

# Confusion, concern in St. Germain over open-records compliance

By Fred Williston

SPECIAL TO THE LAKELAND TIMES

In discussing St. Germain's open-records policy during the Monday, March 13 town board meeting, Supervisor Ted Ritter said he was "shocked" by advice he had received from the town's attorney, Steve Garbowicz.

For the last few months, Ritter and Town Clerk June Vogel have been working together to formalize St. Germain's policy and procedures regarding open-records requests. They were motivated to act after reading an article in the Wisconsin Towns Association (WTA) magazine.

"Has your town board adopted a public records access policy pursuant to Wis Stat 19.34?" the article asks. "This would be the document that spells out when public records can be accessed, what fees will be charged, who is the custodian of which records, etc. ... The law requires that each authority adopt a public records access policy and post it where your records are kept. Don't be caught flat footed."

On January 31, Ritter emailed the WTA's attorney and assistant director, Carol Nawrocki, and asked "Is it appropriate/advisable for a town to adopt an ordinance pertaining to open records requests? If so, can you point me to any examples?"

Nawrocki replied (in part) "An ordinance is another way to establish such policies and procedures", and she furnished Ritter with one example ordinance passed by the Town of Shelby (near LaCrosse) in 2010, and another adopted by the Town of Buchanan (near Appleton) in 1997.

Ritter then drafted a simple, one-page ordinance, and he and Vogel worked together to draw up a list of fees. They also crafted one form for requesting documents and one for the clerk's office to track its progress in fulfilling those requests.

Ritter told *The Lakeland Times* "I thought 'You know, before I take this to the board as a draft, I'm going to send it to Steve Garbowicz'. And he came back with a rather lengthy written response and it basically said 'Don't do any of these things'."

In a March 2 email from Garbowicz to Ritter, the attorney said Wisconsin's public records law has been interpreted many times in courts of appeal and by the state supreme court, with judges issuing many opinions on it. Garbowicz wrote "Those of us that practice law in this area are fairly familiar with those decisions and our opinions correspond to those (judges') opinions."

He advised Ritter "Therefore, by trying to put an Ordinance in place, you run the risk of putting myself (sic) and any other attorney who may look at your Open Records Ordinance in danger of trying to compare that to the Statutes and Court cases. As an attorney that practices in this area, I have to tell you that I much prefer dealing with the opinions of the Courts and the Statutes. ... I have some familiarity with these issues. I have no familiarity with your Ordinance and how it would relate to the Statutes and Court cases."

"Therefore," Garbowicz wrote, "I would advise you that I would not as a Town endeavor to legislate some type of Open Records Ordinance. I would simply stay away from this whole area of the law."

Regarding open-records request forms, Garbowicz advised "The danger with those forms, and I have seen these elsewhere, is that communities begin to require people to use those forms for records requests only. That is not allowed by numerous Court cases. In fact, the Courts have evolved the records requests to

the point that oral requests are sufficient and do not have to be reduced to writing ... There is no desired form for making a request. The Courts are quite clear that any sort of written request or any sort of oral request suffice."

"Therefore," the attorney concluded "I would advise the Town Board of the Town of St. Germain to refrain from legislating in this area of Public Records Law and Public Records Requests."

Wisconsin State Statute 19.35(1)(h) specifically states "A request may be made orally, but a request must be in writing before an action to enforce the request is commenced."

Case law has established a government entity cannot mandate written request forms as the only acceptable means of making an open-records request. With that question answered, Ritter asked another.

In a follow-up email that same day, Ritter asked "Can the Town assess a reasonable copy fee per page of requested documents, and if so, under what authority if we have no ordinance?"

On March 6, Garbowicz replied to Ritter saying "The last Attorney General ... did a study in the Attorney General's Office in Madison as to copy costs and determined that the copy costs of 1/10th of a cent per page was reasonable. He then issued an opinion that more or less put every municipality under the same rule. At that price it is just not even worth charging a copying fee."

He concluded "Therefore, my recommendation is for a paper copy and maybe a couple of paper copies I would not even charge. If it is something much larger or a transfer from paper to a digital device, certainly that is something you could charge for."

During last week's board meeting, Vogel said "Requests will still come to the clerk, and I'll make documentation on my end of what I'm doing, but basically, we shouldn't have an ordinance and we're not going to charge; none of that fun stuff that we thought we were going to put in place."

With the question of fees being answered, Ritter asked whether the town should have a publicly-posted procedural policy for making open-records requests.

He said "If you read it — (the WTA says) you've got to have an ordinance; you've got to have a policy. That's something that needs to be posted, 24/7/365 regarding records access."

Wisconsin Statute 19.34 (1) states: "Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the authority that constitutes a local public office or state public office."

Supervisor Brian Cooper asked "Isn't it all covered in the state statutes?"

"Yes," Ritter replied, "But you have to do it. And we're not doing it. And this — everything that I drafted

— is what I thought the statutes require of us. According to our attorney, he's saying 'Don't do anything.'"

Vogel said she had spoken with representatives from several nearby municipalities, and among those, only Eagle River had an ordinance in place.

Ritter said "The Town of Washington does ... I've seen the exchange between Attorney Garbowicz and the Town of Washington two years ago. It was very different from the advice we got now."

He continued "To our attorney's credit, he explains in his two letters to me that this open-records law is constantly changing. It's a moving target. Judges keep making different decisions, and he's at the point where he's saying it's very, very difficult for towns to stay on top of this rapidly-changing landscape, and it's easier to just not do anything. And when you get an open-records request, do your best to respond positively, don't charge a fee, just get it done, and make the requester happy."

"So why does that surprise you?", Cooper asked.

"Because it's not what the statutes say," Ritter said. "And he's (Garbowicz) saying that the statutes are essentially being ... They're not being amended, but judges are changing the interpretation of the statute. Or the validity of the statute. Maybe the statutes aren't even valid anymore, based on what judges are saying. But he's saying 'Just forget everything the statutes say and ...'."

Addressing the board, Ritter said "I just want everybody to understand that. I encourage June to keep a record of this whole thing that we've prepared and the email exchanges with the attorney so we have a history of what we constructed and how we tried to abide by statute. We were given advice by our town's attorney that is contrary to the statutes. And we've discussed it here."

"Towns do need to post a notice where your public records are kept," Cooper said. "So, we don't have fees, but maybe all we need to do is let them know the clerk's office is here; here's the clerk's phone number; here's where the records are kept."

"The guideline for posting in the statute is just that," Ritter said. "And Attorney Garbowicz is saying 'No; don't even do that. Just don't do it.'"

Ritter said "In fairness to the clerk, the board needs to really understand what occurred during this exchange of documents and acknowledge in the minutes that we are aware of the guidance we've received from the attorney, and we'll abide by it."

He made a motion "That in regards to the town's attempts to comply with state open-record laws, we will abide by the guidance given by Attorney Garbowicz in his letters...to me."

The board voted unanimously to approve.

The following day, Ritter spoke to *The Times*. When asked how to describe the St. Germain's open-records procedural policy now, he said "I would say we don't have a policy. We don't have a written policy. We don't have anything in our procedures ordinance that tells us what to do ... But our attorney is basically saying 'Don't do any of it. When you receive a request — no matter what format it comes in — respond to it

positively, quickly, and freely.'"

He said "I don't know in my mind what's better: not having a procedure, or having a procedure that could cause problems."

"Maybe what (Garbowicz) is saying is 'You know, you ought to be able to get this done without all of this documentation. Just do it.'"

Cooper's question about whether a simple posting with contact information would equate to compliance with 19.43(1) was never answered.

Ritter said "That detail is not specifically discussed in that exchange" with Garbowicz.

To Ritter's recollection, there have been no complaints about — or challenges to — St. Germain's open-records compliance during his seven-year tenure on the board. In fact, *The Times* has awarded "A" grades or better to elected officials in St. Germain for the last several years.

To the best of Ritter's knowledge, though, the town may or may not be in compliance with 19.43(1).

That means many other governments in the area could be in the same boat.

Garbowicz spoke with *The Times* on March 15. "I represent most of the towns in Vilas County," he said. "Some in Forest; I represent Florence County; the City of Eagle River. I've been on a town board for 12 years myself."

"I have to say, if I look at every community I represent, nobody has an ordinance."

In regards to its "may-or-may-not" quandary over compliance with 19.43(1), St. Germain could have a potentially easy fix available.

When asked specifically about Cooper's suggestion of a simple contact-list, Garbowicz said "Yes, you can certainly do that. I don't have an objection to that. But I think everyone — every town elected official — should realize that they can receive a public-records request themselves, which then binds the town to respond."

"I can try to draft a policy that points everybody to the town clerk," he said. "But the problem in St. Germain — as in most towns — is that the town clerk is not a full-time employee. And so, if you have a public-records request that you would like to make at nine o'clock tomorrow morning, and you go to the town hall and there's no town clerk, but you can go see (Town Board Chairman) Tom Christensen at his business."

"I think to force people to act in a certain fashion and deliver requests to a set office that may not always be open, or not be open when it's convenient for them, I think that leads to frustration," Garbowicz said. "And I don't necessarily think that's the best way to govern."

*The Times* asked Garbowicz if he considered St. Germain to be in compliance with statute presently, despite having no publicly-posted information regarding records requests.

"To say that, you can only judge that upon a request that's received," he said. "For me to say — point blank — that all of my municipal clients are complying with the public-records law, well, I'd sure as hell would like to think they are. But can I sit here and tell you beyond a shadow of a doubt that they are? No."

"Compliance," he said, "is on a case-by-case basis."

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