

WISCONSIN PUBLIC RECORDS LAW: ETHICS ISSUES

**Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government**
2016 Annual Department of Justice Ethics Seminar
September 21, 2016



Office of Open Government

- Interpret and apply the Open Meetings Law, Public Records Law and other open government statutes and rules
- Develop open government policies
- Legal counsel to DOJ and clients
- Manage the PROM help line and respond to citizen correspondence concerning open government issues
 - Wis. Stat. §§ 19.39 and 19.98
 - Any person may request AG's advice

OOG




DOJ Public Records Request Process

PRR received 

PRR forwarded to OOG 


OOG sends acknowledgment letter 

OOG begins search for responsive records 

OOG contacts appropriate division/unit/person within DOJ 

Gathered records are forwarded to OOG 

Records are reviewed and redactions applied 

Records are released with explanatory letter 



Ethical Considerations and Issues

- Rules of Professional Conduct for Attorneys (SCR 20)
- SCR 20 Preamble: A lawyer's responsibilities
- Truthfulness
 - SCR 20:4.1 Truthfulness in statements to others
- Respect
 - SCR 20:4.4 Respect for rights of 3rd persons



Ethical Considerations and Issues

- Wis. Stat. § 905.03 Lawyer-client privilege
- Ethics Statutes:
 - Code of ethics for public officials and employees (Wis. Stat. § 19.41)
 - Codes of ethics for local government officials, employees and candidates (Wis. Stat. § 19.59)
- Wis. Stat. § 946.72 Tampering with public records and notices
 - Class H felony: Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record



Ethical Considerations and Issues

- “Transparency and oversight are essential to honest, ethical governance.”
 - *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862

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Wisconsin Public Records Law

- Wis. Stat. §§ 19.31 to 19.39



Presumption

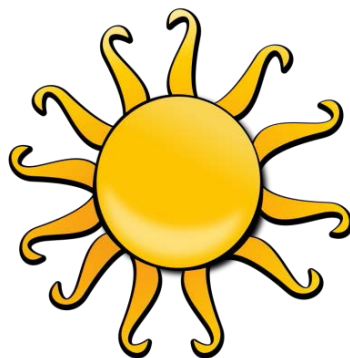
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Objectives

- Shed light on workings of government and acts of public officers and employees
- Assist members of the public in becoming an informed electorate
- Serve a basic tenet of our democratic system by providing opportunity for public oversight



Public Record Roles

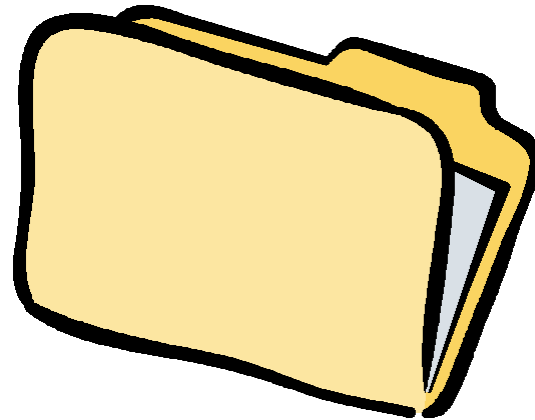
- **Authority**: Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- **Legal Custodian**: Defined in Wis. Stat. § 19.33 - vested by an authority with full legal power to render decisions and carry out public records responsibilities
- **Requester**: Defined in Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
 - Incarcerated or committed persons: more limited rights
 - Requester has greater rights to inspect personally identifiable information about himself or herself in a record



“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)



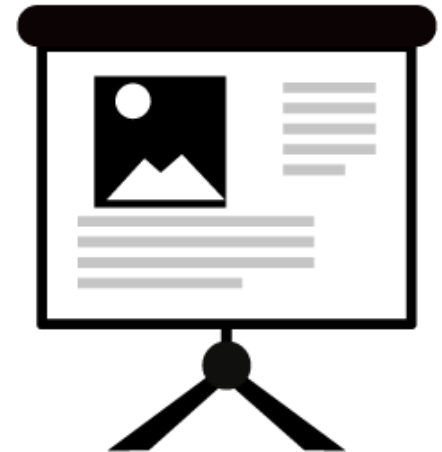
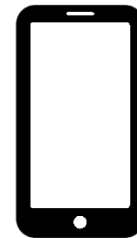
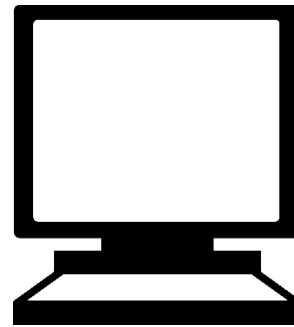
Is it a Record?

- **YES**: Not created by the authority but in the authority's possession
- **YES**: Personal email, texts, etc. on an authority's accounts and business email, texts, etc. on personal accounts
- **YES**: Social media; electronic records, contractors' records
- **NO**: Drafts, notes, and preliminary documents
- **NO**: Published material available for sale or at library
- **NO**: Material with limited access rights, such as copyrights or patents



Electronic Records

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



Social Media

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



Is it a Record?

- The bottom line is that content not format determines if something is a record

CONTENT NOT FORMAT



Receiving a Request

- A request may be verbal or written
- If you receive a request, direct it to your agency's records custodian or other appropriate person
- If you do not know where to send it, find out



Searching for Records

- 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
- If there are no responsive records, inform the requester



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



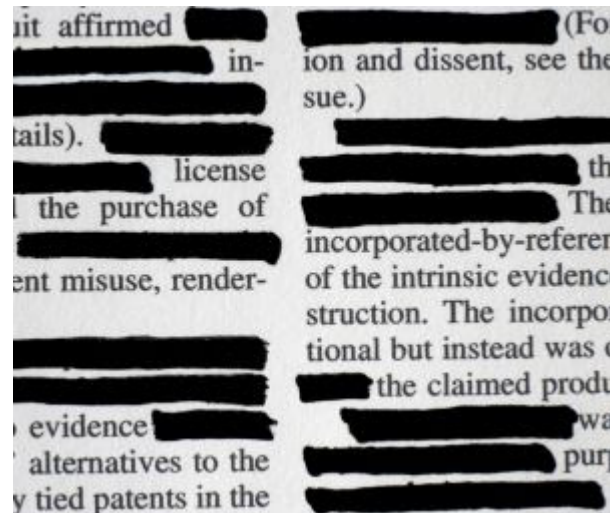
Special Issues

- A 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
- Crime victim rights and family of crime victims
- Children or juveniles
- Attorney-client privileged communications
- Metadata: no controlling Wisconsin precedent



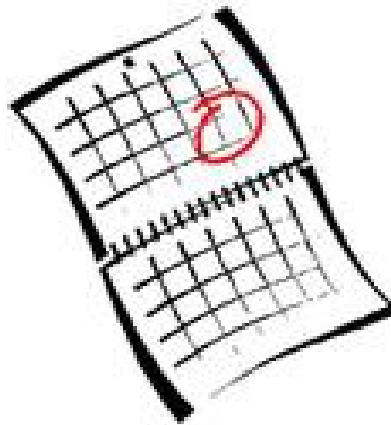
Redaction

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted



Timing of Response

- Response is required, “as soon as practicable and without delay”
- **No specific time limits**, depends on circumstances
- Penalties for arbitrary and capricious delay



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



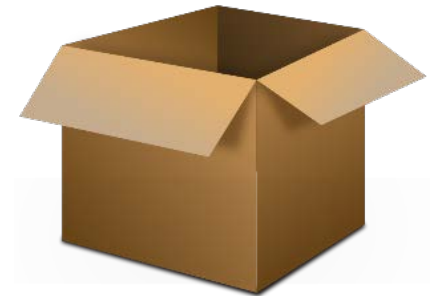
Other Statutes

- Wis. Stat. § 946.72: Tampering with public records and notices
- “Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony.”



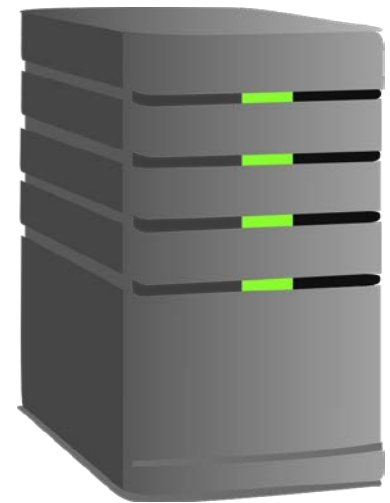
Record Retention

- Public Records Law - Wis. Stat. § 19.35(5):
 - 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
- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21
- Record retention schedules and RDAs



Record Retention Considerations

- Hard copies v. electronic copies
- Copies of records in electronic formats permissible
- Archiving and searching
 - Emails, social media, text messages
- Cell phones
 - Data, texts, other messages, photographs



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: Office of Open Government
 Department of Justice
 P.O. Box 7857
 Madison, WI 53707-7857



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