

State of Wisconsin
OFFICE OF STATE EMPLOYMENT RELATIONS

*- OFFICE OF THE DIRECTOR BULLETIN-
- DIVISION OF MERIT RECRUITMENT AND SELECTION BULLETIN-*

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Subject: Status of "P-File" Material Under
the Public Records Law

The purpose of this Bulletin is to update the general guidelines for determining which documents in the Employee Personnel Record ("P-file") of state civil service employees are open to the public and which may be closed to the public, pursuant to the Public Records Law, ss. 19.31-19.39, Wis. Stats. This update was prompted by the enactment of 2003 Wisconsin Act 47, effective August 26, 2003.

This Bulletin supersedes Bulletin OS-76 & MRS-194, dated November 12, 1998, which is obsolete and should be destroyed. This Bulletin incorporates references to the new legislation and its impact on Public Records Law. Readers should familiarize themselves with the new law and consult agency legal counsel or the Department of Justice with any questions.

According to ss. 230.01(2), 230.04(1) and (2), and 230.05(1) and (2), Wis. Stats., the director of the Office of State Employment Relations (OSER) and the administrator of the Division of Merit Recruitment and Selection (DMRS) are responsible for maintaining a system of personnel management which applies merit principles with adequate civil service safeguards. As provided in ss. 230.04(10) and 230.06(3), Wis. Stats., the OSER director and the DMRS administrator have the authority to prescribe how records shall be prepared and presented. The OSER director and the DMRS administrator, however, may establish guidelines for dealing with requests from the public for information which may be found in an employee's official personnel file, commonly referred to as the "P-file," and jointly issue this Bulletin to provide these guidelines.

Under ss. 230.04(1m) and 230.05(2), Wis. Stats., the OSER director and the DMRS administrator have the authority to delegate functions to appointing authorities. The OSER director and the DMRS administrator have delegated to each state agency appointing authority the responsibility for creating and maintaining employee P-files, which includes accuracy and security. According to s. 19.33 (4), Wis. Stats., the legal custodian of the P-files is the agency's highest ranking officer, although the legal custodian may delegate to others within the agency the duties and responsibilities necessary to respond to open record requests. (See s. 19.33 (6), Wis. Stats.)

RECENT LEGISLATION

As noted above, Act 47 became effective August 26, 2003. It made some significant changes that limit when the *Woznicki* notice can be given and designates certain personnel related records as closed. While the Act is not limited to documents included in a “P-file,” there are some changes that have an impact on the processes and procedures necessary when dealing with open record requests and on documents included within a P-file. A brief summary of the highlights of the Act that can involve P-file documents follows:

1. Records containing the following are closed for employees who do not hold a state public office, pursuant to s. 19.36(10)(a-d), Wis. Stats.:
 - a. Home address, home electronic mail address, home telephone number and social security number, unless the person has authorized release of such information.
NOTE: An employee’s home address, home electronic mail address, home telephone number and social security number must be redacted from all documents, unless the person has authorized release of such information.
 - b. Information relating to current uncompleted investigations of employees for criminal offense or employment related misconduct prior to completion of the investigation.
 - c. Information pertaining to an employee’s employment exam, except an exam score if access to that score is not otherwise prohibited.
 - d. Information relating to specific employees used by an employer for staff management planning, including performance evaluations, recommendations concerning future salary adjustments, promotions, job assignments, letters of reference or other comments or ratings relating to employees.

2. The statute creates a notice procedure, pursuant to s. 19.356(2)(a), Wis. Stats.,¹ which generally governs the release of records containing personally identifiable information about “record subjects” other than state or local public officials in the following circumstances:
 - a. A record containing information relating to an employee that is created or kept by the authority and that is the result of a completed investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee’s employer.
 - b. A record obtained by the authority through a subpoena or search warrant.
 - c. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

3. A definition of “state public office” has been added at s. 19.32(4), Wis. Stats.:

¹ The notice requirements are discussed at pages 12 and 13 of this Bulletin.

- a. The phrase includes elected officials, appointees of the governor, unclassified appointees such as deputy secretary, executive assistant and division administrator, certain high-level positions within the University of Wisconsin System and other specified positions. The definition does not include positions at the Legislative Council, Legislative Fiscal Bureau and the Legislative Reference Bureau.
 - b. If a decision is made to release documents, including those of a completed investigation of a disciplinary matter, (after first applying the balancing test) relating to a person holding a "state public office," notice must be given to the subject; the notice must also advise the employee that he/she has the right to augment the records to be released with "written comments and documentation selected by the record holder."
 - c. A person holding a "state public office" is covered by a provision that prevents access to records containing information maintained, prepared or provided by an employer concerning home address, home electronic mail address, home telephone number or social security number, unless the person authorizes release. (**NOTE:** This prohibition does not apply to the home address of a person who holds an elective public office or of a person who is required to reside in a specified location as a condition of employment.)
 - d. A person holding a "state public office" cannot seek a court order preventing disclosure of documents/information.
4. There is a change to s. 230.13, Wis. Stats.:

Section 230.13(3)(b), Wis. Stats., has been added to permit the OSER director and the DMRS administrator to release to an agency personnel information relating to the hiring and recruitment process, including specifically exam scores and ranks and other evaluations of applicants.

NOTE: There are limitations imposed by s. ER-MRS 6.08(3), Wis. Adm. Code. The items listed in that section of the Code cannot be released until after the interview questions have been finalized. These items include narrative responses to open-ended examination questions, tapes of oral examinations, resumes, letters of interest, provided the released materials do not contain scores, comments, ratings or other evaluations.

5. Unless notice to the subject of a request is authorized, none is required in the event a decision is made to release documents/information.
6. Unless there is a provision that authorizes the subject of the request to seek judicial review of a decision to release, there is no right to judicial review.

GENERAL CONSIDERATIONS

The Public Records Law establishes a presumption that the public has a right to inspect public records, subject to certain legal and/or policy exceptions: (1) specific state or federal laws or

common law which preclude disclosure or require confidentiality; (2) exemptions to the Open Meeting Law; and (3) the balancing test.

With respect to records in an employee's P-file, some records in the P-file may be closed to the public under state or federal law. Those that are deemed open records are available for inspection by the public. A record may contain some data which is "closed." In such situations, the entire document cannot be deemed "closed;" rather, the data which is "closed" must be redacted before the document is released. The reasons certain data were redacted from the record must be provided to the requester. (**NOTE:** s. 103.13, Wis. Stats., permits the inspection of an employee's records by the employee or his/her representative, subject to certain limitations set forth in that section. Chapter 748, *Wisconsin Personnel Manual-Administration, Classification and Compensation*, also addresses issues allowing the employee, his/her representative, and/or supervisor the opportunity to review his/her P-file.)

Collective bargaining agreements should be consulted to determine whether they contain any language that addresses matters set forth in this Bulletin.

Some key points to keep in mind are:

- A "record" is anything recorded or preserved that has been created and is being kept by the agency. (s. 19.32(2), Wis. Stats.)
- Excepted from the definition of "records" are drafts, notes and preliminary documents prepared for the originator's personal use or circulated within the preparer's level of authority.
- An agency is not required to create a new record by extracting and compiling information from existing records into a new format.
- A request does not have to be in writing, and the requester does not have to identify him/herself. (s. 19.35(1)(h) and (i), Wis. Stats.) When a request is made in writing, the response must also be in writing. (s. 19.35(4)(b), Wis. Stats.) However, a lawsuit to compel disclosure cannot be commenced, unless a request is made in writing. (s. 19.37 (1), Wis. Stats.)

STEPS TO TAKE WHEN AN AGENCY RECEIVES A PUBLIC RECORDS REQUEST

1. If a record does not exist, inform the requester that no such record exists.
2. Respond "as soon as practicable and without delay." (s. 19.35(4)(a), Wis. Stats.) This phrase has been interpreted by the Wisconsin Department of Justice to require the agency to reply within ten business days. **However**, there may be legitimate reasons that deadline cannot be met. In such cases, the requester should be advised of the delay and the reason(s).

3. Despite recent legislation, “gray areas” remain when dealing with public record requests. Therefore, P-file custodians are reminded that when a question arises about whether a record is open or closed, the custodian of the records in question for that agency should consult with his/her agency legal counsel. A custodian can also contact Department of Justice attorneys who are current on “open records” issues and can provide instructive literature, including “A Checklist for Record Custodians: How to Comply With the Act and Still Do your Work” and a memorandum on “Wisconsin Public Records Law.”

CONFIDENTIAL INFORMATION; OPEN MEETING EXEMPTIONS

The following table contains information that requires confidentiality or prohibits disclosure, pursuant to state and/or federal laws:

STATE AND/OR FEDERAL LAWS THAT PROHIBIT DISCLOSURE OR REQUIRE CONFIDENTIALITY	
ITEM	AUTHORITY
Right of privacy	s. 895.50, Wis. Stats.
Records of personnel matters NOTE: Some courts, e.g., <u>Armada Broadcasting, Inc., v. Stirn</u> , 177 Wis. 2d 272 (Ct. App. 1993), have held that s. 230.13, Wis. Stats.: (1) allows for discretion on the part of the appointing authority or Administrator and is not a right to be exercised by the individual whose P-file or parts are sought; and (2) represents an indication of public policy favoring non-disclosure which the custodian should weigh against the public policy favoring disclosure, i.e., the balancing test.	s. 19.36(10) and 230.13, Wis. Stats.
Examination information	s. 19.36(10)(c), Wis. Stats., and s. ER-MRS 6.08(2), Wis. Adm. Code
The pledge must be clear, specific as to the information obtained and necessary to obtain the information and maintain confidentiality. Even if these criteria are met, the balancing test must still be applied.	60 OAG 284 (1971); 61 OAG 361 (1972); and 63 OAG 407 (1974)

ITEM	AUTHORITY
<p>Open Meeting Law exemptions are <u>indicators</u> of public policy and may provide a basis for withholding disclosure:</p>	
<p>(a) Personnel matters.</p>	<p>(a) s. 19.85(1)(b), (c) or (d), Wis. Stats.</p>
<p>(b) Personal information and investigations “which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to.” (c) legal advice as to pending or probable litigation. NOTE: The “balancing test” must be applied. See <i>Wis. Newspress v. Sheboygan Falls, infra</i>. If one of these exemptions is used, the reason(s) why the exemption applies must be stated with specificity.</p>	<p>(b) s. 19.85(1)(b), (c), (d) or (f), Wis. Stats. (c) s. 19.85(1)(g), Wis. Stats.</p>

P-FILE DOCUMENTS

The following tables contain the most commonly found materials in the P-file and specify OSER’s and DMRS’ best guidance as to their status as “open records” or “closed records” and, if closed, the authority for keeping such records closed. **This list is not all inclusive.** Some parts of certain records may be closed and editing of the “closed” data will be necessary. If access to a record or any part will be denied because it is a “closed record,” one should first consult with the agency’s legal counsel to ensure that the statutory references apply to the specific request the agency has received.

<p align="center">RECORDS OF CLASSIFIED AND UNCLASSIFIED EMPLOYEES WHICH ARE CONSIDERED <u>OPEN</u></p>	
ITEM	COMMENTS
<p>Appointment Letter</p>	<p>In any document in which the home address appears, it must be redacted. s 19.36(10)(a), Wis. Stats.</p>

ITEM	COMMENTS
Arbitration Decisions	Generally, these are open records, unless the balancing test provides a valid basis to keep the records closed, e.g., the misconduct is so extreme that publicity of the conduct would have a “substantial adverse effect upon the reputation” of the person involved. See s. 19.85(1)(f), Wis. Stats.
Apprenticeship Agreements, Formal	
Awards and Commendations Received	
Certification Request	The custodian <u>must</u> redact information about the social security number (per Federal law and s. 19.36(10)(a), Wis. Stats.), sex, ethnic origin and disability (per AG Opinion), and home address (s. 19.36(10)(a), Wis. Stats.) on this document and other documents where this data appears before releasing it.
Continuing Education Unit (CEU) Record	
Current Rate of Pay and Pay Increases	
Employee Interchange Agreements	
Grievances	Except for a reference to discipline imposed which is exempt from disclosure (s. 230.13(1)(c), Wis. Stats.), or other information which is exempt (e.g., social security number), these records are generally open. See 73 OAG 20 (1984).

ITEM	COMMENTS
Investigation Materials of <u>Completed</u> Disciplinary Matters NOTE: When an investigation is completed, the materials may be released provided notice is given to the subject that he/she may seek a court order to prevent release.	s. 19.36(2)(a)1., Wis. Stats.
Leave of Absence With Pay Due to Injury Request (after blocking out any confidential medical information)	
Moving Expense Request/Authorization	The home address must be redacted (s. 19.36(10)(a), Wis. Stats.)
Payroll-related documents <ul style="list-style-type: none"> - Electronic Deposit - Deferred Compensation - Employee Reimbursement Account 	While these documents are not closed per se, they may contain certain personal information (e.g., social security number, bank accounts, home address, etc.) which must be redacted (see ss. 19.36(10)(a), 40.07(1), and 19.85(1)(f), Wis. Stats., other authorities discussed hereafter and the balancing test), and other data which must be handled on a case-by-case basis.
Personnel Transfer Record	
Position Description and Addendum (s) (such as Supervisory Analysis Forms, organization chart, Confidential Analysis Forms and Management Analysis Forms)	
Reallocation Notice	
Reclassification Request/Report	
Resignation Letter	

RECORDS OF CLASSIFIED AND UNCLASSIFIED EMPLOYEES THAT ARE CONSIDERED <u>CLOSED</u>	
ITEM	AUTHORITY
Settlement Agreements	Generally, settlement agreements are considered open. <i>Journal/Sentinel v. Shorewood Sch. Bd.</i> , 186 Wis 2d 443 (Ct. App. 1994). However, they <u>may</u> be confidential and “closed” if, using the “balancing test,” it is in the public’s interest to settle and a settlement cannot be reached without a pledge of confidentiality. See 74 OAG 14 (1985).
Termination Due to Layoff Notice	
Training Agreements	
<p>Materials used for evaluating an applicant:</p> <p>(a) Examination materials in any form including a resumé if used to screen to an “eligible” register.</p> <p>NOTE: These include: rated exam benchmarks, as well as questions and answers to “paper and pencil” tests.</p> <p>(b) Reference materials, e.g., letters or notes from former employers or others commenting on the applicant’s qualifications, etc.</p> <p>NOTE: A resumé which is not used as a “screen” would be a reference material which would be an open record.</p>	<p>(a) ss. 19.36(10)(c), 103.13(6), 230.13(1)(a) and (2), Wis. Stats., and s. ER-MRS 6.08(2), Wis. Adm. Code</p> <p>(b) ss. 19.36(10)(d) and 103.13(6), Wis. Stats.</p>
Disability Verification for the Handicapped Certification Program	29 C.F.R. § 32.15(a), (b) and (d); and 73 OAG 26 (1984)
<p>Materials regarding employee participation or enrollment in an Employee Assistance Program.</p> <p>NOTE: These documents <u>may not</u> be filed in a P-file.</p>	4 C.F.R. § 2, <i>et seq.</i> ; and ADA: EEOC Reg. 29 C.F.R. § 1630.14
<p>Medical records of an employee</p> <p>NOTE: These documents <u>may not</u> be filed in a “P-file.”</p>	ss. 40.07(1) and (2), 103.13(5), and 252.12(3), Wis. Stats.; and ADA:EEOC Reg. 29 C.F.R. § 1630.14
Notice of involuntary dismissal	s. 230.13(1)(c), Wis. Stats.

ITEM	AUTHORITY
Notice of reprimand or disciplinary action.	ss. 19.36(10)(b), 19.85(1)(b) and (f); and s. 230.13(1)(c), Wis. Stats.
NOTE (1): There are some exceptions, e.g., <i>State Journal v. UW-Platteville</i> , 160 Wis. 2d 31 (Ct. of App. 1990) where the Court used a balancing test to conclude that the public interest of disclosure outweighed the possible harm to the reputation to the employee, where the employee was a dean and because of his position in the university his conduct was subject to greater scrutiny than most employees and where the conduct which resulted in discipline involved nepotism.	
NOTE (2): Records containing information regarding <u>completed</u> investigations into a disciplinary matter for an employee or possible employment-related violation of a statute, rule or policy may be released if notice is given to the employee that he/she can go to court to prevent release. (s. 19.36(2)(a)1., Wis. Stats.) NOTE (3): Records of a <u>pending</u> investigation of possible criminal offense or misconduct connected with employment prior to disposition of the investigation are closed. (s. 19.36(10)(b), Wis. Stats.)	

<p>NOTE (4): Agencies investigate employee complaints of misconduct, e.g., sexual harassment filed by co-workers. A decision on whether to impose discipline may be reduced to writing. The Attorney General believes that the “may” in s. 230.13, Wis. Stats., gives an agency discretion to provide the document to the complainant, upon request. However, the agency must notify the target of the investigation of such a request and advise him/her that the document will be released after 12 days of receipt of the notice unless an action is commenced in Circuit Court that seeks to prevent disclosure. (NOTE: See the discussion at pp. 12-15 regarding the balancing test, <i>Woznicki v. Erickson</i>, 202 Wis. 2d 178 (1996) and subsequent cases and the notice requirements.)</p>	<p>ss. 19.356(2)(a) and (2)(a)1., Wis. Stats.</p>
<p>Annual Employee Performance Evaluations, Performance Improvement Plans, judgments or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference or other comments or ratings about employees for staff management planning purposes.</p>	<p>s. 19.36(10)(d), 19.85(1)(b) and (c), Wis. Stats.</p>
<p>Physical disability retirement examination</p>	<p>s. 40.07(2), Wis. Stats.</p>
<p>Probationary Service Report (Evaluation)</p>	<p>s. 19.85(1)(b) and (c), Wis. Stats.</p>
<p>Sex, race and ethnic group information. NOTE: This may be disclosed only when the custodian determines that the user's purpose relates to equal opportunity programs; otherwise the record is closed.</p>	<p>29 C.F.R. § 1607.4B; and 73 OAG 26 (1984)</p>
<p>Social Security Number</p>	<p>s. 19.36(10)(a), Wis. Stats., and 5 U.S.C.S. § 552a</p>
<p>I-9 Form NOTE: Related documents <u>may not</u> be filed in a P-file.</p>	<p>8 U.S.C.S. § 1324a</p>
<p>ETF documents containing individual personal information</p>	<p>s. 40.07(1), Wis. Stats.</p>

Lists of participants, annuitants or beneficiaries	s. 40.07(3), Wis. Stats.
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THE BALANCING TEST

The balancing test is applied on a case-by-case basis and involves balancing “the harm to the public interest from public examination of the records against the benefit to the public interest from opening [the] records to examination, giving much weight to the beneficial public interest in open public records.” Decisions concerning availability of information from records which may be closed and to which the balancing test is applied must be made on a case-by-case basis. When applying the balancing test, the custodian may determine that the right to inspect a record may be denied because the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection. Questions that the custodian might consider in applying the balancing test include: (1) How will the public benefit by opening for inspection the record being sought? or (2) How will the public suffer if the record is not made public? Reasons given for withholding documents or any parts of documents must be specific to the particular situation.

NOTE: When information concerning an individual’s pay status is requested, the custodian must apply the balancing test. This must done on a case-by-case basis. Records which disclose the amount of a state employe’s salary have long been held to be open since a bona fide benefit is obtained by providing public access which outweighs one’s interest in individual privacy. However, where the requested records contain information about how an individual state employee uses his/her salary, the benefit of disclosure may not be as clear, and the balancing test should be applied. For example, the balancing test should be used before releasing such information from a P-file as garnishment proceedings, receipts of benefits, payment of union dues, payments to a credit union or charitable donations such as gifts to the State and University Employees Combined Campaign.

RELEVANT HISTORY LEADING UP TO THE NEW LEGISLATION

The “balancing test” was used by the Wisconsin Supreme Court in two decisions which illustrate some of the relevant considerations when dealing with employee disciplinary or personnel records. *Wis. Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768 (1996) held: (1) there are no blanket exceptions for employee disciplinary or personnel records; (2) policy exceptions, e.g., s. 19.85, Wis. Stats., do not provide a per se exception; and (3) prominent public officials or officials in positions of authority should have a lower expectation of privacy regarding their employment records. Several months later, the Court held: (1) personal telephone records gathered by the DA in an investigation of alleged wrongdoing are “records;” (2) an individual whose personal records are to be released by the DA can have the decision to release reviewed by a court; and (3) the DA cannot release the records without giving notice and allowing reasonable time to appeal the decision to court. *Woznicki v. Erickson*, 202 Wis. 2d 178 (1996).

Woznicki, supra, was cited in two Court of Appeals cases which extended its application. In *Klein v. Wisconsin Resource Center, et al.*, No. 97-0679 (Ct. App., Dist. II) (4/1/98) the court held: (1) a person who is confined pursuant to a civil commitment procedure is not an “incarcerated person;” (2) where access is sought under the open records law to a record which pertains to an individual, the “targeted” person has a right to notification if the custodian agrees to release the information and the right to seek circuit court review of that decision; (3) a state employee who is the “target” of a request for personnel records has the right to challenge a record custodian’s decision to release such information; and (4) the procedures set forth in *Woznicki* apply to public sector employees. *Klein* was followed by *MTEA v. Journal/Sentinel*, No. 97-0308 (Ct. App., Dist. I) (5/12/98). That case held that *Woznicki* is not restricted only to situations where a district attorney acts as record custodian.

Many custodians, after concluding under the balancing test that the requested documents were personnel records that should be released to the requester, also concluded that a *Woznicki* notice was appropriate. As a general rule, that notice provided that court action must be commenced within 30 days of receipt of the notice or the documents would be released. To the extent that the subject of the request proceeded to court to seek an order to prevent release, legal proceedings took a great deal of time until final resolution that the materials could or could not be released. Media interests wanted to streamline and shorten the notice and litigation process; public sector interests wanted to have additional personnel related items declared closed. Act 47 represents a compromise of the competing interests.

NOTICE REQUIREMENTS

If the “balancing test” results in a decision to release documents, notice is required under certain circumstances. (**NOTE:** Unless notice is specifically authorized, notice is not required, and the record subject is not entitled to judicial review.) The following represent the situations where a notice **must** be given.

1. State employees who do not hold a state public office:

If the request involves the documents referenced in s. 19.356(2)(a)1.-3., Wis. Stats., notice must be given to the subject of the request within three days of deciding to release same. The notice must be sent by certified mail or personally served on the subject of the request. The notice must briefly describe the request and contain a description of the rights of the subject under s. 19.356(3) and (4), Wis. Stats. Within five days of receipt of the notice, the subject may provide the employer with written notification that he/she intends to go to court to obtain an order to restrain the employer from releasing the records; the subject must commence an action within ten days of receipt of the notice from the employer. In no event may the employer release any documents within 12 days of sending notice to the subject; if an action is commenced, no records can be released during the pendency of the action, including appeals. The court must decide the case within ten days of filing of the Summons and Complaint and

proof of service, unless a party demonstrates cause for an extension in which case any decision must be decided within 30 days of filing the pleadings.

2. Persons who hold a state public office:

A person who holds a “state public office” is entitled to notice, but it is of a different kind than for others. The notice must be issued by the employer within three days of a decision to release the records. The notice must advise the subject of the records involved and further advise the employee that he/she has the right to augment the record to be released with written documentation and comments selected by the subject. Within five days of receipt of the notice the subject may augment the record to be released and unless otherwise provided by law, the employer must release the record as augmented by the subject. (NOTE: A person holding a “state public office” does not have a right to seek a court order restraining the release of requested records.)

While this Bulletin has provided several reminders, it cannot be stressed enough that whenever a question arises regarding whether a record or any part is open or closed, the custodian of the records in question for that agency should consult with his/her agency legal counsel and/or the Department of Justice.

The policies in this Bulletin regarding handling requests from the public for information from P-files supersede any other policies contained in previous Bulletins or the current Chapter 748 of the *Wisconsin Personnel Manual-Administration, Classification and Compensation* which is entitled “Classified Employee Personnel Records.” The policies in this Bulletin should be followed when dealing with a request for information about a document in an employee’s P-file.

If you have any questions about this Bulletin, please contact David J, Vergeront, Chief Legal Counsel, at (608) 266-0047 or by e-mail at David.Vergeront@oscr.state.wi.us.

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