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## Two Cases Reaffirm State Open Meetings and Public Records Principles

In *Barbara Sands v. The Whitnall School District*, Appeal No. 2005AP1026 (December 27, 2006), the Court of Appeals took up the issue of whether the discovery rights of litigants trump the terms of Wis. Stat. § 19.85(1)(c), which allows a governmental body to hold a closed session when “considering... performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.” The court decided that the Open Meetings/Record law prevailed.

At issue was a school board that held two closed sessions under Wis. Stat. § 19.85(1)(c) to discuss the performance of an employee whose contract renewal was before the Board. The employee’s contract ultimately was not renewed. The employee sued, challenging the non-renewal and arguing that her right to pursue discovery in litigation entitled her to have the contents of the closed session revealed.

The Court of Appeals disagreed. In doing so, it noted that the statute

in question “contains no exception to the non-disclosure principle, none for litigation or any other circumstance.” If any exceptions should be created, the court wrote, “such must come from the legislature itself.”

In *WIREData, Inc. v. Village of Sussex, et al.*, Appeal Nos. 2005AP1473, et al. (January 3, 2007), the Court of Appeals held that where a municipality contracts with an independent contractor to maintain public records, the municipality—not the independent contractor—is ultimately responsible for open records violations. “[W]here the open records law is concerned, the buck stops with the municipalities,” the court wrote. Municipalities cannot evade their obligations under the open records law by shifting the creation and maintenance of their records to independent contractors. Thus, when open records violations occur under such circumstances, the municipality must pay the costs, fees, and damages assessed. The decision is recommended for publication.

— Richard A. Lebmann

## Disclosure of Disciplinary Investigation Records

A recent case issued by the Wisconsin Court of Appeals concluded that investigatory records and disciplinary documents of a public agency regarding one of its employees are subject to disclosure under the open records law. *Kroeplin v. Wisconsin DNR/Lakeland Times v.*

*Wisconsin DNR*, Appeal Nos. 2005AP 1093 and 22427.

Kroeplin is a DNR Conservation Warden. He requested a license check from the local police agency of a car linked to a person involved in a drug-related crime involving Kroeplin’s nephew, who had been arrested. The

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DNR conducted an investigation into Kroeplin's request and disciplined him for improper conduct.

The Lakeland Times filed an open records request seeking disclosure of the DNR's investigative records and disciplinary documents. The DNR refused to release all of the requested records and Kroeplin filed suit in circuit court to prohibit the disclosure of these records.

The open records law, Sections 19.31-19.39, Wis. Stats., creates a general public policy of open government favoring the public's right to review documents created by government entities. When faced with a request for public records, a governmental entity must first determine whether any of the statutory sections specifically prohibit disclosure. If not, the entity must then balance the strong presumption in favor of disclosure versus any policy supporting limited disclosure.

In this case, Kroeplin and the DNR argued that Section 19.36(10)(d), Stats., created an exception to the disclosure of investigation reports and disciplinary records flowing from them. That exception provides that the following records should not be disclosed:

- (i) information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments or recommendations ....

They contended that the requested documents fit within the scope of "staff management" documents since they could be used in the scope of Kroeplin's performance evaluations.

The court of appeals rejected this argument on several grounds. First, the statutory exemption does not specifically list disciplinary records. Second, the types of records subject to the exemption relate to documents generated on an on-going and routine basis for staff planning, something different than these disciplinary documents. Third, under a different exemption, investigatory records do not have to be disclosed while the investigation is on-going, but are subject to disclosure after its completion. To interpret subsection 10(d) as exempting completed investigatory documents from disclosure would be at odds with the interpretation of that other exemption. Finally, there is a long line of appellate cases which have held that disciplinary records of public employees are subject to disclosure when they involve the violation of law or significant work rules.

Having concluded that the statute does not prohibit disclosure, the court of appeals then assessed the balancing of interests involved in the requested disclosure. The court noted the strong public policy favoring disclosure and concluded that Kroeplin's privacy interest in keeping the records from non-disclosure did not outweigh the public's right to know facts related to his conduct as a public employee. The court stated that public employees, particularly law enforcement employees, should expect closer public scrutiny of their job performance.

Finally, the court of appeals found that disclosure would enhance diligent investigations of alleged public employee misconduct:

"If public employers know that the investigation they perform are subject to public review, common sense dictates that they will be more diligent in ensuring that charges of potential misconduct are thoroughly investigated and that the appropriate discipline is imposed, than they would be if they were not so accountable to the public."

In sum, absent a very strong reason why investigatory and discipline documents related to a public employee should not be disclosed, public policy, state statute and case law interpreting the open records law require such records to be disclosed upon proper request.

— Steven C. Zach

## Concerned Citizens Group Denied Standing to Challenge Rezoning of Farmland

In *Friends of Richland County, et al. v. Richland County, et al.*, Appeal No. 2005AP2970 (December 21, 2006), a nonprofit association and two of its members sued Richland County challenging an alleged pattern and practice of granting rezoning petitions for parcels in the Agricultural-Forestry District. The association and its members asserted that the rezonings could prompt the Land Conservation Board to decertify Richland County's exclusively agricultural zoning for purposes of property tax credit eligibility. This, in turn, could cause some of the association members to suffer pecuniary losses from lost tax credits.

The Court of Appeals held that this claim was too speculative to grant standing to the individual members of the association. "Whatever may be the plausibility of these events ever coming to pass, [the association] and its members cannot rely on events that 'may' someday happen to claim that they are 'directly affected by the issues in controversy,'" the court wrote. The lack of standing of members of the association ultimately defeated standing of the association itself, since its status in the case derived entirely from the asserted and proven interests of its members. Although the court expressed some sympathy with the concerns of the association and its members, the court noted that the venue for such concerns airing was the political arena, not the court system.

— Richard A. Lehmann

## Attorney General Opines that Domestic Partnership Benefits Still Valid

The City of Madison provides that individuals who are not legally married may register as domestic partners, defined as those who are not legally married but are living together in a committed personal relationship. City employees in a domestic partnership are afforded certain employment benefits similar to married employees. Furthermore, the City provides that those in domestic partnerships shall not be discriminated against in places of public accommodation.

The passage of the recent amendment to the Wisconsin Constitution calls into question the validity of these provisions. In particular, the second sentence of that amendment provides that “a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”

The City of Madison sought an opinion from the State of Wisconsin Attorney General as to whether its Ordinances were invalid as a result of the constitutional amendment. The Attorney General, at that time Peggy Lautenschlager, concluded that the amendment did not impact the City’s Ordinances which prohibited discrimination based upon domestic partnerships or the provision of employment benefits to individuals in such partnerships.

The Attorney General’s opinion was based upon the following reasoning:

- The amendment should be construed to ascertain whether the Legislature and the citizens of Wisconsin intended to invalidate domestic partnerships.
- The phrase “identical or substantially similar to that of marriage” means something close to or virtually identical to marriage. The Attorney General noted that while domestic partnerships share some of the attributes of marriage, they are different in many other respects, in particular the legal rights afforded to married individuals (e.g. right to marital property, presumption of paternity, etc.).
- Numerous courts around the nation have concluded that domestic partnerships are not the equivalent of marriage.
- If the legislative intent was to invalidate existing domestic partnerships, the legislature could have done so by using language expressly stating that intent.
- At the time of the public’s vote on the amendment, many large Wisconsin corporations provided domestic partnership benefits and opposed the amendment.
- Public opinion polls showed that while the

majority of Wisconsin voters favored a ban on gay marriage, which was addressed in the first sentence of the amendment, a majority also were in favor of the provision of domestic partnership benefits.

- The proponents of the amendment publicly stated that the amendment would not interfere with the provision of domestic partnership benefits.

The Attorney General’s opinion is not determinative of the issue, however. The Madison Ordinances, and domestic partnership benefits offered by other entities, are subject to potential legal challenges in court. In such circumstances, the Attorney General’s opinion would be an authority used to persuade a court, but a court is not bound by that opinion. Furthermore, Wisconsin now has a Republican Attorney General and his opinion on the issue might differ from his predecessor. It promises to be an interesting issue to watch over the next several years.

— Steve Zach

### WEPCO Enters Into Agreement To Sell Point Beach Nuclear Facility

Wisconsin Electric Power Co., a subsidiary of Wisconsin Energy Corp., has agreed to sell the Point Beach Nuclear Plant to a unit of a Florida energy company, FPL Energy Inc., for almost \$1 billion.

Point Beach is a 1,033-megawatt facility located in Two Rivers, Wisconsin. Its first unit was placed into commercial service in 1970 and is licensed to operate until 2030. A second unit was brought into service in 1973 and is licensed to operate until 2033. Point Beach provides about a fourth of the electricity used by customers of Wisconsin Electric Power Co., which does business as We Energies based in Milwaukee.

The agreement includes \$783 million for the plant and \$215 million for its nuclear fuel and other inventories. The transaction is expected to include a long-term agreement under which FPL would sell 100 percent of the output of Point Beach to We Energies.

We Energies is also expected to receive approximately \$300 million from the plant’s decommissioning trust fund. FPL will be responsible for the ultimate decommissioning of the facility and the cost of that decommissioning.

FPL has committed to retain the plant’s 660 employees for 18 months after the close of the sale.

Although the sale would be subject to a number of regulatory approvals, including from the PSC, FERC, and the Nuclear Regulatory Commission, the companies are expecting to close the transaction in August 2007.

— Mark A. Neuser

# MUNICIPAL LAW NEWSLETTER

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Richard L. Bolton	283-1789	<a href="mailto:rbolton@boardmanlawfirm.com">rbolton@boardmanlawfirm.com</a>
Christopher J. Dodge	283-1777	<a href="mailto:cdodge@boardmanlawfirm.com">cdodge@boardmanlawfirm.com</a>
Anita T. Gallucci	283-1770	<a href="mailto:agallucci@boardmanlawfirm.com">agallucci@boardmanlawfirm.com</a>
Robert E. Gregg	283-1751	<a href="mailto:rgregg@boardmanlawfirm.com">rgregg@boardmanlawfirm.com</a>
Rhonda R. Hazen	283-1724	<a href="mailto:rhazen@boardmanlawfirm.com">rhazen@boardmanlawfirm.com</a>
Richard A. Heinemann	283-1706	<a href="mailto:rheinemann@boardmanlawfirm.com">rheinemann@boardmanlawfirm.com</a>
Lawrie J. Kobza	283-1788	<a href="mailto:lkobza@boardmanlawfirm.com">lkobza@boardmanlawfirm.com</a>
Richard A. Lehmann	283-1719	<a href="mailto:rlehmann@boardmanlawfirm.com">rlehmann@boardmanlawfirm.com</a>
Jennifer S. Mirus	283-1799	<a href="mailto:jmirus@boardmanlawfirm.com">jmirus@boardmanlawfirm.com</a>
Mark A. Neuser	283-1725	<a href="mailto:mneuser@boardmanlawfirm.com">mneuser@boardmanlawfirm.com</a>
Jon C. Nordenberg	283-1739	<a href="mailto:jnordenberg@boardmanlawfirm.com">jnordenberg@boardmanlawfirm.com</a>
William R. Peck	283-1732	<a href="mailto:wpeck@boardmanlawfirm.com">wpeck@boardmanlawfirm.com</a>
Catherine M. Rottier	283-1749	<a href="mailto:crottier@boardmanlawfirm.com">crottier@boardmanlawfirm.com</a>
Mark J. Steichen	283-1767	<a href="mailto:msteichen@boardmanlawfirm.com">msteichen@boardmanlawfirm.com</a>
Cynthia A. Van Bogaert	283-7543	<a href="mailto:cvanbog@boardmanlawfirm.com">cvanbog@boardmanlawfirm.com</a>
Steven C. Zach	283-1736	<a href="mailto:szach@boardmanlawfirm.com">szach@boardmanlawfirm.com</a>

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**BOARDMAN**<sup>LLP</sup>  
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Boardman, Suhr, Curry & Field LLP  
Fourth Floor  
1 South Pinckney Street  
P.O. Box 927  
Madison, WI 53701-0927

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