

An Overview of the Public Records Law

Wisconsin Department of Justice

Office of Open Government

Milwaukee County Public Records Training

September 12, 2019

Milwaukee, Wisconsin



Presentation Overview

- Provide background on the Office of Open Government
- Cover public records law essentials
- Explain what a record is and who can request records
- Discuss the receipt and processing of public records requests
 - Including:
 - Application of the public records balancing test
 - Special issues
 - Employee records
- Outline how to respond to public records requests
- Detail permissible costs that may be assessed
- Address record retention



Introduction



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
- Run 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



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
- **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

- Wis. Stat. § 19.31:
 - 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.”



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
 - Custodial services: other staff may assist
 - All records belong to the authority



Requesters

- **Requester:** Defined in 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)
- **Employees can submit records requests**
 - Wis. Stat. § 19.35(1)(am)
 - Wis. Stat. § 103.13
 - Pertains only to records requested by an employee or a former employee
 - An employee may authorize a representative to obtain records on his/her behalf, but also, in practice, attorneys may make requests under § 103.13 on behalf of employees
 - Applies to public and private employers



Requesters, continued

- Requester generally **need not identify** himself or herself
 - Requesters may be anonymous
 - However, public records requests are records subject to disclosure
- Requester **need not state the purpose** of the request
 - Motive generally not relevant, but context appropriately considered
 - Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.
 - *See State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894:

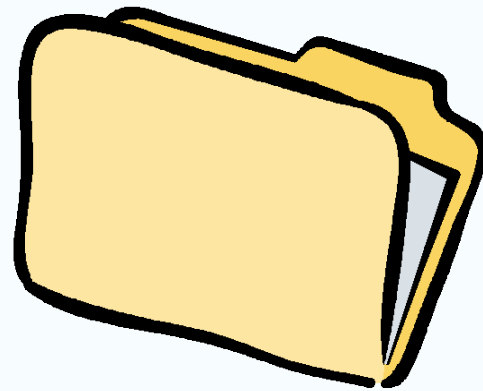


Records



“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.”



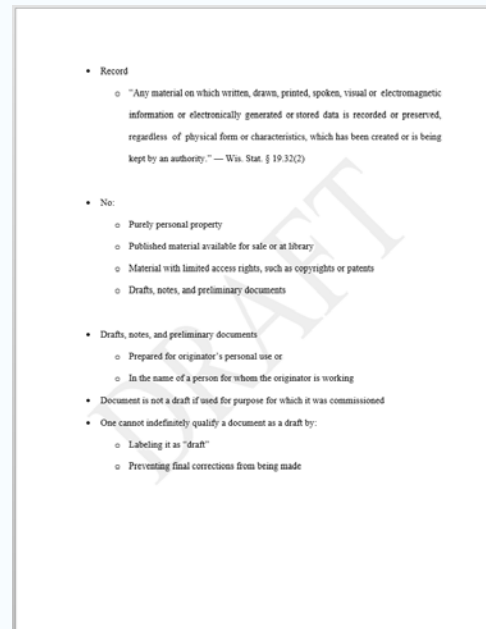
Is it a Record?

- Records **include** the following:
 - **Material not created by the authority but in the authority's possession**
 - Electronic records, including:
 - Audio and video
 - Data in a database
 - Emails
 - Social media
- Records **do not include** the following:
 - Published material available for sale or at library
 - Material with limited access rights, such as copyrights or patents
 - Purely personal property
 - 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" or preventing final corrections from being made



Email, Texts, etc.

- **Personal** email, calls, texts, 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 authority's officers or employees
 - *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
 - Generally, disclosure not required of purely personal e-mails sent or received by employees that evince no violation of law or policy
- **Government business** emails, calls, texts, and documents on **private accounts**:
 - These materials may be "records"
 - Content determines whether something is a "record," not the medium, format, or location
 - Personal materials on the same private accounts are not subject to disclosure
 - **Recommendation**: Conduct a careful search of all relevant accounts

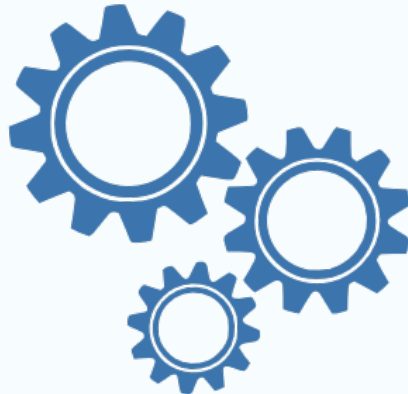


Receiving and Processing a Request



Public Records Request Process

- PRR received and forwarded to authority's records custodian
- Authority begins search for records
- Any responsive records subject to disclosure are reviewed:
 - **Presumption that they will be disclosed unless:**
 - They are exempt from disclosure pursuant to a **statute** or the **common law**
 - The **public records balancing test** weighs in favor of nondisclosure
- Records are released with letter explaining any redactions



Sufficient Request

- A request need **not be in writing**; it may be **verbal**
- An authority may not require the use of a form
- “Magic words” are not required
- A request must:
 - **Reasonably describe** the information or records requested
 - **Be reasonably specific as to time and subject matter**
- Custodian should not have to guess what records the requester wants



Records Must 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. See *Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.



Absolute Right & 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



Special Issues



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 application of the balancing test.



Other Special Issues

- Wis. Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Wis. Stat. § 165.79: Crime Laboratory Privilege
- **Driver's Privacy Protection Act (DPPA)**
 - Federal law that limits the release of an individual's personal information contained in a driver's license record
 - **Accident reports**: permitted to be released unredacted
 - DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
 - **Incident reports**: release of DMV info. prohibited unless exception applies
 - Compliance with public records request not a "function"
 - Information **verified** using DMV records is not protected by DPPA
 - *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339
- Other statutes requiring confidentiality



Special Issues: Employee Records



Employee Records

- Wis. Stat. § 19.35(1)

- Anyone can request
- Applies to public entities and quasi-governmental entities
- Any records, with exceptions
- Presumption of openness
- Private right of action
- Cannot require written request
- Respond as soon as practicable and without delay
- Written explanation of denial

- Wis. Stat. § 103.13

- Employee/former employee
- Applies to public and private employers
- Narrow category of records
- No presumption of openness
- No private right of action
- Employer may require written request
- Allow inspection within 7 days
- No written response or denial letter



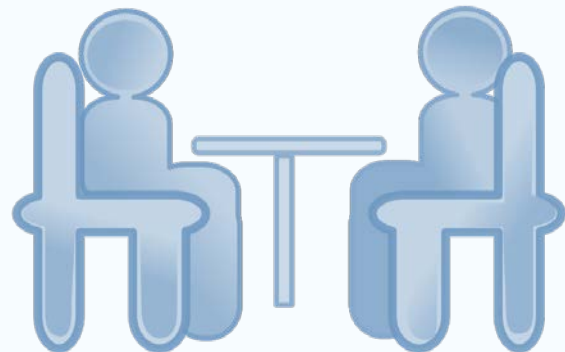
Employee Records, continued

- **Wis. Stat. § 19.36(10):** Treatment of employee personnel records
 - Unless **required** by § 103.13, prohibits the disclosure of information related to:
 - Employee's home address, email, phone number, SSN
 - Current investigation of possible criminal offense or misconduct connected with employment
 - Employee's employment examination, except the score
 - Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- **Other personnel-related records, including disciplinary records may be subject to disclosure**
 - Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356



Employee Records, continued

- Wis. Stat. § 103.13(6)
 - Exceptions generally **limit** the right of access **but do not prohibit** disclosure, except subject to § 19.36(10)
 - Exempts records of investigations of possible criminal offenses but not employee misconduct (does not say “current”)
 - Performance evaluations **not** exempt
 - Not entitled to records about another employee

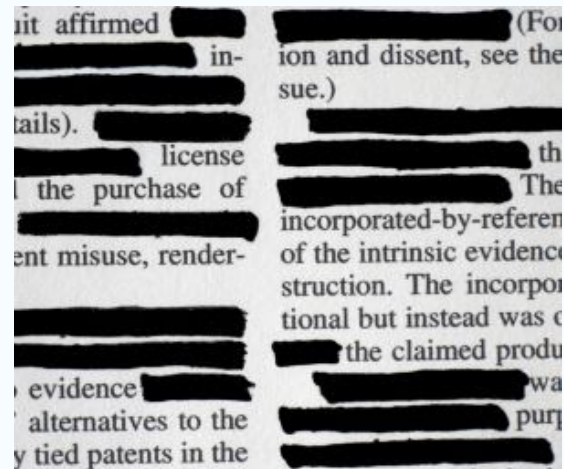


Responding to a Request



Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- Redaction constitutes a denial of access to the redacted information
 - Therefore subject to review by mandamus



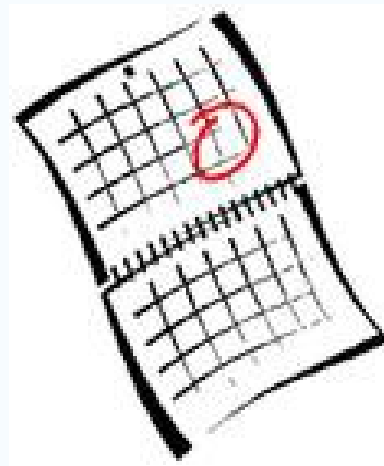
Written Response

- A written request requires a written response, if the request is denied in whole or in part
 - 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**
 - 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
- May respond in writing to a verbal request
- A request for clarification, without more, is not a denial



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



Notice Before Release

- Notice to record subjects is only required in limited circumstances
 - Required by Wis. Stat. § 19.356(2)(a)1:
 - Records containing 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
- Attorney General opinions regarding notice: OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- Courtesy notice



Costs



Costs

- **Actual, necessary, and direct** costs only—unless otherwise specified by law
 - Copying and reproduction
 - Location, if costs are \$50.00 or more
 - Location costs themselves must be \$50 or more: An authority **cannot** combine location costs with other costs to reach the \$50 threshold
 - 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
- **Recommendation:** Keep careful records of time spent working on requests



OOG Fee Advisory

- Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
 - Available at https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf
 - Overview of costs permissible under the law
 - Recent inquiries pertaining to high fees charged by some authorities
 - Copy costs that are not actual, necessary and direct
 - Location costs including time spent by specialists
 - Limit amount of time spent by specialist
 - Charge lowest hourly rate of individual **capable** of searching
 - DOJ's fee schedule is available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf>



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



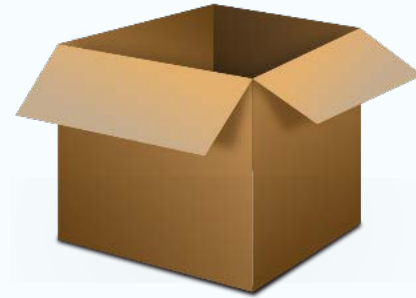
Record Retention - Public Records Law

- 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)
- <http://publicrecordsboard.gov>



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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