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November 16, 2009 OAG—7—09

Mr. Thomas B. Eagon
District Attorney
Portage County
1516 Church Street
Stevens Point, WI 54481-3598

Dear Mr. Eagon:

¶ 1. You have requested my opinion on several questions arising from the Wis. Stat. § 12.13(5) prohibition against disclosure of certain records and investigative information related to possible violations of state elections, lobbying, and ethics laws.

## QUESTIONS PRESENTED AND BRIEF ANSWERS

1. Are these prohibitions limited to information regarding matters referred to a prosecutor or law enforcement from the Government Accountability Board?

2. Is information obtained pursuant to an independent investigation or prosecution by a prosecutor or law enforcement officer subject to this statute?

¶ 2. Your first two questions appear to assume that the prohibition against disclosure in Wis. Stat. § 12.13(5) applies to district attorneys and law enforcement agencies. Having assumed that the statute applies to those authorities, you ask whether it makes any difference to the application of the law whether the records and information are generated following a referral from the Government Accountability Board ("GAB") or as part of an independent investigation or prosecution. However, as will be explained in detail below, I have concluded that Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, but only to the GAB, its employees and agents, and to the investigators and prosecutors retained by the GAB, and the assistants to those persons.

3. When and under what circumstances are district attorney or law enforcement records regarding investigations or prosecutions into the enumerated offenses subject to disclosure under the public records law?

¶ 3. By "enumerated offenses" I assume you are referring to the offenses identified in Wis. Stat. § 12.13(5)(a), that is, offenses under the elections, ethics, and lobbying laws and "any other law specified in s. 978.05(1) or (2)." In my opinion, Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, and therefore Wis. Stat. § 12.13(5) does not alter standard application of the Wisconsin public records law to district attorney and law enforcement records regarding investigations or prosecutions under the enumerated offenses.

> 4. If a district attorney concludes that no prosecution is warranted because there is either no probable cause or the case cannot be proven beyond a reasonable doubt, or declines to issue charges for any other reason, what statements may be made or records disclosed regarding that conclusion by a district attorney or law enforcement official?

¶ 4. In my opinion, Wis. Stat. § 12.13(5) does not affect the statements that may be made or the records disclosed by a district attorney or law enforcement official if a district attorney concludes that no prosecution under the enumerated offenses is warranted due to lack of probable cause or insufficient evidence to prove charges beyond a reasonable doubt, or declines to issue charges for any other reason.

## ANALYSIS

### I. RULES OF STATUTORY CONSTRUCTION.

¶ 5. Your questions require interpretation of Wis. Stat. § 12.13(5) and related statutes. The purpose of statutory interpretation "is to determine what a statute means in order to give the statute its full, proper, and intended effect." *Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130. All statutory interpretation begins with the text of the statute; if the meaning of the statute is plain, the inquiry ordinarily stops there. *Sands v. Whitnall Sch. Dist*., 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 754 N.W.2d 439. Statutory language is generally given its common, ordinary, and accepted meaning. *Town of Madison v. County of Dane*, 2008 WI 83, ¶ 17, 311 Wis. 2d 402, 752 N.W.2d 260 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "[M]eaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." *Hutson v. State Pers. Comm'n*, 2003 WI 97, ¶ 49, 263 Wis. 2d 612, 665 N.W.2d 212. Further, "[s]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 6. I am also guided by recognized canons of statutory construction. The statutes in question limit the public's access to records. As a statutory exemption to the public records law, Wis. Stat. § 12.13(5) must be narrowly construed. *Chvala v. Bubolz*, 204 Wis. 2d 82, 88,

552 N.W.2d 892 (Ct. App. 1996) ("When it is not clear whether an exception to the open records law exists, we are to construe exceptions to the open records law narrowly."). The public records law serves a basic tenet of our democratic system by providing opportunity for oversight of government. *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996). People must be informed about the workings of their government and "openness in government is essential to maintain the strength of our democratic society." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811. It is "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. The public records law therefore must be construed "in every instance with a presumption of complete public access, consistent with the conduct of governmental business." *Id.* Denial of public access generally is contrary to the public interest. *Id.* This is one of the strongest legislative policy declarations found anywhere in the Wisconsin Statutes. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.

## II. APPLICABILITY OF THE LIMITATIONS SET FORTH IN WIS. STAT. § 12.13(5).

¶ 7. Wisconsin Stat. § 12.13(5) provides:

> (a) Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12 [the "elections law"], subch. III of ch. 13 [the "lobby law"], or subch. III of ch. 19 [the "ethics law"] or any other law specified in s. 978.05(1) or (2) [collectively, the "enumerated offenses"] or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05(5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.
>
> (b) This subsection does not apply to any of the following communications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board:
>
> 1. Communications made in the normal course of an investigation or prosecution.
>
> 2. Communications with a local, state, or federal law enforcement or prosecutorial authority.

3. Communications made to the attorney of an investigator, prosecutor, employee, or member of the board or to a person or the attorney of a person who is investigated or prosecuted by the board.

¶ 8. A person violating Wis. Stat. § 12.13(5) has committed a crime punishable by a fine of up to $10,000, imprisonment up to 9 months, or both. Wis. Stat. § 12.60.

¶ 9. Combining the content of Wis. Stat. § 12.13(5)(a), (b) into subparts, these prohibitions apply to:

- the disclosure of records and information that relates to an investigation of the enumerated offenses, unless disclosure is the release of the record and it is authorized by Wis. Stat. § 5.05(5s)[1] or specifically authorized by any other law;
- prior to presentation of the information or record in a court of law;
- by an "investigator or prosecutor, or employee of an investigator or prosecutor, or member or employee of the board;"
- to any person other than
    - an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board;
    - a person to whom a communication would be made in the normal course of an investigation or prosecution;
    - local, state, or federal law enforcement or prosecutorial authority;
    - attorneys of a person under investigation; or
    - attorneys of an investigator, prosecutor, employee, or member of the board.

¶ 10. Fundamental to answering the questions you present is to first determine whether Wis. Stat. § 12.13(5) applies at all to district attorneys offices and law enforcement agencies. By its terms, the statute's prohibitions on disclosure cover only disclosures made by an "investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board."

¶ 11. Defining the last category is simple. As used in Wis. Stat. chs. 5 to 12, "board" is defined to mean the GAB. *See* Wis. Stat. § 5.02(1s). The GAB is composed of "members," appointed pursuant to Wis. Stat. § 15.60, who are assisted by nonpartisan "employees."

[1]For the authorizations contained in Wis Stat. § 5.05(5s), *see* Section II.C., *infra.*

*Cf.* Wis. Stat. § 5.05(4). Wisconsin Stat. § 12.13(5) therefore regulates disclosures by GAB members and GAB employees.

¶ 12. While, absent context or limitations, the definitions of "investigator" and "prosecutor" might normally be thought to include law enforcement and district attorneys, respectively,[2] the rules of statutory construction command me to consider the full text and structure of Wis. Stat. § 12.13(5) and closely related statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46. The statutory context shows that those terms are being used in a more restricted sense in Wis. Stat. § 12.13(5). Thus, I conclude that the phrase "of the board" is intended to modify "investigator[s]," "prosecutor[s]," and "employee of an investigator or prosecutor" such that Wis. Stat. § 12.13(5)(a)'s prohibitions apply only to GAB-employees, GAB-members, investigators, and prosecutors retained by GAB pursuant to Wis. Stat. § 5.05(2m), and employees of those investigators and prosecutors.

**A. Background of 2007 Wisconsin Act 1.**

¶ 13. The global context of Wis. Stat. § 12.13(5) can be understood by examining the Act in which it was created. The prohibitions on disclosure of investigative information were enacted as a part of a comprehensive reform to the administration of the state's elections, ethics, and lobbying laws. 2007 Wisconsin Act 1 ("Act 1"). Act 1 created the GAB and vested it with the administration of these laws. Wis. Stat. § 5.05(1). Under Act 1, GAB "shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws" and allows GAB to make referrals to others for criminal enforcement. Wis. Stat. § 5.05(2m). Act 1 details this process. *See generally* Wis. Stat. § 5.05(2m). If GAB receives a complaint alleging a violation of the laws it administers, then it may commence an investigation and retain a "special investigator." Wis. Stat. § 5.05(2m)(c)4. GAB can also retain special counsel to exercise its authority to prosecute civil violations. Wis. Stat. § 5.05(2m)6. The enforcement provisions in Wis. Stat. § 5.05(2m) also provided a series of provisions that would enable the GAB to refer cases to a district attorney or the attorney general if certain conditions are met. *See* Wis. Stat. § 5.05(2m)11., 14.-17.

[2]Act 1 does not define "prosecutor" or "investigator." *Cf.* Wis. Stat. § 5.02. The common and accepted meaning of statutory terms may be ascertained by reference to dictionary definitions. *Kalal*, 271 Wis. 2d 633, ¶¶ 53-54. An "investigator" is, most essentially, "one that investigates." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1189 (1986) ("Webster's"). The commonly accepted meaning of "investigator" does not limit the term to members or employees of any particular agency or entity, such as the GAB. Under the broadest interpretation of the phrase "investigator," even a private entity who, prior to filing a complaint with the GAB, investigates the facts underlying the complaint would be an "investigator." The dictionary definition of a "prosecutor" is a "prosecuting attorney" or "a person who institutes an official prosecution before a court." Webster's at 1821.

¶ 14. While establishing a mechanism for referring criminal matters, this comprehensive reform did not affect the ability of law enforcement and district attorneys to pursue investigations and prosecutions regarding the elections, lobbying, and ethics laws independent of the GAB.[3] *See* Wis. Stat. § 978.05(1) and (2); Wis. Stat. § 5.05(2m)(c)11., 15., 16., 18.; *see also* OAG-10-08 (October 29, 2008) (discussing respective prosecutorial powers of GAB and district attorneys).

¶ 15. In sum, Act 1 created for the first time GAB-investigators and GAB-prosecutors by authorizing GAB to hire investigators to investigate alleged violations of the elections, ethics, and lobbying laws, and to hire counsel to civilly prosecute these violations. The Act left undisturbed the collective investigative and prosecutorial authority of state and local law enforcement and prosecutors.

### B. Wisconsin Stat. § 12.13(5) must be interpreted to avoid superfluity.

¶ 16. The first reason I believe Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement is that applying it to district attorneys and law enforcement would deprive separate clauses of meaning and render portions of the statute superfluous. *See Hutson*, 263 Wis. 2d 612, ¶ 49 (‘“[A] construction which would make part of the statute superfluous should be avoided wherever possible.’”).

¶ 17. Wisconsin Stat. § 12.13(5)(a) applies only if the group of persons to whom the prohibitions apply are not communicating with specified groups of other individuals. Wisconsin Stat. § 12.13(5)(b) provides exceptions to Wis. Stat. § 12.13(5)(a)’s application. One of those exceptions is for “communications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the [GAB]” with “a local, state, or federal law enforcement or prosecutorial authority.” Wis. Stat. § 12.13(5)(b)2. District attorneys are plainly “state prosecutorial authorities.” A sheriff is plainly “local law enforcement.” So if the statutory term “prosecutor” were intended to include district attorneys and “investigator” to include a sheriff, then the exception in Wis. Stat. § 12.13(5)(b)2. would refer, among other things, to communications between a district attorney and him or herself. By providing for communications with “local, state, or federal law enforcement or prosecutorial authority” in Wis. Stat. § 12.13(5)(b)2., the legislature considered those entities as being distinct from the entities or persons to whom Wis. Stat. § 12.13(5)(a) applies. By identifying state law enforcement and state prosecutorial authorities in this exception, therefore, the legislature has signaled that the provisions of Wis. Stat. § 12.13(5)(a) do not apply to those agencies. Had the legislature wished to signal otherwise, it could have easily provided that the exception to the disclosure rule provided in Wis. Stat. § 12.13(5)(b)2. applied to communications with *other* prosecutorial authorities or law enforcement agencies or used more specific terms in Wis. Stat. § 12.13(5)(a).

[3]While not limiting the prosecutorial authority of district attorneys, Act 1 amended Wis. Stat. § 978.05(1) to change *which* district attorney would have jurisdiction to prosecute an enumerated offense.

¶ 18. No such superfluity is created, however, if one reads "investigator" and "prosecutor" to mean only those individuals retained by GAB pursuant to Wis. Stat. § 5.05(2m)—in other words, if the phrase "of the board" in Wis. Stat. § 12.13(5)(a) is understood to modify "investigator[s]" and "prosecutor[s]." Each category of the exceptions contained in Wis. Stat. § 12.13(5)(b) to the application of Wis. Stat. § 12.13(5)(a) involve communications with those *outside* of GAB, GAB's retained prosecutors and investigators, and the employees of the GAB-retained investigators and employees. "Inside" communications would never need to be subject to an exemption because they are not covered by Wis. Stat. § 12.13(5)(a). *See* Wis. Stat. § 12.13(5)(a) (prohibitions do not cover communications with "an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board"). If "prosecutor" included a district attorney, however, then Wis. Stat. § 12.13(5)(a)'s prohibition would not apply to his or her conversation with an assistant in the office—because conversations with a prosecutor's employees are not covered—and would also be subject to an *exception* from coverage because they would be communications with a "local prosecutorial authority." There would be no need for the legislature to create an "exception" for a communication that is not covered in the first instance. An interpretation of the terms "prosecutor" and "investigator" that includes only GAB investigators and prosecutors avoids this superfluity and incoherence.

¶ 19. The exceptions in Wis. Stat. § 12.13(5)(b), too, contain superfluity only if Wis. Stat. § 12.13(5)(a) is read to include district attorneys and law enforcement as "prosecutor[s]" and "investigator[s]" respectively. Wisconsin Stat. § 12.13(5)(b)3. exempts from Wis. Stat. § 12.13(5)(a)'s prohibitions communications "made to [an] . . . attorney of a person who is investigated or prosecuted *by the board*." It also exempts communications made "in the normal course of an investigation or prosecution." Wis. Stat. § 12.13(5)(b)1. Because statutes are to be construed to give effect, where possible, to every clause, the legislature must have considered "[a] communication[ ] made in the normal course of an investigation" to not include all communications with "the attorney of a person being investigated or prosecuted." It is difficult to fathom *any* communication with the attorney of the person being investigated about the matter being investigated that would not be in furtherance of an investigation unless the legislature considered *all* such communications to be of a different nature. Thus, if "prosecutor" and "investigator" as used in Wis. Stat. § 12.13(5)(a) referred to a district attorney and a law enforcement officer respectively, then it would appear that district attorneys and law enforcement would be barred from communicating with the attorneys of individuals under investigation. Surely this is not what the legislature intended by using the term "prosecutor" and "investigator" in Wis. Stat. § 12.13(5)(a).

### C. The interrelationship between Wis. Stat. §§ 12.13(5) and 5.05(5s).

#### a. The statutory cross-reference to Wis. Stat. § 5.05(5s) signals the legislature was concerned with the GAB's disclosure of records and information.

¶ 20. The second reason I believe Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement agencies is the statute's reliance upon a cross-reference to Wis. Stat. § 5.05(5s). When one statute specifically refers to another statute, the two statutes should be construed together. *Appointment of Interpreter in State v. Le*, 184 Wis. 2d 860, 865, 517 N.W.2d 144 (1994). Wisconsin Stat. § 12.13(5) is closely related to Wis. Stat. § 5.05(5s). Wisconsin Stat. § 12.13(5) regulates actions by people; Wis. Stat. § 5.05(5s) regulates access to records. Tellingly, Wis. Stat. § 5.05(5s) relates exclusively to GAB-records. This gives further support to the interpretation that the terms "prosecutor" and "investigator" relate to GAB-prosecutors and GAB-investigators. It shows that the legislature was addressing GAB-disclosures in Wis. Stat. § 12.13(5), not disclosures by others.

¶ 21. Wisconsin Stat. § 12.13(5)(a) contains an exception to the general prohibition on disclosure of *records* for records that are "subject to access under s. 5.05(5s)." Wisconsin Stat. § 5.05(5s) provides in part that:

> (e) The following records of the board are open to public inspection and copying under s. 19.35(1):
>
> 1. Any record of the action of the board authorizing the filing of a civil complaint under sub. (2m)(c)6.
>
> 2. Any record of the action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution.
>
> 3. Any record containing a finding that a complaint does not raise a reasonable suspicion that a violation of the law has occurred.
>
> 4. Any record containing a finding, following an investigation, that no probable cause exists to believe that a violation of the law has occurred.

¶ 22. By its plain meaning, Wis. Stat. § 5.05(5s)(e) applies *only* to records of the GAB and no other person or governmental authority. Subparts 1.-4. relate to GAB actions or GAB determinations, not determinations by others. *See* Wis. Stat. § 5.05(2m)(c)4., 6., 11.[4] Indeed, Wis. Stat. § 5.05 is entitled "Government accountability board; powers and duties." In sum, nothing about Wis. Stat. § 5.05(5s) indicates that its provisions were intended to apply to any records authority other than the GAB.

¶ 23. Therefore, if a district attorney or law enforcement authority possesses records related to investigations and prosecutions of the enumerated offenses, the cross-reference in Wis. Stat. § 12.13(5)(a) to Wis. Stat. § 5.05(5s) provides no guidance whatsoever as to when, and under what circumstances, those records can be accessed. It is hard to understand why Wis. Stat. § 12.13(5)(a) would rely upon a cross-reference to another section of the statutes in order to define the scope of a crucial exception to Wis. Stat. § 12.13(5) if the cross-referenced statute only applied to some of the authorities subject to Wis. Stat. § 12.13(5). More plausibly, Wis. Stat. § 12.13(5)(a) regulates GAB, its staff, its retained prosecutors and investigators, and the employees of those retained prosecutors and investigators.

**b. The legislature's purpose of allowing the disclosure of certain information to the public is defeated if one reads "prosecutor" and "investigator" to include district attorneys and law enforcement respectively.**

¶ 24. This structural aspect of the statutes becomes particularly significant when one considers your fourth question: what statements district attorneys or law enforcement officials could make, and what records they could disclose, upon determining that no prosecution of an enumerated offense is warranted.

¶ 25. The intent of Wis. Stat. § 12.13(5)(a) and its cross-reference to Wis. Stat. § 5.05(5s) is clear: certain records demonstrating the government's final decisions to investigate or prosecute should be accessible to the public. Without such access, of course, it would be impossible for the public and other government officials including the legislature to evaluate whether the enforcement of laws is operating as it should. An interpretation that would include a district attorney or law enforcement official within Wis. Stat. § 12.13(5)(a)'s definition of "prosecutor" and "investigator" would run counter to the clear legislative intent *allowing* the disclosure of

[4]Unlike the GAB, law enforcement is not under a mandatory duty to investigate any set of facts giving rise to "reasonable suspicion" that a violation of the law has occurred. Nor must "reasonable suspicion" exist for law enforcement to commence an investigation, so long as the methods of investigation do not violate statutory or constitutional rights. With respect to prosecution, prosecutors may not file charges unless they have probable cause to believe a violation of the law has occurred. SCR 20:3.8(a). But probable cause does not automatically trigger a district attorney's filing of a complaint. It is well-recognized that a district attorney is vested with prosecutorial discretion and is under no requirement to prosecute "all cases where there appears to be a violation of the law." *See Kalal*, 271 Wis. 2d 633, ¶ 30.

certain records relating to investigations and prosecutions by virtue of creating Wis. Stat. § 5.05(5s).

¶ 26. If we read Wis. Stat. § 12.13(5) to apply to district attorneys, then a district attorney who has investigated a possible violation of the enumerated offenses, but who has concluded that no prosecution is warranted (whether because of a belief that no probable cause exists or any other reason), could not disclose *any* records containing the district attorney's reasons for making that decision. He or she would be bound by the prohibition on disclosure set forth in Wis. Stat. § 12.13(5)(a), unlike the GAB (and its special counsel), who could release such documents to the public under the specific exceptions set forth in Wis. Stat. § 5.05(5s)(3)3. and 4. Such an interpretation would run counter to the legislature's purpose in creating the exception, and is thus an unreasonable interpretation.

¶ 27. When the legislature enacts a statute, '"it is presumed to do so with full knowledge of the existing law.'" *State DOC v. Schwarz*, 2005 WI 34, ¶ 24, 279 Wis. 2d 223, 693 N.W.2d 703 (quoting *Peters v. Menard, Inc*., 224 Wis. 2d 174, 187, 589 N.W.2d 395 (1999)). As discussed above, when the legislature created the GAB, the legislature knew that district attorneys already possessed prosecutorial authority over the elections, ethics, and lobbying laws, pursuant to Wis. Stat. § 978.05. The legislature also knew that under *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991) and its progeny, district attorneys' case files are protected from public access unless the prosecutor elects in his or her discretion to provide access. So it seems a highly unreasonable interpretation of Wis. Stat. § 12.13(5)(a) to believe that the legislature intended to *curtail* district attorneys' ability to explain their decisions not to charge, while at the very same time specifically giving the GAB the ability to release records explaining their decisions on the same kinds of matters.

¶ 28. The legislature wanted certain of the GAB's records to be exempt from the public records law—hence Wis. Stat. § 5.05(5s). The fact that the legislature specifically provided for the lawful release of records dealing with no-charge determinations shows how important it regarded public access to those determinations to be. To read the terms "prosecutor" and "investigator" in Wis. Stat. § 12.13(5)(a) to include district attorneys and law enforcement would criminalize conduct that the legislature expressly authorizes with respect to the GAB and curtail the flow of information that the legislature has specifically permitted. While it is sometimes the case that records are treated differently for purposes of Wisconsin's public records law depending on which authority has custody over them, *see Portage Daily Register*, 308 Wis. 2d 357, ¶ 18, there is no indication that the legislature intended to create such a disparity here as the statutory context supports reading the terms "prosecutor" and "investigator" in Wis. Stat. § 12.13(5) to relate to prosecutors and investigators of the board and as not applying to district attorneys or law enforcement.

¶ 29. The interplay of Wis. Stat. §§ 12.13(5)(a) and 5.05(5s) causes another, similarly unreasonable result if the terms "prosecutor" and "investigator" in Wis. Stat. § 12.13(5) are read

to include district attorneys and law enforcement agencies. Under Wis. Stat. § 5.05(5s)(d), the subject of a GAB-initiated investigation under the enumerated offenses may ask the GAB to make available for inspection and copying records of the investigation that pertain to that person, if those records are otherwise "available by law." However, since Wis. Stat. § 5.05(5s) pertains only to the GAB and its records, a district attorney presented with the same kind of request by the subject of district attorney-initiated investigation would be prohibited from disclosing records to that person, on threat of criminal penalties, were Wis. Stat. § 12.13(5) to be applied to district attorneys.

¶ 30. Such a stark disparity in treatment seems unreasonable, especially in light of the fact that the legislature is presumed to have known, when it enacted Wis. Stat. § 12.13(5), that district attorneys have discretion, under the public records law, to disclose or withhold their investigative records. *See Foust, supra*. The legislature would not have removed that discretion completely, replaced it with a criminal sanction, and at the same time authorized the GAB to release the very same types of records, without a clear, explicit statement in the statutory language. Act 1 contains no such clear statement.

**D. Prohibitions on public access to records are to be narrowly construed.**

¶ 31. Moreover, as an exemption to Wisconsin's public records law, Wis. Stat. § 12.13(5) should be narrowly construed so as to ensure public access to public records. Stepping back from the specific issues discussed above, the terms "prosecutor" and "investigator" in Wis. Stat. § 12.13(5)(a) should be read to exclude district attorneys and law enforcement because, to the extent there is any uncertainty about the scope of those terms, they should be read to ensure public access to the greatest extent possible.

¶ 32. Only when the legislature's intent to curtail access is clear should an exemption be read into a statute. *Chvala*, 204 Wis. 2d at 88. As the supreme court has explained:

> Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and *unless the exception is explicit and unequivocal, it will not be held to be an exception*. It would be contrary to general well established principles of freedom-of-information statutes to hold that, by implication only, any type of record can be held from public inspection.

*Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984) (emphasis added). *See also Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶ 15, 277 Wis. 2d 208, 689 N.W.2d 644 (interpreting undefined term "investigation" narrowly to refer only to investigations conducted by a public authority).

¶ 33. For the reasons stated above, I believe the legislature has not given an "explicit and unequivocal" indication in Wis. Stat. § 12.13(5) of its intention to curtail the public's access to district attorney and law enforcement records relating to investigations and prosecutions into the

enumerated offenses, subject to the traditional public records law analysis. While the generic terms "prosecutor" and "investigator" can have a broad connotation when taken out of context, the text and structure of Wis. Stat. § 12.13(5) demonstrate that the legislature used those terms in a more limited sense, to refer exclusively to the prosecutors and investigators who are either employed by, or are retained by, the GAB.

**E. Additional Concerns.**

**a. Rule of Lenity.**

¶ 34. It also bears mentioning that Wis. Stat. § 12.13(5) is a penal statute. While I have come to the conclusion that traditional methods of statutory construction indicate that the terms "prosecutor" and "investigator" as used in Wis. Stat. § 12.13(5)(a) do not include a district attorney or law enforcement, I note that even if the statute was capable of equally reasonable constructions, a court would apply the rule of lenity if the statute was to be enforced criminally. That principle of statutory construction holds that where a statute is ambiguous and the legislative history unclear,[5] ambiguous penal statutes are to be construed in a defendant's favor. *See State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700.

**b. The First Amendment.**

¶ 35. Finally, although you have not directly raised the issue, I note that criminal enforcement of the statute may implicate the free speech protections embodied in article I, section 3 of the Wisconsin Constitution and the First Amendment to the United States Constitution.[6]

¶ 36. As an employer, government has broad authority to regulate its employees' disclosure of information that the employee obtained by virtue of the exercise of his or her duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that "when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline"). At the same time, when the government acts in a manner other than as an employer, such as regulation of speech through tort law and presumably criminal law, decisions of the United States Supreme Court suggest the First Amendment provides

[5]Here, there is no legislative history that illuminates the fundamental question this opinion examines or sheds light on whether or not the legislature intended any of the results that would naturally flow from an interpretation that included district attorneys and law enforcement as "prosecutor[s]" and "investigator[s]" as those terms are used in Wis. Stat. § 12.13(5)(a).

[6]Although the remaining discussion refers to the First Amendment, it applies equally to Wisconsin's correlating protections which have been held to follow First Amendment guarantees. *County of Kenosha v. C & S Management, Inc*., 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) ("Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution.").

additional protections to defendants. *Id.* at 417 (recognizing case law permits government's regulation of employee speech "*as an employer*") (quoting *Pickering v. Board of Ed. of TP. H.S. Dist. 205, Ill.,* 391 U.S. 563, 568 (1968)) (emphasis added); *Waters v. Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government *as employer* indeed has far broader powers than does the government as sovereign") (emphasis added); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that First Amendment did not protect an assistant district attorney's disruptive speech in the workplace and upholding government's discharge of the employee, but recognizing that employees' speech would receive the same First Amendment protection as all citizens enjoy if it was the subject of a libel action as opposed to a disciplinary action). Put simply, the First Amendment may permit the government to discipline an employee for engaging in speech that the government may not impose criminal sanctions on the employee for making.[7]

¶ 37. As with any statute, Wis. Stat. § 12.60(1)(bm), which criminalizes violations of Wis. Stat. § 12.13(5), is presumed constitutional. *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34. The question of whether the government may impose a criminal penalty on a public employee for disclosing truthful information about a government investigation into a violation of laws relating to ethics, elections, or lobbying may depend on the facts and circumstances of a particular case. Thus, without a specific challenge, I cannot conclude that it is unconstitutional. However, a prosecutor contemplating the criminal enforcement of Wis. Stat. § 12.60(1)(bm), against any individual should be mindful of possible First Amendment implications.

## III. ANSWERS TO YOUR FOUR QUESTIONS.

¶ 38. Given my opinion that Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement, my answers to your four questions can be quite succinct. Your first question is: "Are these prohibitions limited to information regarding matters referred to a prosecutor or law enforcement from the Government Accountability Board." As explained above, I have concluded that the Wis. Stat. § 12.13(5) disclosure limitations do not apply to records in possession of a district attorney or law enforcement agency to which a matter has been referred by the GAB.

¶ 39. Your second question is: "Is information obtained pursuant to an independent investigation or prosecution by a prosecutor or law enforcement officer subject to this statute?" I assume that you have used the term "prosecutor" in your question as a synonym for district attorney. My answer to your question is no: whether the information is obtained pursuant to an independent investigation or in the course of an investigation that followed upon a referral from GAB, the prohibition in Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement.

[7]Wisconsin Stat. § 12.60(1)(bm) makes the unauthorized release of records *or* "information" a misdemeanor. Nothing in this opinion should be construed as concluding that the disclosure of government records raises identical First Amendment concerns as the disclosure of information through speech.

¶ 40. Your third question asks when and under what circumstances district attorney or law enforcement records regarding investigations into the enumerated offenses are subject to disclosure under the public records law. In my opinion, once in the hands of a district attorney or law enforcement agency, records sent by the GAB to that district attorney or law enforcement agency are not subject to the disclosure limitations of either Wis. Stat. §§ 12.13(5) or 5.05(5s). Disclosure of the records by the district attorney or law enforcement agency would not violate Wis. Stat. § 12.13(5) or 5.05(5s), and would not subject the district attorney or law enforcement agency to the penalty provisions of Wis. Stat. § 12.60.

¶ 41. That is not to say, however, that disclosure of such records by the district attorney or law enforcement agency always would be required by the public records law. It is my opinion that standard public records law analysis would govern disclosure of district attorney or law enforcement records regarding investigations or prosecutions into the enumerated offenses.

¶ 42. Your final question is: "If a district attorney concludes that no prosecution is warranted because there is either no probable cause or the case cannot be proven beyond a reasonable doubt, or declines to issue charges for any other reason, what statements may be made or records disclosed regarding that conclusion by a district attorney or law enforcement official?" I again assume that your question refers to the enumerated offenses identified in Wis. Stat. § 12.13(5).

¶ 43. In my opinion, as discussed above, the Wis. Stat. § 5.05(5s) disclosure limitations apply to GAB members, GAB employees, GAB-retained investigators, GAB-retained prosecutors, and necessary assistants of those persons—not to district attorneys and law enforcement agencies. Consequently, it is my opinion that a district attorney or law enforcement official may make the same types of statements or disclose the same types of records regarding the district attorney's conclusion that no prosecution of an enumerated offense is warranted because there is no probable cause or the case cannot be proven beyond a reasonable doubt, or that the district attorney declines to charge an enumerated offense for any other reason, as the district attorney or law enforcement official may make about any other crime or alleged crime.

¶ 44. The nature of such statements and the disclosure of such records generally is entrusted to the sound judgment of the district attorney or law enforcement official involved, guided when applicable by the public records law. Depending on the circumstances of a particular investigation or prosecution, other disclosure limitations may apply—such as the Wis. Stat. § 968.26 limitations on disclosure of information related to John Doe proceedings or the Wis. Stat. § 146.82 limitations on access to patient health care records. If there remains the possibility of future charges against the same or other persons, the district attorney should be mindful of the SCR 20:3.6 provisions governing trial publicity as well as the legal complications that such statements or disclosures could produce in subsequent proceedings. Conferring with cooperating law

enforcement officials about the propriety and potential consequences of any statements or disclosures therefore would be prudent if some future prosecution might be pursued.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:RPT:KSJ:LWB:rk