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The Honorable Mary Panzer
Chairperson
Senate Committee on Organization
211 South, State Capitol
Madison, WI 53702

OAG 2-03

Dear Senator Panzer:

The Senate Committee on Organization ("Committee") has requested my opinion concerning the application of two recent Wisconsin Supreme Court decisions[1] to requests under the Wisconsin public records statute, Wis. Stat. §§ 19.31-19.39, for mailing or distribution lists of physical or street addresses, e-mail addresses or phone numbers compiled and used by individual legislators for official business. Because lists of street addresses and phone numbers must ordinarily be coupled with an individual name in order to be meaningful or useful, I assume that the Committee's questions refer to the individual's name as well.[2]

The Committee poses a series of questions that may fairly be summarized as follows:

1. Wisconsin Stat. § 19.35(1)(a) provides in relevant part: "Except as otherwise provided by law, any requester has a right to inspect any record." Are legislators' mailing or distribution lists "records" which must be disclosed to the public if requested pursuant to Wis. Stat. § 19.35(1)(a)?

2. Assuming the record custodian determines that such lists are subject to disclosure, must the persons whose addresses or telephone numbers are contained on the list be provided with the notice required by the *Woznicki* and *Teachers' Ed. Ass'n* cases and given an opportunity to challenge the release in court prior to actual release of the record?

[=OAG 2-03, 1-2] Under current law, the first question can only be answered by the courts after applying the common law balancing test articulated in *State ex rel. Youmans v. Owens*, 28

[1]*See Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996) and *Teachers' Ed. Ass'n v. Bd. of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

[2]Because an e-mail "address" is in fact the identifier for a particular computer "mailbox" rather than a particular person, it need not be associated with an individual name to be operative. Indeed, "'[a]n e-mail address provides no authoritative information about the addressee . . . .'" *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 855 n.20 (1997).

Wis. 2d 672, 137 N.W.2d 470, 139 N.W.2d 241 (1965) and succeeding cases. Based on current Wisconsin precedent, however, it is my opinion that the courts would conclude that the records must be disclosed, unless the custodian, applying the balancing test, articulates specific factual circumstances warranting a determination that the public interest in withholding the records outweighs the public interest in releasing them. With regard to the second question, in my opinion the answer is no because neither the Legislature nor the Wisconsin courts have extended the *Woznicki* notice procedure beyond the context of employee records.

The Committee's questions arise in the context of recent requests, directed to individual legislators, for copies of e-mail distribution lists compiled by those legislators for the purpose of distributing electronic newsletters to constituents and other private citizens. Accordingly, I limit my discussion and answers to the Committee's questions to the context of legislators' mailing or distribution lists containing addresses or phone numbers of private citizens.

Plainly, lists of names and street or e-mail addresses and phone numbers, compiled by individual legislators and used for official purposes, are "records" within the coverage of the public records statute. *See* Wis. Stat. § 19.32(2); *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 393-94, 342 N.W.2d 682 (1984). The statute clearly states the general presumption that all public records are open to the public. *Wis. Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996). There are no blanket exceptions to the presumption of openness, except for those created by statute or by the common law. *Id.* at 780.

Absent a statutory or common law exception, a balancing test must be applied in every case in order to determine whether a particular record should be released. *Id.*; *Woznicki*, 202 Wis. 2d at 183. Under the common law balancing test, the record custodian and, if necessary, the court must determine whether the public interest in disclosure is outweighed by the public interest in keeping the record confidential. *See Osborn v. Board of Regents*, 2002 WI 83, 254 Wis. 2d 266, ¶ 14, 647 N.W.2d 158.

There is no common law exception for lists of names, addresses and phone numbers, nor is there a general statutory exception in the public records statute limiting the release of such personal identifying information as names, street addresses, telephone numbers or e-mail addresses. In fact, at least one statute, Wis. Stat. § 19.71, clearly contemplates that lists of names and addresses *are* subject to disclosure under the public records statute. That statute, entitled "sale of names or addresses," provides: "An authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. *The collection of fees under s. 19.35(3) is not a sale or rental under this section.*" The italicized language makes clear that disclosure of names and street addresses under the public records statute is *not* a "sale or rental" prohibited under Wis. Stat. § 19.71, clearly implying that such information is generally available under the public records law.

[=OAG 2-03, 3] Moreover, the existence of specific statutes expressly limiting the release of "personal identifiers," including names, telephone numbers and street and e-mail addresses, in particular circumstances strongly supports the inference that there is no general statutory exception that would justify maintaining the confidentiality of legislators' mailing and distribution lists. For example, under a newly enacted statutory exception to the public records statute itself, home addresses, home telephone numbers and home e-mail addresses of state employees may not be disclosed by an agency authority unless the employee authorizes access to this personal information. *See* 2003 Wisconsin Act 47, sec. 7, creating Wis. Stat. § 19.36(10)(a) (effective August 26, 2003). A full interpretation of the newly created exceptions to disclosure set forth in Wis. Stat. § 19.36(10)(a) is beyond the scope of this opinion. However, statutory exceptions must be narrowly construed and this new exception is plainly limited to information compiled by an "employer" in relation to an "employee." *See id.* Accordingly, there is no basis for a claim that the new exception set forth in Wis. Stat. § 19.36(10)(a) covers information relating to private citizens compiled and maintained by legislators in their capacity as elected officials. *See also*, Wis. Stat. § 23.45, created by 1999 Wisconsin Act 88 (regulating disclosure of certain computer-generated lists by the Department of Natural Resources).

Furthermore, Wis. Stat. § 895.50, creating a statutory right of privacy in Wisconsin, provides no direct support for a claim that individual privacy interests foreclose release of legislators' mailing and distribution lists. Rather, Wis. Stat. § 895.50(2)(c) cautions that "[i]t is *not* an invasion of privacy to communicate any information available to the public as a matter of public record." Instead, the "protection of privacy and reputational interests . . . plays an integral role" in the application of the common law balancing test itself. *See Woznicki*, 202 Wis. 2d at 202 (Abrahamson, J., dissenting).

Thus, whether lists of street or e-mail addresses and phone numbers compiled by legislators must be disclosed under the Wisconsin public records statute depends on application of the balancing test. *See Youmans*, 28 Wis. 2d at 682; *Woznicki*, 202 Wis. 2d at 183-84. It is, therefore, incumbent upon the custodian of the records in the first instance to balance all interests of the public bearing on both sides of the calculus, both those favoring disclosure and those opposing disclosure. Nonetheless, current Wisconsin precedent offers some guidance on how the courts are likely to resolve the question whether legislators' mailing and distribution lists are public records that must be disclosed.

[=OAG 2-03, 3-4] *Street Addresses.* In Wisconsin, there is considerable precedent requiring disclosure of lists of names and street addresses under the public records law, absent a statutory exception or a particularized demonstration of the need to maintain confidentiality in the specific case. In *Hathaway*, for example, the supreme court held that a computer-generated list of names and addresses of parents with children enrolled in the school district had to be disclosed to the requester because the custodian had failed to state specific, sufficient reasons to the contrary. *Id.*, 116 Wis. 2d at 404. *See also* 68 Op. Att'y Gen. 68 (1979) (mailing lists compiled by the Department of Natural Resources subject to inspection and copying); 61 Op. Att'y Gen. 297

(1972) (waiting lists for vocational school programs). *Cf. Atlas Transit, Inc. v. Korte*, 2001 WI App 286, 249 Wis. 2d 242, 638 N.W.2d 625 (public's right to know names and commercial driver's license numbers of all bus drivers transporting children for the Milwaukee School District outweighed "slight invasion" of drivers' privacy from release of that information).

Although some Wisconsin cases have upheld limitations on the release of home addresses of public employees even before the creation of Wis. Stat. § 19.36(10)(a), these cases illustrate the need for a particularized showing that the public interest supports withholding the records. *See, e.g., Morke v. Record Custodian*, 159 Wis. 2d 722, 465 N.W.2d 235 (Ct. App. 1990) (list of names, addresses and phone numbers of prison employees withheld from disclosure based on the institution's interest in ensuring safety inside and outside the prison boundaries and in encouraging persons to serve as prison employees); *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996) (trial court order releasing records relating to the use of deadly force by police officers modified to require redaction of the individual officers' home addresses based on privacy interests and public safety concerns). *Cf. U.S. Dept. of State v. Ray*, 502 U.S. 164, 176 n.12 (1991) (emphasizing that disclosure of a list of names and other identifying information is not inherently or necessarily a significant threat to the privacy of the individuals on the list; the significance or insignificance of the threat to privacy depends upon the characteristics revealed by virtue of being on the particular list and the consequences likely to ensue).

Home Telephone Numbers. There is a less well-developed body of precedent on the question whether lists of home telephone numbers are subject to disclosure under the public records statute. However, *Morke* demonstrates that personal telephone numbers can be withheld under the balancing test based upon a particularized showing of possible harm to the public interest, including concern for safety and institutional security. *Id.*, 159 Wis. 2d at 726-27. *See generally State ex rel. Pflaum v. Psych. Examining Bd.*, 111 Wis. 2d 643, 646, 331 N.W.2d 614 (Ct. App. 1983) (in affirming discovery order requiring disclosure of names, addresses and phone numbers of particular individuals, the court observed that disclosure did not implicate those persons' constitutional right to privacy); *cf. Wisconsin Professional Police Ass'n v. PSC*, 205 Wis. 2d 60, 70 n.6, 555 N.W.2d 179 (Ct. App. 1996) (citing factual evidence to support commission finding that there is no general societal expectation or norm that a person placing a telephone call has the right to remain anonymous).

[=OAG 2-03, 4-5] *E-mail addresses.* It is fair to say that courts and legislatures are currently struggling to apply existing statutes, including public records and freedom of information statutes, to the

exploding technology of the Internet.[3] At this juncture, there are no Wisconsin cases directly addressing whether a distribution list of e-mail addresses may be withheld from disclosure under the public records law based on concern for the privacy rights of those persons to whom the e-mail addresses belong, nor has our research discovered any cases from other jurisdictions that analyze the issue. *Cf.* n.2, above, citing *Reno*, 521 U.S. at 855 n.20.

Furthermore, courts in other jurisdictions appear to treat privacy concerns with differing degrees of respect, depending on whether the basis for the claimed right of privacy is statutory or constitutional. In Wisconsin, however, the statutory right of privacy does not directly affect the duties of record custodians based on Wis. Stat. § 895.50(3). Assuming the courts treat e-mail address lists consistently with the lists of names, street addresses and telephone numbers, it is likely that disclosure of e-mail distribution lists will be required, absent a specific statutory exception or a showing of particularized harm to the public interest from release of such records. *Cf. Morke*, 159 Wis. 2d at 726-27.

The Committee has also asked about the application of the *Woznicki* and *Teachers' Ed. Ass'n* cases to the mailing and distribution lists at issue here, assuming the record custodian determines that such lists are subject to disclosure in the first instance. In those cases, the Wisconsin Supreme Court has held that a public employee has the right to be notified and to seek judicial review of a custodian's decision to disclose information that may implicate the privacy or reputational interests of that employee. *See Woznicki*, 202 Wis. 2d at 192-95 (records held by the district attorney); *Teachers' Ed. Ass'n*, 227 Wis. 2d at 782, 798-99 (extending *Woznicki* remedy to all cases implicating the privacy or reputational interests of an individual public employee, "regardless of the identity of the record custodian").

[=OAG 2-03, 5-6] As restated above, the Committee's second question is whether the *Woznicki* and *Teachers' Ed. Ass'n* remedy applies to release of mailing and distribution lists compiled by legislators for purposes of communicating with constituents and other private citizens. Based on 2003 Wisconsin Act 47, sec. 4, creating Wis. Stat. § 19.356, enacted since the Committee requested my opinion on this issue, the answer to this question is clearly no. Wisconsin Stat. § 19.356 represents the legislative response to the *Woznicki* and *Teachers' Ed. Ass'n* cases and is expressly intended to limit and clarify the scope of the remedy created in

[3]For cases illustrating judicial and legislative efforts to apply constitutional precedent and statutory initiatives to the Internet and other advanced electronic technology, *see generally Reno*, 521 U.S. 844 (constitutionality of provisions of the Communications Decency Act seeking to protect minors from harmful material on the Internet); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (application of wiretap acts' prohibitions against intentional disclosure of illegally intercepted cell phone conversations to media defendants violated First Amendment); *In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001) (class action by Internet users against Internet advertising corporation alleging that storage of computer programs known as "cookies" on users' computer hard drives violated federal statutes and state law).

Woznicki. *See generally* Note of the Joint Legislative Council following 2003 Wisconsin Act 47, sec. 4.

Under newly created Wis. Stat. § 19.356(2)(a), an authority is required to provide "record subjects," *see* Wis. Stat. § 19.32(2g), created by 2003 Wisconsin Act 47, sec. 1, with written notice of a decision to release records in only three defined circumstances, two of which relate directly to the employment context. *See* Wis. Stat. § 19.356(2)(a)1. and 3. The remaining instance in which notice is now required is limited to records obtained by an authority pursuant to a subpoena or a search warrant. *See* Wis. Stat. § 19.356(2)(a)2. Moreover, the statute now expressly provides that notice is *not* required and that no person is entitled to judicial review of a decision to provide access to a record "[e]xcept as authorized in this section or as otherwise provided by statute." Wis. Stat. § 19.356(1). Plainly, therefore, the new statute does not require that a *Woznicki*-type notice be provided in the case of a legislator's decision to release mailing or distribution lists.

I note as well that the limitations in the new statute, Wis. Stat. § 19.356(2), are consistent with post-*Woznicki* precedent, which did not extend the notice requirement beyond the context of privacy or reputational interests of public employees or employees of public contractors. *See Kraemer Brothers, Inc. v. Dane County*, 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999); *Atlas Transit*, 249 Wis. 2d 242.

I conclude, therefore, that if a legislator custodian decides that a mailing or distribution list compiled and used for official purposes must be released under the public records statute, the persons whose names, addresses or telephone numbers are contained on the list are not entitled to notice and the opportunity to challenge the decision prior to release of the record.

Very truly yours,

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Attorney General

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[=OAG 2-03, 6]Opinion Summary: Public Records. Disclosure of mailing and distribution lists discussed. Courts are likely to require disclosure of legislators' mailing and distribution lists absent a factual showing that the public interest in withholding the records outweighs the public interest in their release. Assuming the custodian decides to release such distribution lists, addressees on the list are not entitled to prior notice and the opportunity to challenge the release under *Woznicki* and newly created Wis. Stat. § 19.356.