

Expectations of JAC Confidentiality under the Wisconsin Open Meetings Law

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

State JAC/JATT Committee Members Conference

Baraboo, March 9, 2018



Office of Open Government (OOG)

- ▶ Interpret and apply the Open Meetings Law, Public Records Law, and other open government statutes and rules
- ▶ Manage DOJ's public records request process
- ▶ Develop open government policies
- ▶ Provide legal counsel to DOJ and clients
- ▶ Operate 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
- ▶ Provide training and open government resources



Introduction



Sunshine Laws

- ▶ Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98
 - ▶ Ensures public can attend and observe meetings of governmental bodies
- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ Ensures public can inspect or receive copies of public records
 - ▶ 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
- ▶ “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



Presentation Objectives

- ▶ Provide an overview of the Open Meetings Law to ensure an understanding of the law's requirements
 - ▶ Special emphasis on what constitutes a “meeting”
 - ▶ Will help ensure that government business is not conducted in violation of the law
 - ▶ Includes overview of key closed session exemptions
 - ▶ Will help address some confidentiality concerns
- ▶ Provide brief overview of the Public Records Law to ensure an understanding of the law's basic provisions
 - ▶ Emphasis on what is a “record”
 - ▶ Review of the basic steps of processing public records requests
 - ▶ Focus on the balancing test
 - ▶ Includes processing records related to closed sessions of meetings



The Open Meetings Law



Public Policy - Open Meetings Law

- ▶ “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.”

—Wis. Stat. § 19.81(1)



Public Policy (continued)

- ▶ The open meetings law is to be broadly interpreted to promote the policy of openness. *See Wis. Stat. § 19.81(4).*
- ▶ On close questions, courts will prefer an interpretation of the law that favors open government.
- ▶ Courts disfavor any interpretation that would facilitate evasion of the policy of openness.
- ▶ Bottom Line: The purpose of the open meetings law is to ensure openness.
 - ▶ Only a few limited exemptions permit confidentiality



Wisconsin Open Meetings Law

- ▶ Generally, the open meetings law requires that all meetings of governmental bodies:
 - ▶ must be preceded by public notice;
- AND
- ▶ must be held in a place that is open and reasonably accessible to all members of the public;
 - ▶ except in limited situations in which a closed session is specifically authorized.



When Does the Open Meetings Law Apply?

- ▶ It applies to meetings of governmental bodies.
- ▶ The key terms, “governmental body” and “meeting,” are defined in Wis. Stat. § 19.82.



Governmental Bodies



Governmental Body

- ▶ “‘Governmental body’ means a state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order” Wis. Stat. § 19.82(1).
- ▶ Translation:
 - ▶ Any kind of collective governmental entity (state or local level).
 - ▶ Created by constitution, statute, ordinance, rule or order.
 - ▶ Without regard to what that entity is called (i.e., a board, commission, committee, council, etc.).
- ▶ Example: JAC Committee Meetings



Collective Governmental Entity

- ▶ Must be a group of people.
- ▶ Does not include a single, individual government official.
- ▶ Must have a collective identity and purpose.
- ▶ A group with a determinate membership and an expectation that it will act collectively in relation to some subject of governmental business.
- ▶ Does not include an *ad hoc* gathering.



Creation

- ▶ “[C]reated by constitution, statute ordinance, rule or order”
 - ▶ Refers not to the kind of power wielded by a governmental body, but rather to how the body is created.
- ▶ How to determine whether a body is created by constitution, statute, ordinance or rule?
 - ▶ Look it up.



Advisory Bodies

- ▶ The definition of “governmental body” includes purely advisory bodies.
See State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).
- ▶ A governmental body does not have to possess final decision-making power in order to be subject to the open meetings law.
- ▶ What usually matters is the manner in which the body was created, rather than the nature of its authority.



Administrative Staff

- ▶ A governmental body generally does not include a group of administrative staff of a government agency.
- ▶ This is a highly fact-specific issue. It is discussed further in DOJ's *Wisconsin Open Meetings Law Compliance Guide*.



Subunits of Governmental Bodies

- ▶ Formally constituted subunits of a governmental body are also subject to the open meetings law.
- ▶ A “subunit” is a body that is:
 - ▶ created by a parent body; and
 - ▶ composed exclusively of members of the parent body
 - ▶ e.g., a committee of a municipal board or a subcommittee.
 - ▶ *See* 74 Op. Att’y Gen. 38, 40 (1985).



Governmental Bodies | Conclusion

- ▶ Determining whether a particular entity is or is not a governmental body:
 - ▶ Highly fact-specific question
 - ▶ There often is no simple, bright line answer.
- ▶ Tip:
 - ▶ Learn to identify the important issues and ask the right questions, so you can effectively seek assistance, when needed.



Meetings



Meeting

- ▶ “‘Meeting’ means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(1).



Meetings | Key Concepts: The *Showers* Test

- ▶ The Wisconsin Supreme Court has established a two-part test, encompassing two requirements:
 - ▶ the purpose requirement
 - AND
 - ▶ the numbers requirement.
 - ▶ *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
- ▶ A meeting occurs whenever:
 - ▶ Members convene for the purpose of conducting governmental business,
 - AND
 - ▶ The number of members present is sufficient to determine the body's course of action.



Meetings | *Showers* Test: “Purpose” Requirement

- ▶ “Conducting governmental business” is an expansive concept that is not limited to formal or final decision making.
- ▶ “Conducting governmental business” includes:
 - ▶ preliminary decisions
 - ▶ discussion
 - ▶ information gathering
 - ▶ interaction among members is not required
- ▶ *State ex rel. Badke v. Greendale Vill. Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).



Meetings | *Showers* Test: “Numbers” Requirement

- ▶ **Q:** How many members must gather to constitute a meeting?
 - ▶ **A:** A sufficient number to determine a body’s course of action.
 - ▶ **WARNING:** This number is not necessarily equal to a majority of the membership or to a quorum of the body.



Meetings | *Showers* Test: “Numbers” Requirement (continued)

- ▶ A sufficient number of members to determine a body’s course of action can refer to either:
 - ▶ the affirmative power to pass an action

OR

- ▶ the negative power to defeat an action.
 - ▶ Sometimes referred to as a “negative quorum.”



Meetings | Key Concepts: “Convening” of Members

- ▶ Members must convene for there to be a meeting.
- ▶ Not limited to face-to-face gatherings or physical presence together.
- ▶ Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority.
- ▶ If members communicate without physically gathering together, the key question is:
 - ▶ To what extent do their communications resemble a face-to-face exchange?



Meetings | Key Concepts: “Convening” of Members (continued)

- ▶ Written correspondence
 - ▶ Circulation of one or more written documents among members of a body
 - ▶ Generally, a “one-way” communication
 - ▶ Any responses are spread out over time
 - ▶ Courts are unlikely to find such written communication to be a “convening” of members.



Meetings | Key Concepts: “Convening” of Members (continued)

- ▶ Telephone conference calls, video conferences, etc.
 - ▶ Permit instantaneous verbal interaction among members
 - ▶ For practical purposes, equivalent to a physical gathering
 - ▶ If it passes the purpose and numbers tests, then it is a “meeting.” 69 Op. Att’y Gen. 143 (1980).



Meetings | Key Concepts: “Convening” of Members (continued)

- ▶ Other forms of electronic messaging
 - ▶ Email, electronic discussion boards, instant messaging, social networking
 - ▶ May or may not implicate the open meetings law
 - ▶ Depends on how they are used
 - ▶ Technology creates a risk of private communications that should be conducted at public meetings.
 - ▶ Therefore, **caution is advised**.



Meetings | Key Concepts: “Convening” of Members (continued)

- ▶ Other forms of electronic messaging (continued)
 - ▶ Courts will likely consider:
 - ▶ Number of participants
 - ▶ Number of communications
 - ▶ Time frame
 - ▶ Extent of conversation-like interaction
 - ▶ To minimize the risk of violations:
 - ▶ Use only for one-way transmissions
 - ▶ Do not send replies or minimize their content and distribution



Meetings | Key Concepts: Serial or “Walking” Quorum

- ▶ A “meeting” can sometimes result from a series of gatherings among members of a body.
 - ▶ When this occurs, it is known as a serial or “walking” quorum.
- ▶ Elements of a “walking” quorum:
 - ▶ A series of gatherings among groups of members
 - ▶ Each smaller in size than a quorum
 - ▶ Agreement to act uniformly
 - ▶ In sufficient number to control the body



Meetings | Key Concepts: Serial or “Walking” Quorum (continued)

- ▶ The “walking” quorum concept is intended to prevent:
 - ▶ circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.
- ▶ **Practical Tips:**
 - ▶ “Walking” quorum issues are complex and fact-specific.
 - ▶ Be prepared to consult with your legal counsel.



Meetings | Key Concepts: Social or Chance Gathering

- ▶ A “meeting” does not include a social or chance gathering of members of a body, unless the gathering is intended to avoid compliance with the law. Wis. Stat. § 19.82(2).
- ▶ If one-half or more of the members are present at a gathering, they have the burden to prove that the gathering was social or chance and was not for the purpose of conducting governmental business. Wis. Stat. § 19.82(2).



Notice



General Notice Requirement

- ▶ “Every meeting of a governmental body shall be preceded by public notice” Wis. Stat. § 19.83(1).
- ▶ Notice must be communicated to:
 - ▶ The public
 - ▶ News media that have filed a written request for notice
 - ▶ The official newspaper for the community in question
 - ▶ If none, then a news medium likely to give notice in the area

NOTICE



Timing of Public Notice

- ▶ Notice must be given at least 24 hours before the meeting.
- ▶ Shorter notice may be given only if, for good cause, 24-hour notice is impossible or impractical.
- ▶ In no case may less than 2 hours notice be given.



Content of Public Notice

- ▶ The meeting notice must reasonably inform the public of the time, date, place, and subject matter of the meeting. Wis. Stat. § 19.84(2).

Time

Date

Place

Subject Matter



Content of Public Notice | Subject Matter

- ▶ **Q:** How detailed must a notice be in describing the subjects to be considered at a meeting?
 - ▶ **A:** The Wisconsin Supreme Court has said that the description must be reasonable under all of the relevant circumstances of the particular case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
- ▶ Relevant circumstances include:
 - ▶ The burden of providing more detail
 - ▶ The degree of public interest in the subject
 - ▶ Whether the subject is non-routine



Content of Public Notice | Generic Agenda Items

- ▶ A notice should not use generic, uninformative subject-matter designations, such as:
 - ▶ Old or new business
 - ▶ Agenda revisions
 - ▶ Miscellaneous business, etc.



Content of Public Notice | Closed Session Notice

- ▶ If a possible closed session is anticipated at the time when public notice is given, then the notice must include the subject matter of the closed session.



Open Sessions



Open Session Requirements

- ▶ “[A]ll meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.” Wis. Stat. § 19.81(2).
- ▶ “‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times” Wis. Stat. § 19.82(3).



Open Session Requirements | Public Accessibility

- ▶ Public accessibility has three aspects:
 - ▶ Physical location in the community
 - ▶ Room size and acoustics
 - ▶ Physical accessibility



Open Session Requirements | Citizen Participation

- ▶ The open meeting law grants citizens the right to attend and observe open session meetings.
- ▶ The law does not require a governmental body to allow members of the public to speak or actively participate in the meeting.
- ▶ However, the law permits a portion of an open meeting to be set aside as a public comment period.
 - ▶ Public comment periods are not required.
 - ▶ Such a period must be included on the meeting notice.
 - ▶ Wis. Stat. §§ 19.83(2), 19.84(2).



Record Keeping

- ▶ All motions and roll call votes must be recorded and preserved.
 - ▶ Law does not specify a timeframe in which records of motions and roll call votes must be created.
 - ▶ However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable.
- ▶ Voting records must be open to public inspection to the extent required under the public records law.
- ▶ The open meetings law does not itself require bodies to keep formal minutes of meetings.
 - ▶ However, minutes are often required by other statutes for certain types of bodies, such as city councils, village boards, county boards.



Closed Sessions



Closed Sessions | Required Procedure

- ▶ Every meeting must begin in open session.
 - ▶ To go into closed session, a motion must be made and carried in open session.
 - ▶ The vote of each member must be recorded.
 - ▶ Before a vote to go into closed session, the presiding officer must announce:
 - ▶ The statutory exemption(s) authorizing the closed session
- AND
- ▶ The nature of the business to be considered.



Closed Sessions | Limited Scope

- ▶ When a governmental body is in closed session, it must limit its discussion:
 - ▶ to the specific business for which the closed session was authorized
- AND
- ▶ and may not take up any other matters.



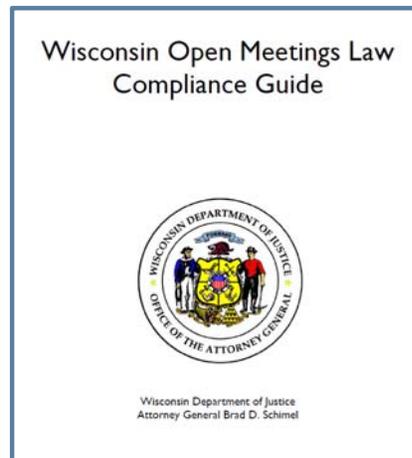
Closed Sessions | Attendance

- ▶ A governmental body has discretion to allow anyone to attend a closed session whom the body determines to be necessary for the business at hand.
- ▶ No duly elected or appointed member of a body may be excluded from any meeting of that body—whether closed or open.
- ▶ A member also may not be excluded from a meeting of a subunit of the body, unless the body has a rule to the contrary.



Closed Sessions | Authorized Subjects

- ▶ The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).
- ▶ For a more complete discussion of this topic, see DOJ's *Wisconsin Open Meetings Law Compliance Guide*.



Closed Sessions | Authorized Subjects (continued)

1. Deliberating about a case that has been the subject of a judicial or quasi-judicial trial or hearing before the body. Wis. Stat. § 19.85(1)(a).
2. Considering dismissal, demotion, licensing or discipline of a public employee or the investigation of charges against the employee. Wis. Stat. § 19.85(1)(b).
 - ▶ If there is to be an *evidentiary hearing* or if *action* is to be taken in closed session, then the employee is entitled to actual notice and may demand that the hearing or action be conducted in open session.



Closed Sessions | Authorized Subjects (continued)

3. Considering employment, promotion, compensation, or performance evaluation data of a public employee. Wis. Stat. § 19.85(1)(c).
 - ▶ Applies to public employees and *appointed* officials over whom the governmental body exercises responsibility.
 - ▶ Does not apply to *elected* officials. 76 Op. Att’y Gen. 276 (1987).
 - ▶ Applies to *specific individuals* and does not allow closed discussion of more general policies. 80 Op. Att’y Gen. 176 (1992).
4. Considering sensitive personal information that would be likely to have a substantial adverse effect upon an individual’s reputation. Wis. Stat. § 19.85(1)(f).



Closed Sessions | Authorized Subjects (continued)

5. Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting “other specified public business” whenever competitive or bargaining reasons require a closed session. Wis. Stat. § 19.85(1)(e).
 - ▶ The burden is on the governmental body to show that competitive or bargaining interests *require* confidentiality. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640.
 - ▶ The competitive or bargaining interests must belong to the *government*, not to a private party.
 - ▶ Only those *portions* of a meeting may be closed which directly impact the competitive or bargaining interests.
 - ▶ Closed *discussion must be limited* to matters that directly and substantially affect the government’s competitive or bargaining interests.



Closed Sessions | Authorized Subjects (continued)

6. Conferring with legal counsel about strategy related to litigation. Wis. Stat. § 19.85(1)(g).
 - ▶ The attorney must be legal counsel for the governmental body.
 - ▶ The attorney must be rendering advice about strategy related to litigation in which the body is or is likely to become involved.
 - ▶ Other discussions with counsel should be held in open session.

- ▶ For additional provisions authorizing closed sessions, see Wis. Stat. § 19.85(1) and DOJ's Compliance Guide.



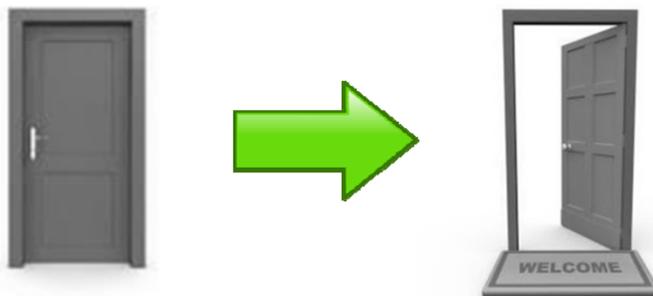
Closed Sessions | Voting

- ▶ Under a *prior* version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, if the vote is integral to the authorized subject of the closed session. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- ▶ More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
 - ▶ The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.
- ▶ A body may vote in closed session if the vote is an integral part of authorized closed deliberations.
- ▶ DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.



Closed Sessions | Reconvening in Open Session

- ▶ A body may vote in closed session if the vote is an integral part of authorized closed deliberations.
- ▶ DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.



The Public Records Law



Presumption - Public Records Law

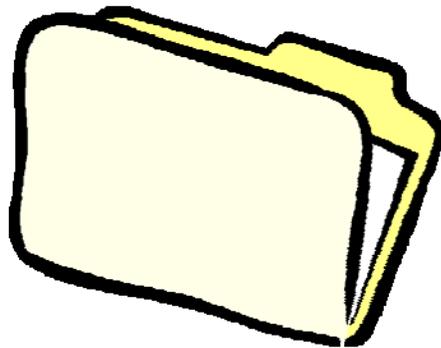
The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



“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.”
- ▶ Content not format



Is it a Record?

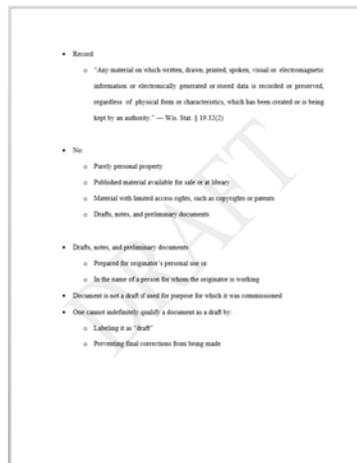
No:

- ▶ 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



Drafts, Notes, Preliminary Documents

- ▶ Prepared for originator's personal use or
 - ▶ In the name of a person for whom the originator is working
- ▶ Not a draft if used for purpose for which it was commissioned
- ▶ One cannot indefinitely qualify a document as a draft by:
 - ▶ Simply labeling it "draft"
 - ▶ Preventing final corrections from being made



Is it a Record?

Yes:

- ▶ Not created by the authority but in the authority's possession
- ▶ Electronic records, including:
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Social Media
- ▶ Contractors' records



Personal and Business Email, etc.

- ▶ 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, but the records custodian must still be made aware that such emails exist
- ▶ Government business emails, calls, and documents on private accounts:
 - ▶ Content determines whether something is a "record," not the medium, format, or location
 - ▶ These materials may be "records"
 - ▶ Personal materials on the same private accounts are not subject to disclosure
 - ▶ Recommendation: Conduct a careful search of all relevant accounts



Electronic Records

- ▶ Social media accounts created or maintained by an authority
- ▶ Cell phone content, including content on phones issued by an authority and possibly content on personal phones used for government business
 - ▶ Phone call records, text messages, app content
- ▶ It is important to check cell phones when gathering records in response to public records requests



Processing a Request - Basic Steps

- ▶ Does a record exist?
- ▶ Is there an absolute right of access?
 - ▶ If yes, disclose the record.
- ▶ Is there an absolute denial of access?
 - ▶ If yes, deny the request.
- ▶ If there is no statute or common law reason prohibiting access, then apply the public records balancing test.



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
 - ▶ Cannot rely on closed session exemption to deny access to related records if the reason requiring the closed session no longer exists
- ▶ Policies expressed in evidentiary privileges
- ▶ Public interest in reputation and privacy of individuals



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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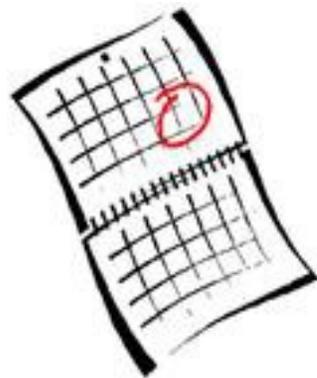
Written Response

- ▶ A written request requires a written response, if the request is denied in whole or in part
 - ▶ Must provide 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
 - ▶ Availability of same records from other sources generally not a sufficient reason
 - ▶ Reviewing court usually limited to reasons stated in 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
- ▶ Notice to record subjects is only required in limited circumstances
 - ▶ See Wis. Stat. 19.356



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 and status updates
- ▶ Penalties for arbitrary and capricious delay



Enforcement



Enforcement Provisions

- ▶ Open Meetings Law - Wis. Stat. § 19.97:
 - ▶ By the attorney general, the local district attorney, or a private relator
- ▶ Public Records Law - Wis. Stat. § 19.37:
 - ▶ Mandamus action to challenge withholding all or part of a record or a delay in granting access
 - ▶ Authority may be ordered to release records
 - ▶ Other remedies
 - ▶ By the attorney general, the local district attorney, or the requester
 - ▶ 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.”



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



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Baraboo, March 9, 2018

