations expressed by the Legislature through Wis. Stat. § 19.36(10)(a) and 19.36(10)(d). An additional argument can be made that disclosing personal contact information of applicants would dissuade highly qualified candidates from seeking public employment, which would be to the detriment of the level of public services provided by the municipal employer. However, caution should be taken by the employer in these areas as the reasons for nondisclosure must be exceptional circumstances.

7. **Records of Closed Session Discussions**

8. **Penalties and Forfeitures**
a) Under section 19.37(2), the court must award damages of not less than $100, as well as other actual costs to a party who prevails. An authority or a records custodian who acts arbitrarily or capriciously in denying a request or delaying a response, or who charges excessive fees for the response, may be subject to a forfeiture of not more than $1,000.

b) Costs and attorneys’ fees.

PUBLIC RECORDS TIPS

1. Cooperate and communicate with the Requester to avoid larger problems and to avoid unnecessary searches and costs.

2. Cautiously create records.

3. Do not comingle records containing sensitive information with records containing other unrelated information.

4. Read what you write, before you send it.

5. The Public Records Law is not the only applicable law—many records are subject to discovery in litigation.

6. Consider what your mom would think if she read what you wrote.

7. Carefully tailor redactions to minimize liability for public records violations.

8. Provide specific public policy reasons for withholding records.

9. Maintain important documents and make certain employees follow the City’s Records Retention Policy.

10. As technology changes, the scope of the law will continue to grow.
II. WISCONSIN’S OPEN MEETINGS LAW

A. Overview

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

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

   (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

   (3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

   (4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

2. Governmental bodies are required to do as follows:

   a) Give the public notice of their meetings

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

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

   d) Provide the public reasonable access to those meetings.

   e) Comply with the law regarding openness of meetings.
B. Meetings of Governmental Bodies

1. Meetings of governmental bodies Section 19.82(1), Wis. Stat.: the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . .

2. Open session meetings must occur in a place reasonably accessible to members of the public and open to all citizens at all times. Wis. Stat. § 19.82(3).

3. A meeting occurs when there is a purpose to engage in governmental business and the number of members present is sufficient to determine the course of action of a body regarding the issues discussed. State ex rel Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987) (finding that the gathering of four of eleven members of a governmental body constituted a violation of the Open Meetings Law).

   a) Walking Quorums
   b) Negative Quorums
   c) Rebuttable presumptions

      i. “If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated or vested in the body . . .” Wis. Stat. § 19.82(1).

4. A “meeting” may be occurring for the purpose of exercising responsibilities, authority, power or duties delegated to or vested in the body when a quorum of members of that governmental body are present, even though those persons are attending a meeting of another governmental body. The Wisconsin Supreme Court has stated:

   Interaction between members of a governmental body is not necessary for a convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties or responsibilities. Listening and exposing itself to facts,
arguments and statements constitute a crucial part of a governmental body’s decisionmaking. ... Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.


5. An informal meeting of a quorum of Town Board members where the Town Chairperson decided not to place a sensitive personnel issue on the agenda and where one Board member conveyed advice received from the Town’s attorney about that personnel issue was not a “meeting” under the Open Meetings law. State ex rel. Gates v. Dorshorst, 2004 WI App 88, 272 Wis. 2d 854, 679 N.W. 2d 926 (Unpublished).

C. **Proper Notice of Open and Closed Meetings**

1. The governmental body must give proper notice of its meetings to the public. Wis. Stat. § 19.84(1)(b). Notice must be posted in at least one location likely to be seen by the public, and the Attorney General has recommended postings in at least three locations. 66 Op. Atty. Gen. Wis. 93 (1977). Notice must be given to the official newspaper of the community or a news source likely to provide notice in the area, and to members of the news media upon request. Wis. Stat. § 19.84(1)(b). Other statutes dictate and establish specific public notice requirements including publication and timing requirements. See, e.g., Wis. Stat. § 120.08.

2. Notice must be given no less than 24 hours in advance of the meeting unless complying with the notice requirements is impractical or impossible to meet for good cause. Wis. Stat. § 19.84(3). Notice must still be given at least two hours before the meeting if good cause can be shown.

3. Notice of the location, time and date must be given for each meeting. Wis. Stat. § 19.84(4).

4. Notice Contents
a) The public is entitled to the best notice possible that can reasonably be given at the time the notice is prepared.

b) The public is entitled to specific notice of the subjects that will be addressed by the governmental body at that meeting. Generic catch-all agenda items such as “Board Member comments” and Staff “Comments” may not meet the compliance requirements. *Letter to Charles Rude from Attorney General* (March 5, 2004). Members of governmental bodies and administrators have opportunities to suggest meeting subjects to be placed on that agenda prior to the release of the agenda.

c) Notice to the public must be reasonably likely to apprise members of the public of the subject matter of the meeting under the circumstances. *State ex. rel Buswell v. Tomah Area School District*, 2007 WI 71, 732 N.W.2d 804.


ii. Public policy considerations under the law demand that the public receive notice that will reasonably apprise the public of the subjects that will be addressed. Sufficient information must be given to the public so that they may determine whether to attend the meeting.

iii. Under *Buswell*, effective June 13, 2007, agenda drafters must now consider reasonableness considerations which includes the following factors:

a. The burden of providing a more detailed notice. This factor balances the public’s need for information against the efficient administration of governmental business.

b. Whether the subject is of particular public interest requiring greater specificity in the notice. This factor is based on the number of people interested in the subject and the intensity of that interest. When gauging public interest poses an unreasonable burden, the governmental body will be relieved of this burden.

c. Whether the subject involves routine action that the public would be more likely to anticipate or novel
action that the public would be unlikely to anticipate.

iv. General subject headings may be sufficient in cases where the general heading reasonably apprises members of the public of the subject matter of the meeting.

v. Under this reasonableness requirement, meeting participants are free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it.

5. “Public Comments” Periods

6. “Other Business” Designations

D. Proper Subjects for Closed Session Meetings

1. Statutory Provisions permit specific and limited discussion in closed session. Section 19.85(1), Wis. Stat. identifies several open session exemptions and states:

   Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer’s announcement of the closed session. A closed session may be held for any of the following purposes:

   (a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.

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

(c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

2. Several important considerations exist about closed meetings:

a) All parts of the meeting may not be closed if only a portion of the meeting is subject to the Open Meetings exemption. *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 731 N.W.2d 640. Application of exemptions to the Open Meetings Law must be narrow and only applicable to that portion of the meeting which can be closed under the exemptions.

b) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open
session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session. Wis. Stat. § 19.85(2). When a closed session is to be followed by an open session, the public notice must include notification that the governmental body will reconvene in open session. If a governmental body is unsure whether it will reconvene in open session, the appropriate notification would read “the board may vote to reconvene in open session following the closed session.” If this or similar language is not included in the public notice, the governmental body can “not reconvene into open session after closed session within twelve hours unless the notice of such intention to reconvene in open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.”

E. Penalties and Forfeitures

1. Section 19.96 provides for a forfeiture of between $25 and $300 per member in violation, for each violation. This is a personal liability and is not reimbursable.

   a) Under Section 19.96, a member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may argue that he or she:

      i. Made or voted in favor of a motion to prevent the violation from occurring (for example, voting against going into an unauthorized closed session); or

      ii. Before the violation occurred, voted on relevant motions that were inconsistent with all those circumstances causing the violation.

   b) A governmental-body member who is charged with other violations of the Open Meetings Law may claim that he or she did not act in his or her official capacity.

   c) Good faith advice of legal counsel.

2. Section 19.97(4) allows the court to award the relator (a private party who brings an action on behalf of the state) the actual and necessary cost of prosecution, including reasonable attorney fees, if the relator prevails.
3. Actions taken during an improperly noticed meeting. WIS. STAT. § 19.97(3).
