

Access to Public Records and Personnel Files

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Public Records

- ▶ The public records law presumes complete public access to district records and that the denial of public access is generally contrary to the public interest.
- ▶ A district may only deny access to public records in “exceptional cases.”
- ▶ The purpose is to shed light on the workings of government and the acts of public officers and employees.



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Public Records - Basics



- ▶ “Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.



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Public Records - Basics

- ▶ The definition of “record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved.
- ▶ In other words, a “record” is any information created or kept in connection with the official purpose or function of the school district.



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Public Records

- ▶ Not all documents or information constitute a public record.
- ▶ A record does not include (for example):
 - Drafts, notes, preliminary documents and similar materials prepared for the originator's personal use . . .
 - Published material available for sale or at the library.
 - Material with access limited due to copyright, patent, or bequest.
 - An identical copy of an otherwise available record.



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Public Records

- ▶ Not all documents or information constitute a public record.
- ▶ An email that is purely personal in nature may or may not be subject to disclosure.
 - If the email becomes a part of an investigation as to whether the employee or local public official violated the law or policy, the personal emails will become records subject to disclosure.
 - *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86.



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Public Records Notice

- ▶ Districts must adopt and display a public records notice that includes:
 1. A description of the organization.
 2. The established times and places members of the public may inspect and copy records.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records.
 - a. Copy fees are limited to the “actual, necessary and direct cost” of reproduction, unless a fee is otherwise specifically established or authorized to be established by law.
 - b. “Reproduction” means the act, condition, or process of producing a counterpart, image, or copy. Reproduction is a rote, ministerial task that does not alter a record or change the content of the record. It involves only copying the record – for example, by printing out a record that is stored electronically or making a photocopy of a paper record.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records.
 - c. The Department of Justice has opined that photocopy fees should be around \$.15 per page and anything more than \$.25 may be suspect.
 - d. Costs of a computer run may be imposed on a requester as a copying fee.
 - e. Transcription fees may be charged, but are limited to the “actual, necessary and direct” cost of transcription, unless a fee is otherwise specifically established or authorized by law.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records.
 - f. Photography and photographic reproduction fees may be charged if the authority provides a photograph of a record, the form of which does not permit copying, but are limited to the “actual, necessary, and direct” costs.
 - g. Actual, necessary and direct locating costs may be charged only if the cost of locating the records is \$50 or more. “Locating” a record means to find it by searching, examining, or experimenting.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records.
 - h. Mailing and shipping fees may be charged, but are limited to the “actual, necessary and direct cost” of mailing or shipping.
 - i. A records authority may require prepayment for any fees if the total amount exceeds \$5.00, and the authority may refuse to make copies until payment is received; however, except for prisoners, the statute does not authorize a requirement for prepayment based on the requester’s failure to pay fees for a prior request.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records.
 - j. An authority is not required to charge fees and may provide requested records for free or at a reduced rate.
 - k. An authority may not make a profit on its response to a records request.
 - l. Generally, the rate for an actual, necessary and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task.



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Public Records Notice

- ▶ Districts must adopt and display a public records policy that includes:
 3. The costs for obtaining records – May an authority charge for time spent redacting records prior to their release?
 - No. Review and redaction of records are separate processes from locating and reproducing the records. Therefore, because the statute does not specifically authorize an authority to charge a requester for review and redaction costs, these costs must be borne by the authority. *Milwaukee Journal Sentinel*, 2012 WI 65.



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Public Records Notice

4. The identity of the legal custodian(s).
5. The methods for accessing or obtaining copies of records.
6. For any authorities that do not have regular office hours, any notice requirement of intent to inspect or copy records.
7. Each position that constitutes a local public office.



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Public Records Notice

- ▶ Additionally, districts are required to provide the name of the legal custodian, and a description of the nature of his or her duties as records custodian, to all employees of the district entrusted with records that are subject to the records custodian's supervision. § 19.33(4).



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Public Records Legal Custodian

- ▶ An elected official such as a school board member is the legal custodian of his or her records;
- ▶ The school board president is responsible for the board's records unless a records custodian is designated.



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Public Records Requests

- ▶ Do not have to be made in writing.
- ▶ Do not have to contain “magic words” if they reasonably describe the record or information requested.
- ▶ Must be reasonably specific as to subject matter or length of time represented by the record.
- ▶ Districts are not required to comply with standing requests for records that do not yet exist.



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Public Records Requests

- ▶ A district cannot require a person making a request to identify him or herself – except in very limited circumstances.
- ▶ A district cannot require a person to disclose the reason for which he or she is requesting the record.
- ▶ A district cannot reject a request received by mail unless the prepayment of a fee is required.



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Public Records Requests – Section 19.35(1)(a) & (1)(am):

- ▶ Except as otherwise provided by law, a requester has a right to inspect any record.
- ▶ In addition to the right above, if the requester is seeking records in which he or she is the “record subject,” the requester has greater access to those records than a member of the public.
 - Any requester has a right to inspect any record containing personally identifiable information.



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Public Records Requests – Section 19.35(1) & (1)(am):

- ▶ However, the record subject’s right does not extend to:
 - Any record collected or maintained by a district in connection with a complaint, investigation, or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.



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Public Records Requests – Section 19.35(1) & (1)(am):

- ▶ However, that right also does not extend to:
 - Any record containing personally identifying information that would, if disclosed:
 - Endanger an individual’s life or safety.
 - Identify a confidential informant



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Responding to Requests

- ▶ Responses are mandatory under the law.
- ▶ Districts are required to respond to all public records requests “as soon as practicable and without delay.”
- ▶ The attorney general has opined that ten working days is a reasonable time period to respond.
- ▶ If it will take longer, districts are advised to notify the requestor that the request is being processed and a response will be provided as soon as it is feasible for the district to do so.



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Responding to Requests

▶ Four-step approach:

1. Does the requested record exist?
 - a. If so, proceed to step 2.
 - b. If not, notify the requestor in writing that no such record exists.



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Responding to Requests

▶ Four-step approach:

2. Is the requester entitled to access the record pursuant to statute or court decision (e.g., uniform traffic accident reports)?
 - a. If yes, provide the record to the requester.
 - b. If not, proceed to step three.



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Responding to Requests

▶ Four-step approach:

3. Is the requestor prohibited from accessing the record pursuant to statute or court decision (e.g., information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation)?
 - a. If yes, notify the requester in writing of the specific statutory provision and reasons prohibiting release.
 - b. If not, proceed to step four.



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Responding to Requests

▶ Four-step approach: Balancing Test

4. If a requestor is neither explicitly entitled to nor prohibited from receiving the requested record, the records custodian must balance the strong public interest in disclosing the record against any public interests favoring nondisclosure.



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Responding to Requests – Redacting

- ▶ If a record contains some information that can be released and some information that cannot be released, the records custodian must redact those portions of the record that cannot be released and provide the requester with a redacted copy of the record.



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Responding to Requests – Denials

- ▶ If a district denies all or part of a request, it must notify the requester in writing and list every specific statutory and policy reason for denying the request.
- ▶ Merely citing to a statute number or case name will not suffice. Reasons for denial must be specific and sufficient.
- ▶ The district must also notify the requester of his or her right to file a mandamus action in court to force the district to release the record.



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Enforcement and Penalties

- ▶ If the requester prevails, the district may be forced to pay for court costs and the requester's attorney fees.
- ▶ If the district arbitrarily or capriciously denied access, it may be subjected to punitive damages and a civil forfeiture of up to \$1000.



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Requests for Personnel Records

- ▶ “Employee”? “Local public officer?” Applicant?
 - “Employee” means any individual who is employed by an authority (school district), other than an individual holding local public office, or any individual who is employed by an employer other than an authority.
 - “Local public office” means an elective office of a local government unit and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency or division of the local governmental unit, but does not include any office or position filled by a municipal employee as defined by the Municipal Employment Relations Act.



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Requests for Personnel Records

- ▶ Who is making the request?
 - Member of the public or media?
 - Employee?
 - Record subject?



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Requests for Personnel Records

- ▶ Personnel records of employees and local public officers prohibited from release to the public or media:
 - Home address (except board members);
 - Home email address;
 - Home telephone number;
 - Social security number; and,
 - Financial identifying information.



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Personnel records of employees prohibited from release to the public or media:

- Information relating to the *current* investigation of a possible criminal offense or possible misconduct connected with employment by an employee *prior to the disposition of the investigation*.
- What's constitutes "the disposition of the investigation?"
 - *Local 2489 v. Rock County*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644.
 - *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W. 2d 240.



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Personnel records of employees prohibited from release to the public or media:

- ▶ Information relating to one or more specific employees that is used by an authority for *staff management planning*, including:
 - Performance evaluations;
 - Judgments or recommendations concerning future salary adjustments or other wage treatments;
 - Management bonus plans;
 - Promotions;
 - Job assignments;
 - Letters of reference;
 - Employment examination.



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Personnel records of employees prohibited from release to the public or media:

- ▶ Information relating to one or more specific employees that is used by an authority for *staff management planning*, including:
 - Performance evaluations - 2011 Act 166:
 - s. 120.12 (2m) **School board duties.** The school board of a common or union high school district shall:
 - (2m) EDUCATOR EFFECTIVENESS (a) Beginning in the 2014-15 school year, evaluate the effectiveness of each teacher and principal employed by the school district . . .
 - (b) Ensure that the results of evaluations conducted under this subsection are *not* subject to public inspection, copying or disclosure under s. 19.35.



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Personnel records – notice of right of action

- ▶ If a district decides to permit access to :
 - A record relating to an **employee** that is the result of an 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 district;
 - A record obtained by the district through a *subpoena* or *search warrant*; or
 - A record prepared by *an employer other than the district*, if the record contains information *relating to an employee of that employer*, unless the employee authorizes the district to provide access to that information.



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Personnel records – notice of right of action

- ▶ If a district decides to permit access to any of those records:
 - The district must first *notify the employee* who was the record subject of its intent to release the requested records and of the employee's right to seek a *restraining order* in court to prevent the district from releasing the record.



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Personnel records – notice of right of action

- ▶ If a district decides to permit access to :
 - Any record relating to a *local public official*, the district should first notify the local public official who was the record subject of its intent to release the requested records and of the local public official's right to *review and augment* the records with written comments and documentation prior to their release.



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Personnel records available for inspection by an employee or his or her union representative (including local public officers) under section 103.13 of the Wisconsin statutes:

- ▶ Documents used to determine that employee's qualifications for:
 - employment,
 - promotion,
 - transfer,
 - additional compensation,
 - termination, or
 - other disciplinary action.



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Personnel records not available for inspection by an employee (including local public officers) under section 103.13 of the Wisconsin statutes:

- ▶ Records relating to the investigation of possible criminal offenses by that employee.
- ▶ Materials used by the employer for staff management planning
...
- ▶ Records relevant to any other *pending claim* between the employer and the employee which may be discovered in a judicial proceeding.



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Personnel records not available for inspection by an employee (including local public officers) under section 103.13 of the Wisconsin statutes:

- ▶ Any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document.
- ▶ Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.



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Identities of Applicants for Public Positions:

- ▶ Every applicant for a position may indicate in writing that the district may not reveal his or her identity. Except with respect to an applicant who is a “final candidate,” if an applicant makes such an indication, the district shall not provide access to any record related to the application that may reveal the applicant's identity.
- ▶ “Final candidate” means each applicant for a position who is seriously considered for appointment to a local public office or whose name is certified for appointment to a local public office.



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Identities of Applicants for Public Positions:

- ▶ “Final candidate” includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the position.
- ▶ Whenever an appointment is to be made from a group of fewer than 5 candidates, “final candidate” includes each candidate in the group.




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Case Study #1:

- ▶ Public employee is investigated by his employer for a violation of the employer’s work rule.
- ▶ A local newspaper requests all investigatory and disciplinary records for that employee related to the rules infraction.
- ▶ Release records?




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Case Study #1:

▶ Process:

- Do the records exist?
- Is the requester entitled by statute to receive the records?




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Case Study #1:

▶ Process:

- Is the requester prohibited from receiving the requested records?
 - Is the investigation ongoing or has it reached its disposition?
 - Do the records consist of “staff management planning” documents, such as performance evaluations?



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Case Study #1:

▶ Process:

- If not expressly prohibited, perform the balancing test.
 - Redact some information such as evaluative judgments made by supervisors?

Case Study #1: *Kroeplin v. Wis. Dept. of Natural Res.*, 2006 WI App 227



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- ▶ What if the individual investigated was not an employee, but a local public official, and it was a current investigation?
- ▶ Because the discussed express statutory exemptions apply to “employees” only, the employer would have to balance the public’s interest in disclosure against the public’s interest in non-disclosure in releasing the record during the course of the investigation.
- ▶ *See Jensen v. Sch. Dist. of Rhineland*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638.



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Case Study #2:

- ▶ Employer investigates potential employee misconduct (violation of internet/technology acceptable use policy).
- ▶ Employer disposes its investigation by terminating the employee.
- ▶ Employee files a grievance and claims that the district did not have just cause for his termination.
- ▶ Newspaper files a request for the investigatory and personnel files.



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Case Study #2:

- ▶ The records exist, but there is no express statutory or common law provision that entitles the newspaper to the files.
- ▶ Is the newspaper expressly prohibited from accessing the records?



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Case Study #2:

▶ Balancing test:

- Does the public's interest in protecting the employee's privacy and reputational interests outweigh the public's interest in knowing what a public employee was accessing on his employer's computer?
- Isn't the public's interest served by simply knowing that he violated the employer's acceptable use policy?



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- ▶ Release all of the records, or redact some of them?

- ▶ Notice requirements?

Case Study #2: *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W. 2d 240.



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▶ **Case Study #3:**

- District and union reach tentative agreement over a collective bargaining agreement covering an increase to total base wages.
- The union subsequently demands that the district provide it with the home addresses of the employees covered by the tentative agreement so that it can communicate with those members about the details of the TA and about the details of the upcoming ratification vote.



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▶ **Case Study #3:**

- Step 1 – the records clearly exist.
- Step 2 & 3 - is the requester entitled to, or prohibited from, accessing the record pursuant to statute or court decision?
- Pursuant to what statute has the union made the request? §19.35(1)(a), §103.13, and/or pursuant to its duty of representation under §111.70?



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▶ **Case Study #3:**

- Step 2 & 3 - is the requester entitled to, or prohibited from, accessing the record pursuant to statute or court decision?
 - On the one hand, we know that §19.36(10) prohibits a district from releasing employee home addresses without their consent.
 - On the other hand, we know that, pursuant to the duty to bargain in good faith, we have to provide the union with information that is relevant and reasonably necessary for the union to meet its obligations to bargain and administer a collective bargaining agreement.

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▶ **Case Study #3:**

- If the union were making the request pursuant to the public records law or §103.13, the district would deny the request absent employee authorization, which in this case, it did not have.
- Therefore, the question becomes, are the employee home addresses “relevant and reasonably necessary” for the union to meet its obligations to bargain and administer a collective bargaining agreement?



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► **Case Study #3:**

- *School District of La Crosse*, Dec. No. 34659 (WERC, 11/19/2013).
 - “When the information being requested is something other than wage and fringe benefit data, the burden is on the [union] to demonstrate the relevance and necessity of said information to its duty to represent unit employees.”
 - Although the district denied the union’s request for employee home addresses, it offered to provide the union with alternative means of contacting the employees by providing the union with their work addresses, work email addresses, work phone numbers and even offered to send a sealed packet of information to the employees’ homes.



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► **Case Study #3:**

- *School District of La Crosse*, Dec. No. 34659 (WERC, 11/19/2013).
 - Because the district offered alternative means of contacting the employees, the union could not meet its burden to prove that it was entitled to their home addresses as information that was relevant and reasonably necessary to its representational duties, and the district prevailed.



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Case Study #4:

- ▶ What if you are in the process of developing or revising a handbook provision, but it's not finished or approved, and you receive a request for all present and future staff handbooks?
 - Does the record (or records) exist?
 - Making the request pursuant to the public records law or duty to bargain?
 - Subject to copyright?
 - Fall within the definition of "record"?



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Records Retention:

- ▶ Unless a district has adopted DPI's records retention schedule for school districts or an explicit statutory exception applies, a school district record must be kept for at least 7 years before the district can destroy the record as obsolete.
- ▶ Prior to the destruction of obsolete records, a district must provide the State Historical Society with at least 60 days' written notice. The Historical Society may preserve any records of historical significance.



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Questions?

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WASB's Public Records Resources:



► Legal Comments:

- “Recent Statutory Changes to the Public Records Law (Part I),” September 2003; Part II, October 2003.
- “Final Candidates Under the Wisconsin Public Records Law,” August 2008.
- “Disclosure of Employee Investigation and Disciplinary Records,” July 2007.
- “Records Retention Schedules,” October 2002.

See also “Wisconsin Public Records Law Wis. Stat. secs. 19.31-19.39 Compliance Outline,” Dept. of Justice, Atty. Gen, Brad Schimel, November 2015.

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Presenter Bio

Ben Richter has been a WASB staff counsel since 2007 and directly represents many school districts across the State of Wisconsin on employment, human resources and school law matters. Ben also provides general legal information to all WASB member school districts.

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