

## **Josh Kaul Response**

### **Question 1**

**What challenges does the attorney general's office face with enforcing the public records and open meetings laws and what could be done to address those challenges?**

The biggest challenge DOJ faces with respect to the enforcement of public records and open meetings laws is limited resources. The best way to address this would be for the state legislature to provide additional funding and position authority for DOJ's Office of Open Government (OOG).

### **Question 2**

**What is your assessment of the DOJ's Office of Open Government? What are its strengths and weaknesses?**

OOG does an excellent job with the limited resources available. OOG provides general guidance that government agencies can rely on, and it provided important guidance regarding compliance with the open meetings law during the pandemic and the impact of Marsy's Law on public records issues. OOG also capably handles public records requests that DOJ receives and public records and open meetings inquiries. More resources would allow OOG to respond to those requests and inquiries more quickly.

### **Question 3**

**Local governmental bodies routinely post agenda items and closed session notices that are insufficiently specific. What can the AG's office do to address this problem?**

DOJ can and should address any regularly occurring problems in compliance with the open meetings law through general guidance. DOJ can also provide specific guidance to a local governmental body in response to a particular notice that lacks sufficient specificity.

### **Question 4**

**Do you agree with the majority's decision and reasoning in Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57? Why or why not?**

No. Friends of Frame Park creates the absurd result that the requester must bear their costs of litigation where the government wrongly initially declines to provide records but then subsequently provides them prior to a court ruling. This decision removed a key check on unnecessary delays in public records compliance, undermines transparency in government, and, in many cases, could make obtaining records cost-prohibitive. It is at odds with the public policy of Wisconsin, as set forth in Wis. Stat. § 19.31, "that all persons are entitled to the

greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”

#### **Question 5**

**Do you agree with the majority’s decision and reasoning in Wisconsin Manufacturers & Commerce v. Evers, 2022 WI 38? Why or why not?**

Yes. This decision was a straight-forward application of the relevant statutory language.

#### **Question 6**

**Requesters seeking records from both local and state units of government often encounter lengthy delays, despite the statutory mandate that authorities respond “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a). What are the underlying causes of this problem and what would you do if (re)elected to address it?**

The causes of such delays almost certainly vary depending on the agency and the specific request, but I believe that many delays result in part from the general under-resourcing of critical services and the lack of resources at many agencies for personnel responsible for responding to public records requests. I have advocated and will continue to advocate for the state legislature to invest in public safety and address the decades of underfunding of the criminal justice system.

#### **Eric Toney Response**

#### **Question 1**

**What challenges does the attorney general’s office face with enforcing the public records and open meetings laws and what could be done to address those challenges?**

The Wisconsin Open Meetings and Public Records Laws apply to many state and local public agencies in Wisconsin. The broad sweep of these laws places a premium on applying sufficient resources to enforce these laws. As Attorney General, I will apply sufficient resources and prioritize the proper administration and enforcement of these laws.

However, enforcement is also not an exclusive authority of the Department of Justice. These laws also permit enforcement by private persons.

Therefore, enforcement must be accompanied by greater efforts to educate those entities subject to these laws and the public. The Attorney General has a special statutory authority to provide guidance to state and local governments and the public. Making use of this authority through issuance of opinions, informal guidance and educational sessions organized by DOJ or other organizations will be a priority.

## Question 2

### **What is your assessment of the DOJ's Office of Open Government? What are its strengths and weaknesses?**

The strength of the Office of Open Government is its existence, its mission, and the experts who staff it. Its only weakness is, it currently is not prioritized. The Office of Open Government (OOG) which was created by then Attorney General Brad Schimel in 2015, was and still could be an excellent resource for anyone with questions about Wisconsin's Open Meetings and Public Record laws, if its mission is prioritized by the Attorney General. Currently, it is not. Response times for public records requests have lagged, with an increase from an average response time of 10 days in 2018, to an average of anywhere from 30-86 days in 2022. Advice has not been updated since May of 2021 in many areas, and no new training events have been scheduled since May of 2021. The OOG conducted 12 trainings in 2016 and 10 trainings in 2018. In 2021, the OOG conducted just 2 trainings. [WISFOIC comment: After Toney's campaign submitted its response, the Department of Justice posted three trainings from September 2022 on its website.]

Aside from its public education, training and advisory functions, the OOG also acts as the public records custodian for the DOJ. They serve a critical role in ensuring the public has access to important public records. DOJ's services are broad, touching law enforcement, civil litigation, victim services, providing grant funding, and much more. The public should be able to access public records to ensure their Attorney General is upholding his duties in each of these respects. Josh Kaul's DOJ has not prioritized this critical function of the agency. According to his own pending requests of DOJ, updated last on September 19, 2022, the agency has unfulfilled records requests dating back to July of 2020.

Further, in 2017 AG Schimel instituted a policy of publicly posting certain responses to public records. During 2017 through 2018, the Office published nearly 50 responses. From January 2019 through today, a period of almost 4 years, AG Kaul has only posted 5 responses, most of which were critical law enforcement incidents.

When elected, openness and transparency will be a priority for my office. As the state official tasked with providing our citizens with guidance on the Open Meetings and Public Records laws, it is imperative that I lead by example - and I will do so.

**[WISFOIC comment: The Toney campaign's initial response to Question 2 contained inaccurate factual assertions about the Office of Open Government's caseload statistics. The campaign submitted the revised response above.]**

## Question 3

**Local governmental bodies routinely post agenda items and closed session notices that are insufficiently specific. What can the AG's office do to address this problem?**

The Attorney General can make use of the special authority to interpret the Open Meetings Law to guide local governments when questions arise. The AG can also issue both formal and informal guidance, whether issued in writing or through educational sessions and programs offered by DOJ or private organizations. Efforts should be made to guide those subject to the law to achieve compliance.

**Question 4**

**Do you agree with the majority's decision and reasoning in Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57? Why or why not?**

As Attorney General, once the highest Court has spoken, my job is to follow their directive. My role as Attorney General is to follow the law, upholding the Constitution. That said, the Court has made clear there are areas of Wisconsin's Public Records Law that need some clarification or revision. I do agree that it is important that legal maneuvering by well-funded Government lawyers should not absolve members of the public from remedies for violations of Public Records Law. Frame Park requires some clarity from the Legislature regarding the impact of writs of mandamus that are ultimately mooted by the action of the custodian of records and I commit to working with the Legislature to navigate those questions.

While this case had serious implications for Wisconsin Public Records Law, it does not come near to the damage done to government transparency like that done by Josh Kaul's failure to adhere to our state's foundational principle of open government. There is absolutely no reason records requests remain unfulfilled for years. As Attorney General, transparency will be a priority. I intend to reverse the damage done by Kaul and restore the Office of Open Government to what it once was and even improve upon it.

**Question 5**

**Do you agree with the majority's decision and reasoning in Wisconsin Manufacturers & Commerce v. Evers, 2022 WI 38? Why or why not?**

As previously indicated, as Attorney General, my duty is to follow the law. However, similar to Frame Park, in WMC, the Court again demonstrated that there are areas of Wisconsin Open Records Law that need to be addressed. In WMC, serious, and unprecedented issues of privacy were raised and perhaps there are instances where third parties must be able to intervene as the best representatives of their privacy interests. On the other hand, I am sympathetic to the concerns raised by allowing third parties to stall release of public records and third parties shouldn't automatically be presumed to have the ability to block the release of records. Again, I will work with the Legislature to strike that balance. In any event, I will follow the directive of the Supreme Court in similar cases moving forward.

However, I reiterate, that although this case raises concerns with Wisconsin Public Records Law, it does not compare to the damage done to government transparency by Josh Kaul and his failure to adhere to our state's foundational principle of open government. As Attorney General, transparency will be a priority, and I will fix the damage caused by Josh Kaul.

## **Question 6**

**Requesters seeking records from both local and state units of government often encounter lengthy delays, despite the statutory mandate that authorities respond “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a). What are the underlying causes of this problem and what would you do if (re)elected to address it?**

There may be a number of reasons that responses to records requests are delayed beyond the statutory standard for a timely response. State and local agencies may not be aware that DOJ has historically advised that a response should occur within 10 days of the receipt of a sufficient request. Requesters may not know how to make a request sufficiently specific to allow a prompt response. Agencies may not have sufficient personnel to fulfill requests or may not have practical guidance to understand how to resolve ambiguities that may accompany a request. It's also very desirable for agency personnel and requesters to talk about a request to clarify the public information sought.

The Attorney General can assist when requested and can make greater use of the AG's authority to provide on-going practical advice and guidance to agencies and requesters. Where appropriate, the AG can also advise the Legislature if and when statutory clarifications to the current statute should be considered.

However, what certainly has been a significant problem over the last four years is having a DOJ that does not prioritize transparency. As previously indicated, response times have lagged, advice has not been updated since May in many areas, and no new training events have been scheduled in well over a year. These are all areas that when elected, I will prioritize and ensure transparency within the DOJ.