**STATE OF WISCONSIN**
**DEPARTMENT OF JUSTICE**

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PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

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Mr. James Friedman
La Follette, Godfrey & Kahn
Post Office Box 2719
Madison, WI 53701-2719

Mr. Charles F. Graupner
Michael, Best & Friedrich LLP
Two Riverwood Place
N19 W24133 Riverwood Drive, Suite 200
Waukesha, WI 53188-1174

Gentlemen:

On behalf of the Milwaukee Journal Sentinel and the Milwaukee Area Technical College ("MATC"), you ask for an opinion under Wisconsin's public records law concerning the public's right to access "'evaluations of MATC President Darnell Cole prepared by members of the MATC Board of Directors during Dr. Cole's term of employment.'" The original request included within the definition of "evaluations" "letters and memos shared among board members as part of Dr. Cole's annual evaluation."

MATC denied the request stating that disclosure would

1) discourage the participation of MATC District Board members in the annual written review of Dr. Cole;

2) discourage MATC District Board members from being open and honest when assessing Dr. Cole's annual performance in written form;

3) discourage the MATC District Board's written feedback process for Dr. Cole currently in place at MATC;

4) serve to limit or undermine the effectiveness of Dr. Cole's leadership with MATC employees;

5) serve to limit or undermine the effectiveness of Dr. Cole's leadership with organizations partnering with MATC;

6) impinge on Dr. Cole's privacy interest as a public employee, MATC acknowledges the reduced privacy interests of Presidents of Technical College Districts;

7) discourage MATC District Board members from assessing in detail Dr. Cole's management of other administrator employees. A proper discussion of how Dr. Cole has managed other administrators and employees will/may involve reference to the performance of other identifiable employees. Of course, the public has an interest in keeping appropriately confidential personnel information related to these administrators/employees; and

8) impinge on the public's interest under Wis. Stats. § 19.35(1)(e) by disclosing information relevant to Dr. Cole's work with the collective bargaining representatives of MATC employees since the evaluation appropriately addresses collective bargaining relationship issues.

MATC's letter denying the request also referred to Wis. Stat. § 19.85(1)(c), that part of the open meetings law that allows governmental bodies to review performance evaluation data in closed session. Finally, MATC concluded that the public interest in not disclosing ongoing employer/employee communications regarding performance outweighed the public interest in the disclosure of such communications.

Wisconsin Stat. § 19.36(10)(d) provides that an authority shall not provide access under the public records law to records containing information relating to one or more specific employees "including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments . . . or other comments or ratings relating to employees." Under Wis. Stat. § 19.32(1bg), however, an employee "means any individual who is employed by an authority, other than an individual holding local public office." Wisconsin Stat. § 19.32(1dm) in turn includes within the definition of "'local public office'" "[a]n appointive office or position of a local government which is filled by the governing body of the local government . . . and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor." Wis. Stat. § 19.42(7w)(d).

Because a president of a technical college is included within the definition of a local public official, the exemption under Wis. Stat. § 19.36(10)(d) is inapplicable. Because there is no common law or statutory exception to providing access to the records, we must determine whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure (the balancing test). *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, ___ Wis. 2d ___, 699 N.W.2d 551.

Wisconsin courts consistently have held that prominent public officials must have a lower expectation of personal privacy than a regular public employee. In *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 557, 334 N.W.2d 252 (1983), the court held that a local chief of police was a public official subject to "close public scrutiny" and noted that "[b]y accepting his public position Bilder has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official."

In *Wis. Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 546 N.W.2d 143 (1996), the court reiterated that "an official in a position of authority should have a lower expectation of privacy regarding his or her employment records." *Newspress*, 199 Wis. 2d at 787, citing *Bilder*. In *Hempel*, the court's most recent pronouncement on the subject, the court again distinguished between rank and file employees and "prominent public officials" who have a lower expectation of privacy. *Hempel*, 2005 WI 120, ¶ 75.

In *Newspress*, the Supreme Court concluded that the public policies favoring disclosure outweighed any general public policy against releasing employee personnel records and ordered the release of records involving a disciplinary action against a school district administrator. In an earlier case, the court of appeals held that the public interest in disclosure of documents compiled in an investigation of a University of Wisconsin-Platteville dean outweighed the possibility of harm to the dean's reputation noting that the dean was a university official subject to close public scrutiny and concluding "[b]y accepting appointment as dean of a department of a state university . . ." [the dean] voluntarily took a position of public prominence. He has, for the most part, relinquished his right to keep confidential activities directly related to his employment. *Wis. State Journal v. UW-Platteville*, 160 Wis. 2d 31, 41, 465 N.W.2d 266 (Ct. App. 1990).

Although these cases concerned disciplinary records of prominent public officials, the court of appeals engaged in the same analysis concerning performance evaluations in *Jensen v. School Dist. of Rhinelander*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638. In that case, Jensen, the superintendent of schools, sought to block the release of the school district's evaluation of Jensen's performance. At the time the case was filed, Jensen had already been given notice of the nonrenewal of his contract and been placed on administrative leave. *Jensen*, 251 Wis. 2d 676, ¶ 5. The court of appeals concluded that the public interest in overseeing the school board and evaluating the manner in which it fulfilled its responsibilities outweighed Jensen's reputational interest because, in part, those interests had already been harmed when he was placed on administrative leave. *Jensen*, 251 Wis. 2d 676, ¶ 14.

Although the court in *Jensen* in part relied on the fact that Jensen had a diminished expectation of privacy because the public knew he was on paid administrative leave, the court's ultimate conclusion was that the diminished reputational interest "is patently inadequate to defeat the manifest public interest in evaluating the board's reasons for placing Jensen on paid

administrative leave while hiring an acting superintendent to perform Jensen's duties. Only if it has available what purports to be the board's basis for its actions can the public evaluate the board's judgment, and thus the desirability that its members remain in the public's service." *Jensen*, 251 Wis. 2d 676, ¶ 24.

Although here, unlike the situation in *Jensen*, there is no public manifestation of the board's evaluation of Dr. Cole's performance, the court's reasoning applies with equal force. Dr. Cole's reputational interest and expectation of privacy, although lowered because he is a prominent public official, has not been further lowered by any public disclosure of board action. But whether the public may know, or may surmise, what the board thought of an employee, cannot be determinative under the public records law. The public is entitled to know how the board members performed their duties as public officials. The public is entitled to know whether the board was doing its job when it evaluated Dr. Cole. The public cannot thoroughly evaluate the board's performance unless it can know how the board evaluated Dr. Cole's performance. That is true whether the board's evaluation is positive, negative or inconclusive.

The Legislature is presumed to act with knowledge of the existing case law. *Maurin v. Hall*, 2004 WI 100, ¶ 75, 274 Wis. 2d 28, 682 N.W.2d 866. The Legislature enacted Wis. Stat. § 19.36(10), which prohibits the release of employee personnel evaluations but allows the release of personnel records of "upper level governmental office or position," over one year after the court of appeals decision in *Jensen*. Note to 2003 Wisconsin Act 47, sec. 1. The Legislature is presumed to know, therefore, that the court had concluded that personnel evaluations of a school superintendent should be released. The notes to 2003 Wisconsin Act 47 reflect that the drafters specifically distinguished between releasing the records of an individual "who holds an upper level governmental office or position" and lower ranking employees. *Id.*

Some of MATC's reasons for denying access to the records, particularly reasons one, two, three and seven, posit that release of the records will discourage district board members from frankly discussing and evaluating the district president's performance. Wisconsin Stat. § 19.85(1)(c), an exception to Wisconsin's open meetings law, which allows closed meetings to review employee performance, recognizes these interests. The fact that the board's ultimate evaluation is made public, however, need not, and should not discourage board members from performing their mandated duties. To the extent release of any of the "letters and memos shared among board members" would adversely affect the public interest in promoting frank and complete evaluations, those records may be withheld or appropriately redacted. *See* Wis. Stat. § 19.36(6). The evaluation itself, however, should be the result of frank and complete discussion. Release of the board's conclusions about the president's performance does not mean that the deliberative process leading to those conclusions must be released. Similarly, if release of specific information in the evaluation would adversely affect the district's position in collective bargaining or unduly adversely affect the reputation of another employee, that information could be redacted. Any redactions, however, should be made with the understanding

that the Legislature has determined that that public records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.31.

The public has a right to judge not only Dr. Cole's performance. It has the right to judge the board's performance. A public evaluation of either the president or the board is impossible if the public is denied access to records reflecting one of the board's most important responsibilities.

In closing I would note that under Wis. Stat. § 19.56(9) MATC must provide Dr. Cole with written notice of what is going to be released and notice that he has the right to augment the record with written comments and documentation.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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