

WISCONSIN PUBLIC RECORDS LAW LEGAL UPDATE: ELECTRONIC RECORDS

**Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government**
16th Annual LEAP Training Conference
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Introduction



Wisconsin Public Records Law

- Wis. Stat. §§ 19.31 to 19.39



Presumption

The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government 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



Public Record Roles



“Authority”

- Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- Very similar to “governmental body” in Open Meetings law
- Includes quasi-governmental corporation
- Public records law obligations apply separately to each authority
- *Wis. Prof'l Police Ass'n v. Wis. Cnty. Ass'n*, 2014 WI App 106, 357 Wis. 2d 687 (unincorporated association is not an authority)



“Legal Custodian”

- Defined in Wis. Stat. § 19.33 - vested by an authority with full legal power to render decisions and carry out public records responsibilities
- Elective official, chairperson of a committee of elected officials, or designee
- Other authorities to designate one or more positions
- Defaults are highest ranking officer and chief administrative officer, if any
- Other authority staff may participate or assist
- Helpful to establish an internal public records procedure



“Requester”

- Defined at Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
- More limited rights for persons committed under mental health laws or incarcerated (must be requesting records containing specific references to themselves or minor children)
- Per Wis. Stat. § 19.35(1)(am), a requester has greater rights to inspect personally identifiable information about himself or herself in a record containing personally identifiable information



Who Can Request?

- Requester need not state the purpose of the request
- Requester generally need not identify himself or herself
- Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, 354 Wis. 2d 471: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test



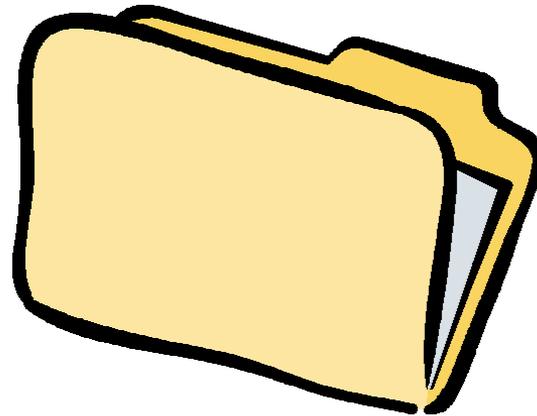
Records



“Record”

“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.”

— Wis. Stat. § 19.32(2)



Is it a Record?

- **NO**:

- Drafts, notes, and preliminary documents
- Published material available for sale or at library
- Purely personal property
- Material with limited access rights, such as copyrights or patents



Is it a Record?

- YES:

- Not created by the authority but in the authority's possession
- Personal email, texts, calls, and documents on an authority's accounts
- Business email, texts, calls, and documents on personal accounts



Is it a Record?

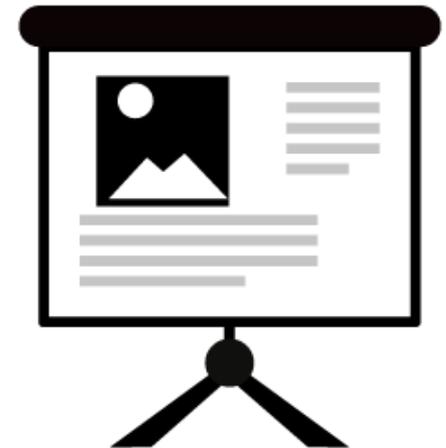
- YES:

- Data in a database
- Social media
- Contractors' records
- Police body camera and dash camera video



Electronic Records

- Content not format
- Emails
- Database files
- PowerPoint presentations
- Audio and video
- Web-based documents
- Social media
- Cell phones, including texts



Personal Email, Calls, and Documents on an Authority's Account

- Email sent and received on an authority's computer system is a record
- Includes purely personal email sent by officers or employees of the authority
- Disclosure generally not required
- *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177



Government Business Emails, Calls, and Documents on Private Accounts

- These materials may be “records”
- Content determines whether something is a “record,” not the medium, format, or location
- Recommendation: Conduct a careful search of all relevant accounts
- Personal materials on the same private accounts are not subject to disclosure



Social Media

- Increased use of social media by authorities
 - Facebook
 - Twitter
- Likely to be a “record” if created or maintained by an authority



Social Media, continued

- Considerations:
 - Be familiar with the site
 - Are the records archived?
 - Who may post, manage, or control?
 - How long is content available?
 - Will third-party messages or posts be “records”?
 - Does the authority have a social media policy?



Contractors' Records

- Records produced or collected under a contract with the authority are “records” for public records law purposes
 - Records produced or collected “in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of” a contract
 - Records produced “in the course of” the contracted-for matter
 - Includes data and other electronic records
- *Juneau Cnty. Star-Times v. Juneau Cnty.*, 2013 WI 4, 345 Wis. 2d 122



Receiving a Request



Sufficient Request

- Written request or form not required—but may be a good idea
- “Magic words” not required
- Reasonably describes the information or records requested
- Reasonably specific as to time and subject matter
 - Important for requests involving electronic records
- Custodian should not have to guess what records the requester wants



Scope of Request

- A large number of responsive records—by itself—does not make a request too broad
- But a request cannot so burden an authority that its normal functioning would be impaired
- A requester may have no way of knowing how many responsive records exist
- A requester may have no interest in many “technically” responsive records
- Keep purpose and objective of public records law in mind



Processing a Request



Evaluating a Request

- Carefully assess to determine what is needed to respond
- Don't understand the request?
 - Contact the requester
 - Send a written summary of your understanding
 - Request clarification
- Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
- Send the requester an acknowledgment and periodic status updates if the response will take some time



Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the balancing test



Step 1 – Does the Record Exist?

- Generally, only records that exist at the time of the request must be produced
 - To respond, an authority need not create new records
- Public records law does not require answering questions
 - However, if a request asks a question and an existing record answers the question, provide the record or inform the requester
- Continuing requests are not contemplated by the public records law



Step 1, continued

- Search for records that might be responsive
- If there are no responsive records, inform the requester
- *Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, 362 Wis.2d 577, 866 N.W.2d 563: It is problematic to deny access to records on substantive grounds, then respond later that there are no responsive records



Step 2 – Absolute Right of Access

■ Absolute Right

- Not many exist:
- Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
- Daily arrest logs or police “blotters” at police departments



Step 3 – Absolute Denial of Access

■ Absolute Denial

- Can be located in public records statutes
 - Information related to a current investigation of possible employee criminal conduct or misconduct
 - Plans or specifications for state buildings
- Can be located in other statutes or case law:
 - Patient health care records; pupil records



Step 4 - The Balancing Test

- Weigh the public interest in disclosure of the record against the public interest and public policies against disclosure
- Fact intensive; “blanket rules” disfavored
- Must conduct on case by case basis taking into consideration the totality of circumstances
- Identity of the requester and the purpose of the request are generally not part of the balancing test



Some Sources of Public Policies

- Policies expressed in other statutes (such as patient health care records, student records)
- Court decisions
- Exemptions to open meetings requirements in Wis. Stat. § 19.85(1) – but only if there is specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
- Public interest in protecting privacy of individuals



Law Enforcement Considerations

- Presumption of complete public access – public’s right to know
- Crime victim rights expressed in statutes, constitutional provisions, and case law
 - Consideration of family of crime victims
- Protection of witnesses
 - Safety and security
 - “Chilling” future cooperation with law enforcement
- Children and juveniles



Redaction



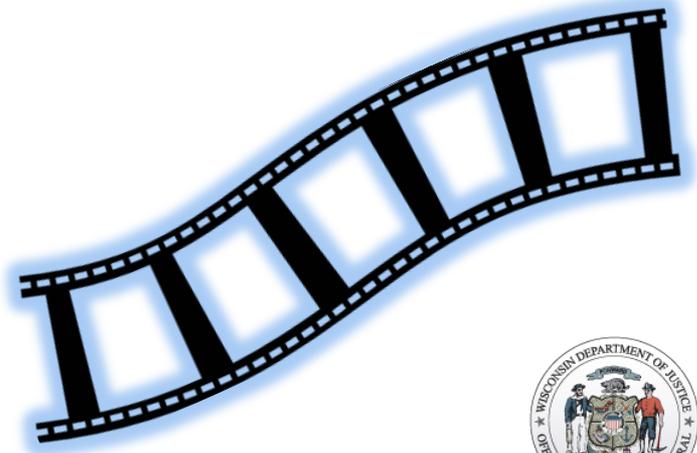
Redaction

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information** (and therefore subject to review by mandamus)
- Effective July 1, 2016, certain personally identifiable and financial information will be required to be redacted from records filed with Wisconsin's circuit courts.



Redaction – Audio and Video

- Audio – accompanying video, dispatch recordings, etc.
 - Digital editing equipment
 - Partial redaction
- Video – security video, body cameras, dashboard cameras, etc.
 - Video blurring
 - Blacking out portions of video
- Technology
- Cost



Special Issues



Special Issues

- *Prosecutor's* files are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991).
 - Law enforcement records: balancing test must be applied on a case-by-case basis
- Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise



Special Issues, continued

- Records related to children or juveniles:
 - Wis. Stat. ch. 48: Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 48.396.
 - Wis. Stat. ch. 938: Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 938.396.
 - Access to other records regarding or mentioning children subject to general public records rules



Special Issues – Law Enforcement

- Audio:
 - Voices of victims and witnesses
- Video:
 - Home addresses, home interiors
 - Information in the background
 - Family photographs, personal documents



Driver's Privacy Protection Act (DPPA)

- Federal statute enacted in 1994
- Purpose: limit release of an individual's personal information contained in driver's license record
- Concerns about threats from stalkers and criminals and states' practice of selling personal information to businesses



DPPA, continued

- Wisconsin Public Records Law and DPPA
 - Newspaper requested two accident reports and two incident reports from the City of New Richmond PD
 - PD provided redacted reports based on DPPA
 - Newspaper sued City of New Richmond alleging violation of public records law
 - *New Richmond News v. City of New Richmond*, ___ N.W. 2d ___, 2016 WL 2637449



Driver's Privacy Protection Act (DPPA)

- Accident reports: permitted to be released unredacted
 - DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
- Incident reports: release of DMV information prohibited unless DPPA exception applies
 - Compliance with public records request not a “function”
- Information verified using DMV records is not protected by DPPA
 - Presents problem of determining how information was obtained



Electronic Databases

- Direct access to electronic databases not required
- Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- Wis. Stat. § 19.36(4): a computer program is not subject to examination or copying
 - However, the following is:
 - Input: Material used as input for computer program
 - Output: Material produced as product of computer program
- Requester, within reasonable limits, may request a data run to obtain requested information



Metadata

- No controlling Wisconsin precedent
 - A circuit court held metadata is not a record because it includes drafts, notes, preliminary computations, and editing information
 - Courts in other jurisdictions have held metadata must be disclosed in response to freedom of information laws
- Good rule of thumb: content determines whether it is a record, not the format



Responding to a Request



Format of Records

- Wis. Stat. § 19.35(1)(b), (c), (d): a copy substantially as readable/audible/good as the original
- *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W. 2d 736 (*Wiredata II*)
 - Whether records must be produced in requested format not squarely addressed
 - PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester
 - Sufficient to provide a copy of relevant data in an appropriate format
- Right to receive land information from a political subdivision in same format in which record is maintained



Written Response?

- A written request requires a written response, if the request is denied in whole or in part
- May respond in writing to a verbal request
- A request for clarification, without more, is not a denial
- Must inform requestor that denial is subject to review in an enforcement action for mandamus under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney General



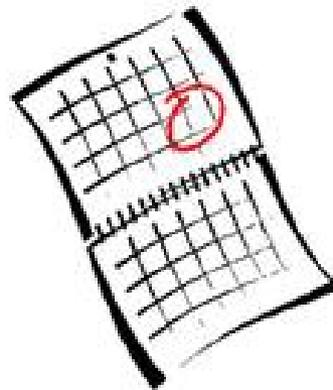
Reasons for Denial

- Reasons for denial must be specific and sufficient
- Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
- Reviewing court usually limited to reasons stated in denial
- Availability of same records from other sources generally not a sufficient reason



Timing of Response

- Response is required, “as soon as practicable and without delay”
- **No specific time limits**, depends on circumstances
- DOJ policy: 10 business days generally reasonable for response to simple, narrow requests
- May be prudent to send an acknowledgement
- Penalties for arbitrary and capricious delay



Notice Before Release

- Required by Wis. Stat. § 19.356(2)(a)1
 - Records information resulting from closed investigation into a disciplinary matter or possible employment-related violation of policy, rule, or statute
 - Records obtained by subpoena or search warrant
 - Records prepared by an employer other than the authority about employees of that employer
 - “Record subject” can try to stop disclosure in court
- Required by Wis. Stat. § 19.356(9)—officer or employee holding state or local public office
 - OAG-07-14 (October 15, 2014)
- Courtesy notice



Costs



Costs

- Actual, necessary, and direct costs only—unless otherwise specified by law
 - Copying and reproduction
 - Paper copies v. electronic copies
 - Location, if costs are \$50.00 or more
 - Mailing/shipping to requester
 - Others specified in Wis. Stat. § 19.35(3)



Permissible Charges

- Authorities **may not** charge for redaction costs
- Prepayment may be required if total costs exceed \$5.00
- Authority may choose to provide records for free or reduced charge



Cost of Response

- Clarifying or limiting a request may:
 - Reduce costs to requester
 - Eliminate records not of interest to requester
 - Facilitate a quicker response
- Cost estimates should be reasonable, based on information available before preparing the response or developed during preparation
- Keep careful records in order to support and calculate requests for payment of costs



Enforcement



Enforcement

- Wis. Stat. § 19.37
- Mandamus action to challenge:
 - Withholding a record or part of a record
 - Delay in granting access to record or part of record



Remedies

- Authority may be ordered to release records
- Attorney's fees and costs may be awarded if mandamus action was a cause of the release
- If a denial, delay or charge of excessive fees is found to be arbitrary and capricious:
 - Court may award punitive damages
 - Authority may be required to forfeit not more than \$1,000
 - Forfeitures enforced by action on behalf of state by the attorney general or district attorney



Record Retention



Record Retention – Public Records Law

- Wis. Stat. § 19.35(5) - after receiving a request:
 - No destruction until request granted or until at least 60 days after request is denied
 - 90 days if requester is committed or incarcerated
 - No destruction during enforcement action



Record Retention – Other Statutes

- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21
- Record Retention Schedules (RDAs)
 - Check for existing RDAs
- <http://publicrecordsboard.wi.gov/>
- Consult legal counsel



Record Retention, continued

- Hard copies v. electronic copies
 - Copies of records in electronic formats permissible
 - State authorities: Wis. Stat. § 16.61(5)(a)
 - Local authorities: Wis. Stat. § 19.21(4)(c)
 - Local government unit or agency may provide for retention of records in electronic format
 - Local government unit or agency shall make for such provision by ordinance or resolution



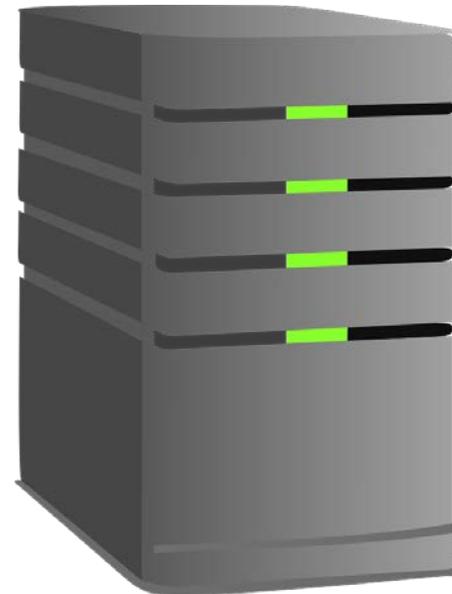
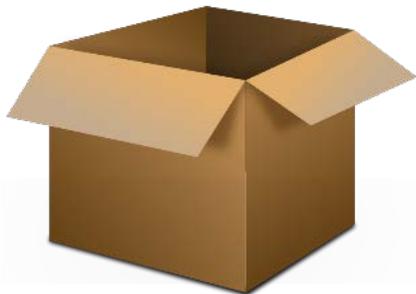
Retention - Considerations

- Retention includes electronically formatted documents
- Audio and video
 - Law enforcement
- Archiving and searching
 - Emails, social media, text messages
- Cell phones
 - Data, texts, other messages, photographs



Retention – Considerations, continued

- Storage and archiving
 - Costs
 - Equipment
 - Maintenance



Further Information

- Consult legal counsel
- Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Call the Office of Open Government: (608) 267-2220
- Write to: Paul M. Ferguson, Assistant Attorney General
Office of Open Government
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857



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