

# Police Body Cameras: Public Records Law and Retention Considerations

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

Legislative Council Study Committee on the Use of Police Body Cameras

July 26, 2018

State Capitol, Madison



# Introduction



# Government Transparency and the Wisconsin Public Records Law

- ▶ “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
- ▶ There is a strong public interest in investigating and prosecuting criminal activity
- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
  - ▶ 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



# 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



# Authorities and Custodians

- ▶ **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
  - ▶ E.g., elective official or designee
  - ▶ All records belong to the authority
  - ▶ Custodial services: other staff may assist



# Who Can Request?

- ▶ **Requester:** Defined at Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
  - ▶ Incarcerated or committed persons have more limited rights
  - ▶ Requester has greater rights to inspect personally identifiable information about himself or herself in a record. Wis. Stat. § 19.35(1)(am)
- ▶ Requester generally need not identify himself or herself
- ▶ Requester need not state the purpose of the request



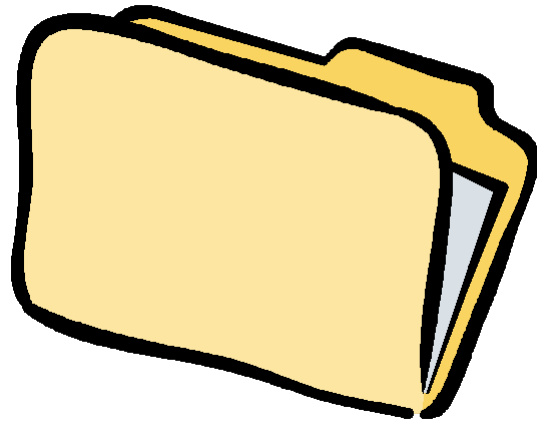
# Records





# “Record”

- ▶ Wis. Stat. § 19.32(2):
  - ▶ “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.”



# Is it a Record?

- ▶ No:
  - ▶ Published material available for sale or at library
  - ▶ Purely personal property
  - ▶ Material with limited access rights, such as copyrights or patents
  - ▶ Drafts, notes, and preliminary documents
- ▶ Yes:
  - ▶ Not created by the authority but in the authority's possession
  - ▶ Electronic records, including:
    - ▶ Audio and video
    - ▶ Data in a database
    - ▶ Emails
    - ▶ Social media
  - ▶ Contractors' records



# Audio and Video

- ▶ Examples:
  - ▶ Police body cameras
  - ▶ Police dashboard cameras
  - ▶ Surveillance video
  - ▶ Accompanying audio
  - ▶ 911 recordings



# Receiving and Processing a Request



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



# Absolute Right or Denial 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
- ▶ **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



# 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
  - ▶ E.g., patient health care records, student records
- ▶ Court decisions
- ▶ Exemptions to open meetings requirements in Wis. Stat. § 19.85(1)
  - ▶ Only if there is a specific demonstration of need to deny access at the time of the request
- ▶ Policies expressed in evidentiary privileges
- ▶ Public interest in reputation and privacy of individuals





# The Balancing Test: Law Enforcement Considerations



# Prosecutor's Files v. Law Enforcement Records

- ▶ 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).
- ▶ However, for a law enforcement agency's records, the balancing test must be applied on a case-by-case basis



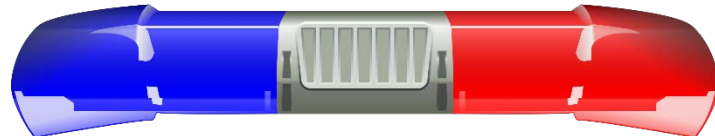
# Police Investigations

- ▶ *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
  - ▶ Public oversight of police investigations is important
  - ▶ Police investigation reports can be particularly sensitive
  - ▶ Generally, law enforcement records more likely to have an adverse effect on public interests if released



# Key Considerations

- ▶ Presumption of complete public access
  - ▶ The 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
- ▶ Confidential Informants
  - ▶ Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise



# Key Considerations, continued

- ▶ Children and 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
    - ▶ Including the balancing test
- ▶ Officer safety
  - ▶ Including the safety of officers' families and homes



# Questions to Ask

- ▶ Would the release endanger the safety of persons involved?
- ▶ Are there reputation and privacy interests involved?
  - ▶ The public interest is found in the public effects of failing to honor the individual's privacy interests not the individual's personal interests
- ▶ Do the records contain rumor, hearsay, or potentially false statements?
- ▶ Were potentially biased witnesses interviewed?
- ▶ Do the records discuss confidential law enforcement techniques and procedures?
- ▶ Is there a possibility of threats, harassment, or reprisals?
  - ▶ Against victims, witnesses, officers, others, or their families?
  - ▶ Any such possibility is accorded appropriate weight depending on the likelihood
    - ▶ Generally, there must be a **reasonable probability**



# Special Considerations for Video

- ▶ Voices and likenesses of victims and witnesses
- ▶ Home addresses
- ▶ Home interiors
  - ▶ Background items, e.g.:
    - ▶ Family photographs
    - ▶ Personal documents



# Redaction





# Redaction

- ▶ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- ▶ 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
  - ▶ Therefore subject to review by mandamus

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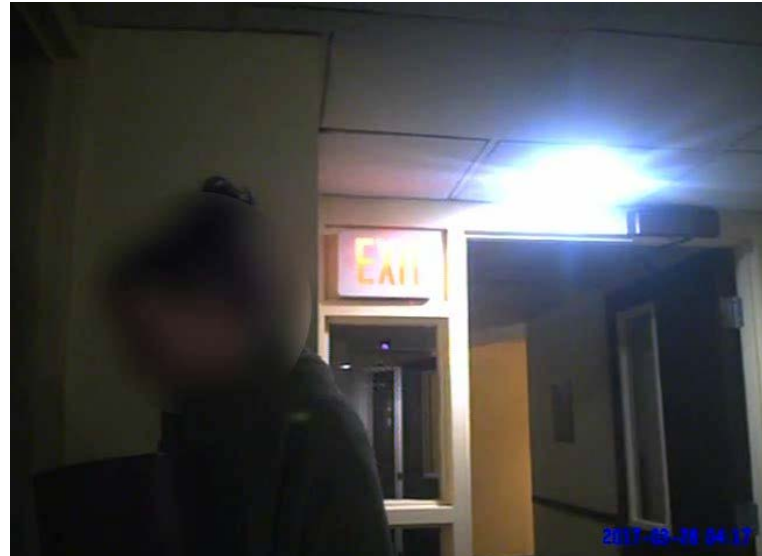
On 01/04/2018, FOSO Deputy (Dep.) Craig Justice responded to a "assist motorist" call-for-service which had initially been called in to the dispatch center by a passing motorist. A short time later, Dep. Justice arrived at the scene and met the stranded motorist who was identified as Brandon Owen Cude. Dep. Justice assisted Cude by placing a portable charging unit upon the battery of the vehicle that Cude had been operating.

During his contact with Cude, Dep. Justice formally identified Cude by Cude's pictured Wisconsin operator's license. Dep. Justice performed a driver record query upon Cude. The driver record query resulted in notification that Cude had two outstanding extraditable warrants which originated from the State of Texas. Dep. Justice confronted Cude about the warrants. Dep. Justice additionally confirmed Cude's identity with the dispatch center by Cude's physical descriptors and the location of Cude's tattoos. As Cude sat on the front driver's seat inside the vehicle, Dep. Justice informed Cude that he was under arrest.

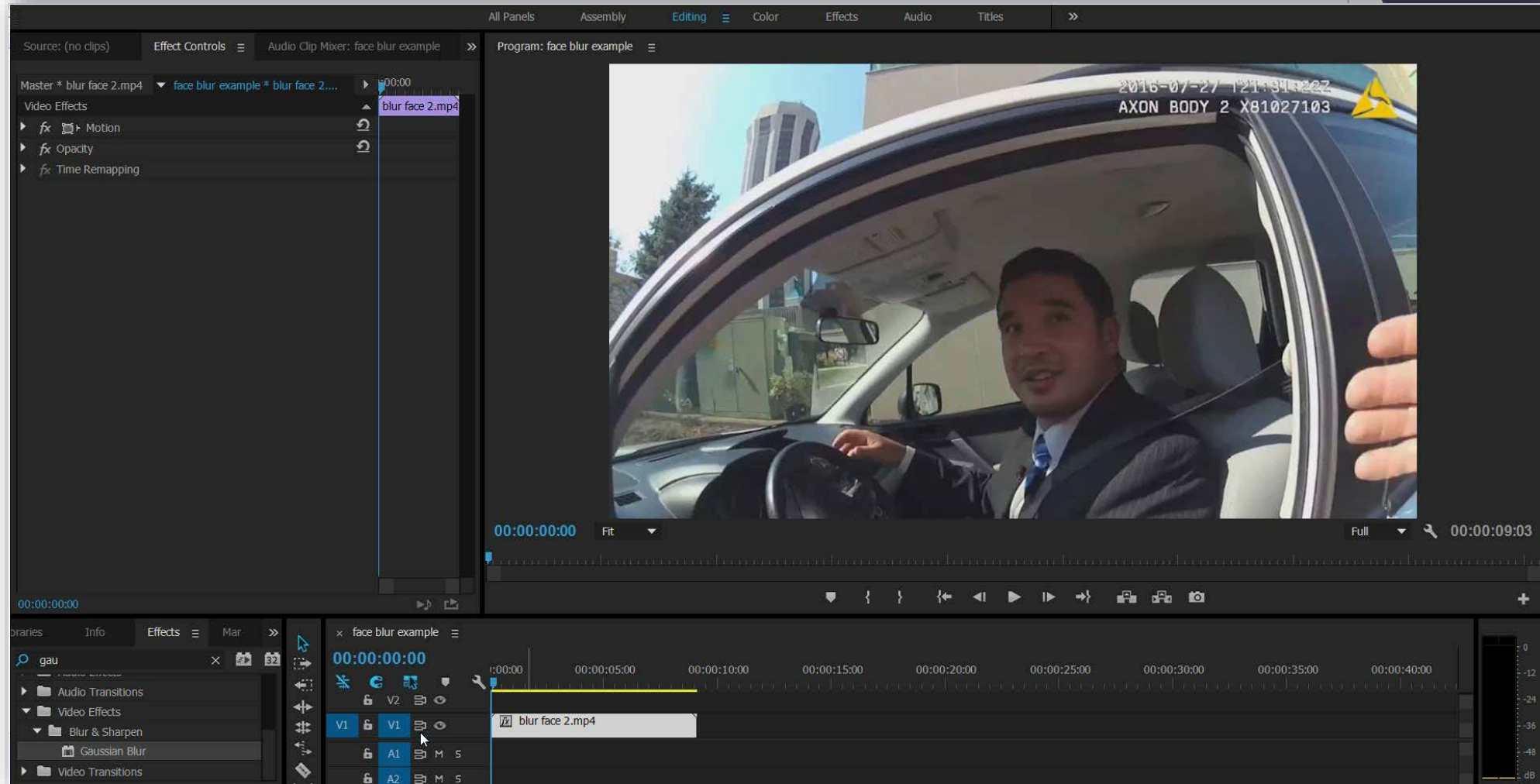


# Redaction—Audio and Video

- ▶ Audio—accompanying video, dispatch recordings, etc.
  - ▶ Partial redactions (names, victim voices, addresses, etc.)
- ▶ Video—security video, police body and dashboard cameras, etc.
  - ▶ Video blurring
  - ▶ Blacking out portions of video
  - ▶ Removing sections



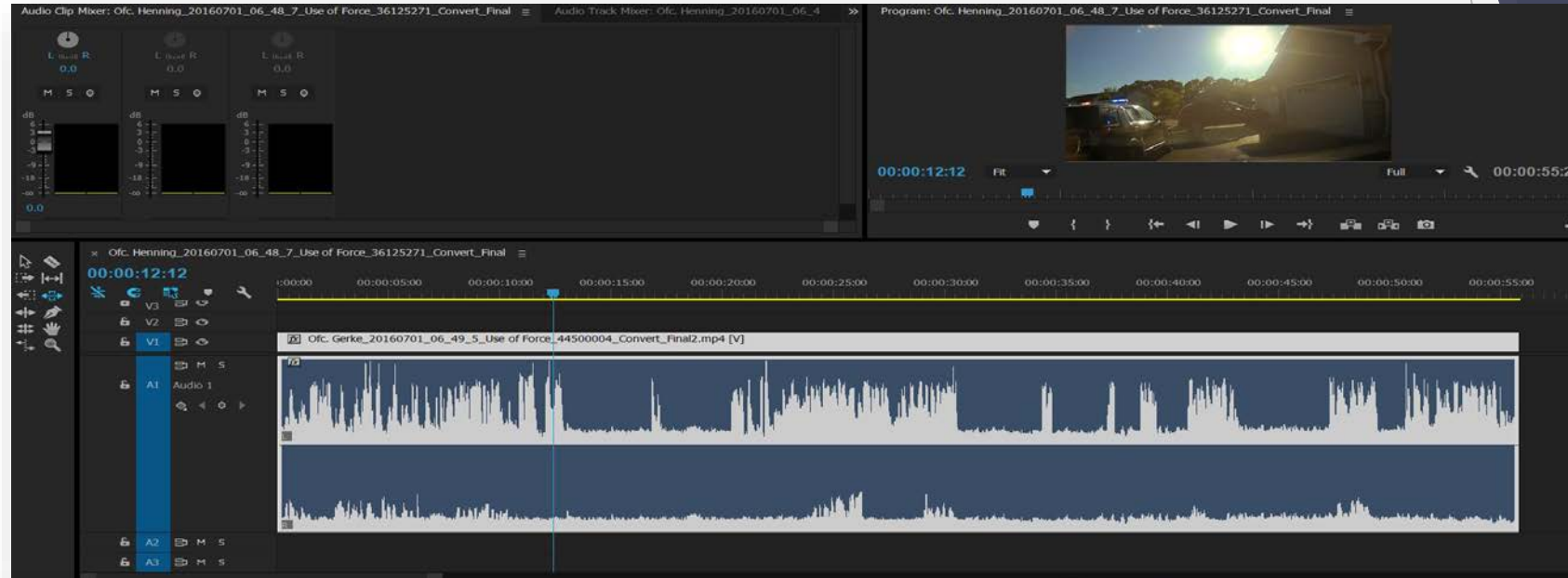
# Video Redaction: Blur Demo



# Video Redaction



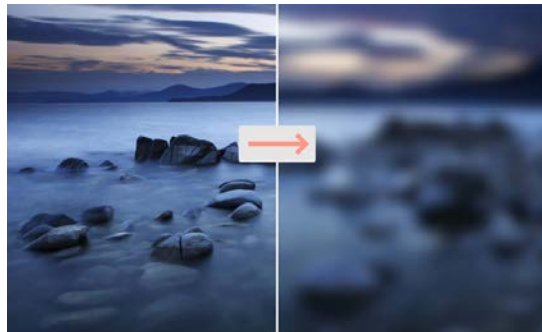
# Audio Redaction





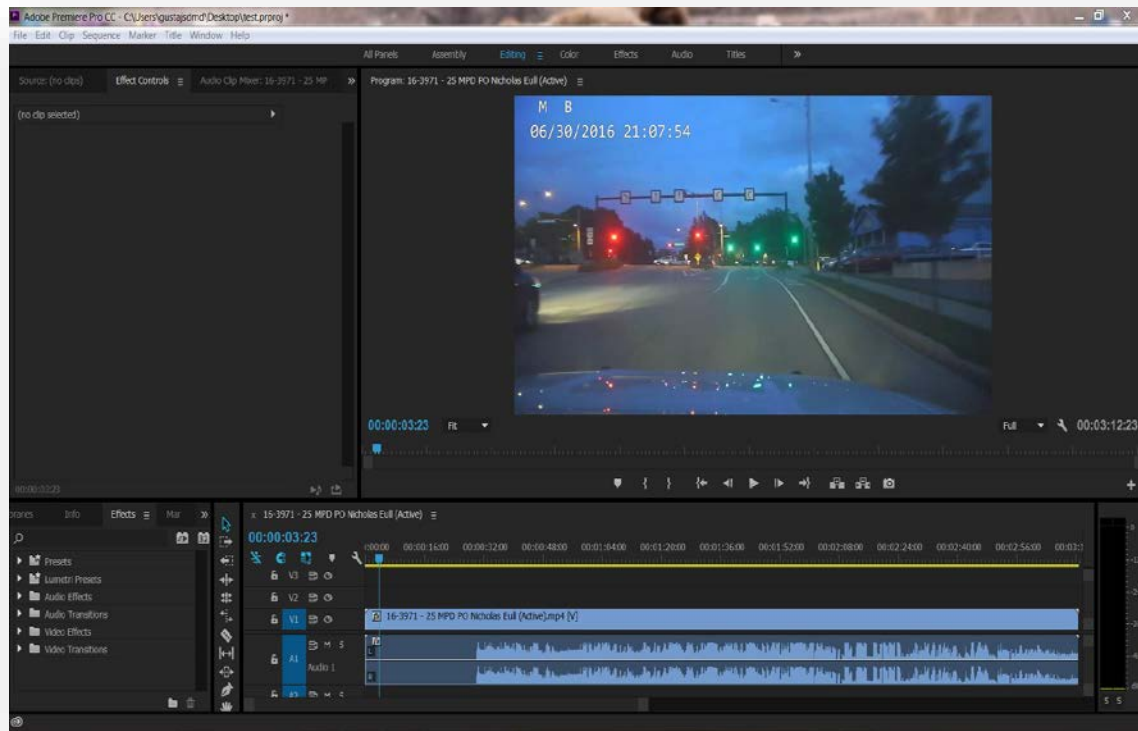
# Redaction—Audio and Video

- ▶ Technology
  - ▶ Software for blurring video can be difficult to find using the term “redaction”
  - ▶ Find software with tools including: Gaussian blur, Mosaic blur, and motion tracking
  - ▶ Most video software will handle audio redactions too
- ▶ Cost
  - ▶ Many cost effective options available for audio/video software
  - ▶ May take many working hours to redact audio/video (time decreases with practice)

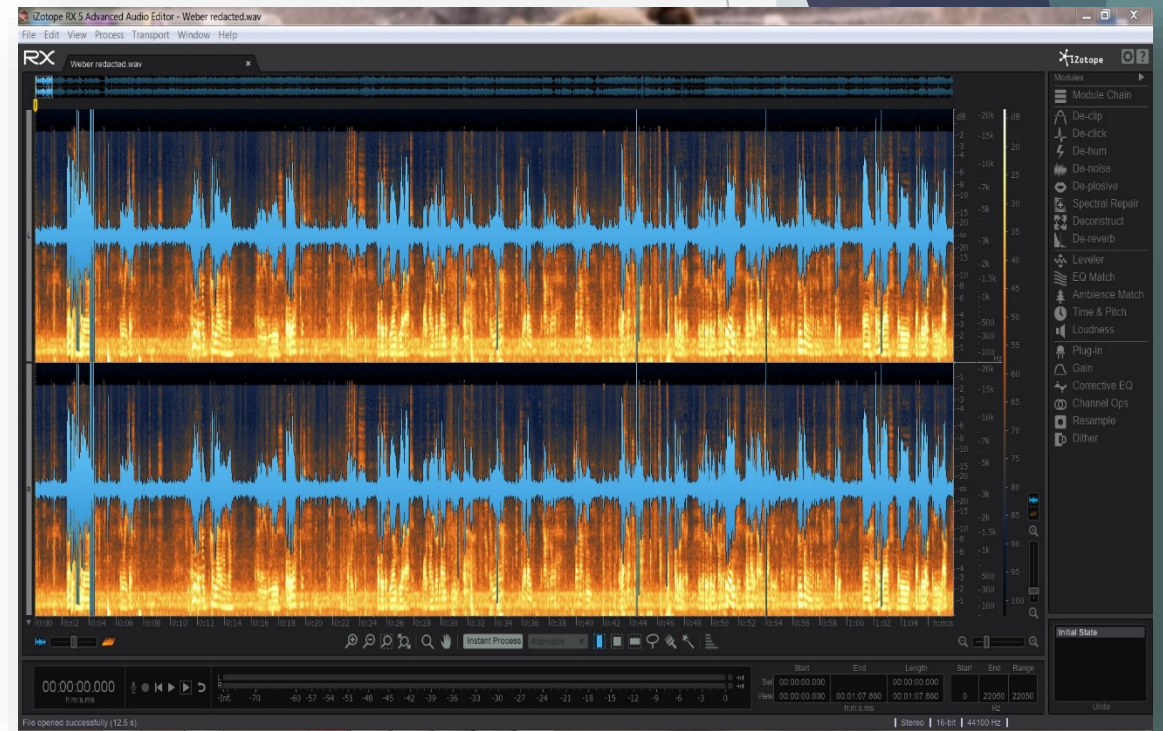


# Redaction Software

## Video/Audio



## Adv. Audio



# Responding to a Request





# 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
- ▶ 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
- ▶ 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
  - ▶ Penalties for arbitrary and capricious delay



# 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



# Notice Before Release

- ▶ Notice to record subjects is only required in limited circumstances
  - ▶ 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 of the authority holding state or local public office
    - ▶ “Record subject” may augment the record to be released
- ▶ OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- ▶ Courtesy notice



# Costs

- ▶ Actual, necessary, and direct costs only—unless otherwise specified by law
  - ▶ Copying and reproduction
  - ▶ Location, if costs are \$50.00 or more
  - ▶ Mailing/shipping to requester
  - ▶ Others specified in Wis. Stat. § 19.35(3)
- ▶ Authorities may not charge for redaction costs
- ▶ Prepayment may be required if total costs exceed \$5.00
- ▶ Authority may waive all or part of costs



# Officer Involved Critical Incident Page

Secure | <https://www.doj.state.wi.us/dci/officer-involved-critical-incident>

## Wisconsin Department of Justice

Search

Officer Involved Critical Incidents  
Incident Map

### Officer Involved Critical Incident

[Wisconsin Statute § 175.47](#) requires that, in the event of the death of an individual as the result of an action or inaction by a law enforcement officer, the ensuing investigation must be conducted by an investigative team from an independent agency.

When the Division of Criminal Investigation (DCI) serves as that independent agency, it provides a complete report to the prosecutor for review. If the prosecutor determines there is no basis for prosecution of the law enforcement officer, access to the report as required by § 175.47(5)(b) will be posted below.

The related investigative file and associated evidence, which will be made available to the public upon request in a redacted format under the Wisconsin Public Records Law ([Wis. Stat. §§ 19.31-19.39](#)), may also be posted here for certain cases.

For more information, please email us at [dojcommunications@doj.state.wi.us](mailto:dojcommunications@doj.state.wi.us).

Filter by Year

2017

**Walworth County – Kris Kristl** Feb 2 2017

- [DCI Investigative File Public Records Release - DCI Case Reports - Cover Letter](#)
- [DCI Investigative File Public Records Release - DCI Case Reports](#)
- [Kris Kristl Investigative Synopsis Report](#)

**Lincoln County – Shawn M. Igers** Feb 17 2017



# Audio/Video Disbursement

Millston - Donovan Scheurich

Jan 25 2017 

-  DCI Investigative File Public Records Release - DCI Case Reports - Cover Letter 
-  DCI Investigative File Public Records Release - DCI Case Reports 
-  Donovan Scheurich Investigative Synopsis Report 

▶ 2016

▶ 2015

Photo and video evidence in a redacted format will be made available upon request to DOJ Communications Director Johnny Koremenos at: [koremenosj@doj.state.wi.us](mailto:koremenosj@doj.state.wi.us)

**Audio / Video:** <https://widoj.sharefile.com/d-s8a8142957ad4905b>

1. 17-612 - 19WCSO Dep Matthew Weber Interview
2. 17-612 - 25WCSO Dep Jesse Smith Interview



# Enforcement



# Enforcement

- ▶ Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
  - ▶ Authority may be ordered to release records
  - ▶ Other remedies
- ▶ 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



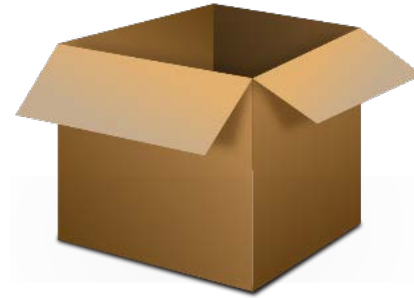
# Record Retention—Public Records Law

- ▶ 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



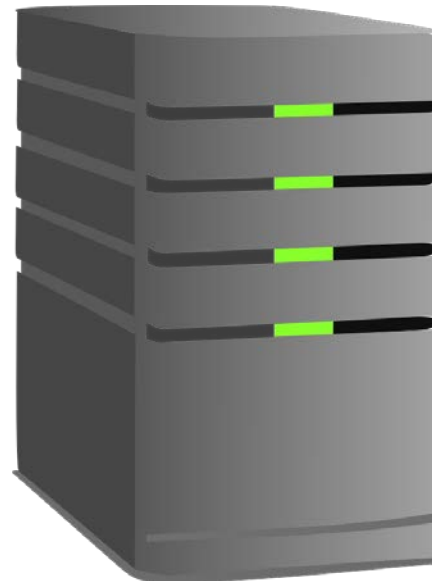
# Record Retention—Other Statutes

- ▶ Records retention laws
  - ▶ State authorities: Wis. Stat. § 16.61
  - ▶ Local authorities: Wis. Stat. § 19.21
- ▶ Record Retention Schedules
  - ▶ Includes:
    - ▶ General Records Schedules (GRSs)
    - ▶ Agency-specific Records Retention/Disposition Authorizations (RDAs)
    - ▶ E.g., 121 days for body camera video when there is no incident shown
- ▶ <http://publicrecordsboard.gov>



# Record Retention—Considerations

- ▶ Accounting for record storage, archiving, and searching
- ▶ Concerns:
  - ▶ Costs
  - ▶ Equipment
  - ▶ Technological knowledge and expertise
  - ▶ Maintenance



# Record Retention—Best Practices

- ▶ Establish agency policies regarding retention
- ▶ Ensure all agency-specific RDAs are up-to-date
  - ▶ RDAs sunset after 10 years
- ▶ Train agency records officers and other staff on record retention and relevant agency policies
- ▶ Follow your retention schedules
- ▶ Consult your legal counsel



# Future Tech Questions?

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Email: [gustafsonjs@doj.state.wi.us](mailto:gustafsonjs@doj.state.wi.us)



# Further Information

- ▶ Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ▶ Contact the Office of Open Government:
  - ▶ Write: Office of Open Government  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857
  - ▶ Tel: (608) 267-2220
  - ▶ Email: [fergusonpm@doj.state.wi.us](mailto:fergusonpm@doj.state.wi.us)



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