STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Michael R. Bauer
Legal Services Administrator
bauermr@doj.state.wi.us
608/266-0332
TTY 1-800-947-3529
FAX 608/267-2223

September 25, 2006

Mr. George A. Dunst
Legal Counsel
Elections Board
17 West Main Street, Suite 310
Madison, WI 53701-2973

Dear Mr. Dunst:

This is in response to your letter dated September 14, 2006, requesting advice concerning the interpretation of the Wisconsin public records law, Wis. Stat. §§ 19.31-19.39, under the following circumstances.

Appointed members of the Wisconsin Elections Board ("the Board") have received requests for e-mail correspondence sent or received by them on a matter considered at the Board's meeting of August 30, 2006, concerning Congressman Mark Green's conversion of his federal campaign committee to a state campaign committee. I further understand that the requested e-mails were sent or received on the personal e-mail accounts of the respective members because these members do not have e-mail accounts provided by the Board itself. The e-mail communications that are the subject of the requests for public records fall into two general categories: (1) e-mail communications between Board members themselves on the subject of the Green campaign conversion; and (2) e-mail communications between Board members and members of the general public on the same subject.

In this context, you pose two questions on behalf of members of the Board. First, are e-mail communications of either general category subject to the public records law? Secondly, if the public records law does apply, is there any basis under the common law balancing test, for not disclosing some or all of the requested communications?

The answer to the first question is unequivocally yes: an e-mail communication sent or received by a Board member in that capacity, whether from another Board member or from a member of the general public, on the subject of public business before the Board is plainly a "record" within the definition set forth in Wis. Stat. § 19.32(2). A "record" includes written material which has been received, created or is being kept by an authority in connection with the

official purpose or function of the agency, in this case, the Board. *See id.*; *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965); 72 Op. Att'y Gen. 99, 101 (1983). The Board is an "authority" subject to the statute. Wis. Stat. § 19.32(1).

The fact that these electronic communications are transmitted and stored on private e-mail accounts of Board members is immaterial, because Wisconsin law has long recognized that the substance of the record, not its physical location or custody, determines whether the document is subject to the public records statute. *See Journal/Sentinel v. Shorewood School Bd*, 186 Wis. 2d 443, 452-53, 521 N.W.2d 165 (Ct. App. 1994); *cf. International Union v. Gooding*, 251 Wis. 362, 370-71, 29 N.W.2d 730 (1947). Accordingly, I must conclude that, in general, e-mail communications created or received by Board members in connection with the official business of the Board are "records" within the scope of the public records statute.

Your second question asks whether, if these communications are "records" under the statute, there is any basis under the common law balancing test to withhold some or all of the requested e-mails. The statute creates a presumption in favor of access to public records. Wis. Stat. § 19.31. If neither a statute nor case law requires disclosure or creates a blanket exception from disclosure, the custodian must apply what is called the common law balancing test in order to determine whether the strong presumption favoring disclosure is overcome by public interests favoring confidentiality. *See State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969).

In applying the balancing test, the custodian must on a case-by-case basis identify any public interests that favor confidentiality of all or parts of particular records. The custodian then must determine whether any identified interests outweigh the strong presumption of disclosure. You have not suggested any interests of the public that would support nondisclosure of the requested e-mails and it would not be appropriate for me to speculate on what such interests might be. Certainly, unless the custodian can identify public interests that not only support nondisclosure, but also outweigh the presumption favoring disclosure, the records must be released.

I hope this information assists the Board in responding to the pending record requests "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). Thank you for the opportunity to clarify the scope of the statute and its application to records that are not currently stored within the agency itself. I do suggest, however, that the Board consider the creation of e-mail accounts

for Board members that are within the control of the Board and that the Board reiterate and clarify the responsibility of individual members to preserve and retain records, including e-mail communications, created or received in connection with official business.

Sincerely,

Michael R. Bauer
Assistant Attorney General
Administrator, Legal Services

MRB:MMF:rkk