

Public Records Law: Compliance Essentials For Law Enforcement

Wisconsin Department of Justice

Office of Open Government

Green Lake County Law Enforcement Training

February 18, 2020 and February 20, 2020



Overview of Presentation

- ▶ Overview of DOJ's Office of Open Government (OOG) and the Public Records Law
- ▶ What is a Record (and What is Not)?
 - ▶ Record Subject to Disclosure vs. Disclosing Records
 - ▶ Electronic Records
- ▶ Receiving and Processing Public Records Requests (PRRs)
- ▶ Special Considerations for Law Enforcement Records
 - ▶ Open v. closed investigations
- ▶ Other Issues: Redaction, Timing, Format, Costs, Enforcement, Retention



Overview of the OOG and the Public Records Law



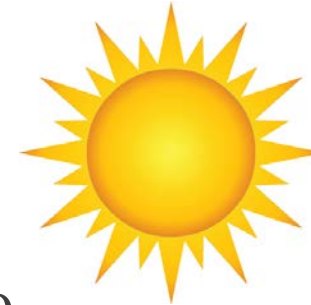
Overview of the OOG

- ▶ Interpret and apply the Public Records and Open Meetings (PROM) Laws
 - ▶ Develop open government policies
 - ▶ Provide legal counsel to DOJ and client agencies
 - ▶ Provide training and open government resources
- ▶ Manage DOJ's public records request (PRR) process
- ▶ 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
 - ▶ PROM Help Line: (608) 267-2220



Government Transparency and the 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
- ▶ Objectives of Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ 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

- ▶ **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.
 - ▶ Wis. Stat. § 19.35(1)(am)



Who Can Request (and Why)?

- ▶ Requester generally *need not identify* himself or herself
 - ▶ Anonymous requesters allowed (Wis. Stat. § 19.35(1)(i))
 - ▶ PRR's themselves 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 balancing test
 - ▶ *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894



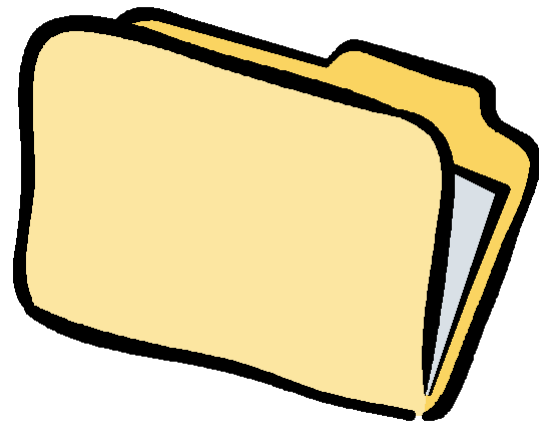
What is a Record? (And What is Not?)



“Record” = Content, Not Form

“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
- ▶ Contractors' records
- ▶ Electronic records, including:
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Audio and video
 - ▶ Social media



Is it a Record?

No:

- ▶ Published material available for sale or at library
- ▶ Purely personal property
- ▶ Material with limited access rights
 - ▶ *E.g.*, 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
- ▶ *Bottom Line:* Ask legal counsel if you have questions about drafts/notes

- 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)
- No:
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 - Prepared for originator's personal use or
 - In the name of a person for whom the originator is working
- Document is not a draft if used for purpose for which it was commissioned
- One cannot indefinitely qualify a document as a draft by:
 - Labeling it as "draft"
 - Preventing final corrections from being made



Record Subject to Disclosure v. Disclosing Record

- ▶ Employee's Role: You search for responsive records and give all responsive records to records custodian to review
 - ▶ You must give custodian all responsive records, even if you think record should not be disclosed or you don't want it disclosed
- ▶ Custodian's Role: Reviews responsive records and determines if records must be disclosed (4-step evaluation)
- ▶ *Bottom Line*: Record subject to disclosure does NOT necessarily mean it will be disclosed
 - ▶ But presumption of disclosure



Personal vs. Business Email

- ▶ **Personal** email, calls, and documents on an **authority's account**:
 - ▶ Email sent/received on an authority's computer system is a record subject to disclosure (but disclosure generally not required)
 - ▶ Includes purely personal email sent using authority's email system
- ▶ **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
 - ▶ Personal materials on the same private accounts are not subject to disclosure
- ▶ **Recommendation:** Do not use personal email for LE business!



Electronic Records: Questions to Ponder

- ▶ What about texts?
 - ▶ From LE agency cell phones?
 - ▶ From personal cell phones?
- ▶ What about MACH/dispatch messaging?
- ▶ What about social media posts?
 - ▶ On LE agency accounts?
 - ▶ On personal accounts?



Electronic Records = Public Records

- ▶ Cell phone content, including content on phones issued by an authority and *possibly content on personal phones used for government business* = Public Record
 - ▶ Phone call records, **text messages**, app content
 - ▶ Social media content
- ▶ *Bottom Line*: It is important to **check cell phones** when gathering records in response to public records requests
- ▶ **Recommendation**: **Do not use your private accounts/phone** to conduct LE business!

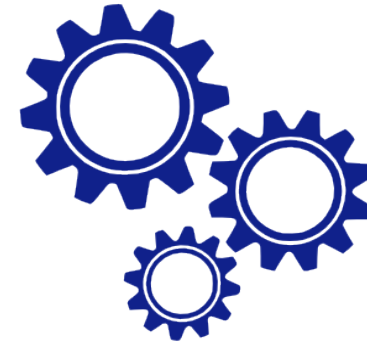


Receiving and Processing Public Records Requests (PRR's)



Public Records Request (PRR) Process, Generally

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for any responsive records that are *subject to disclosure*
- ▶ Responsive records are reviewed:
 - ▶ Presumption = Records will be disclosed
 - ▶ But under limited exceptions, not disclosed/redacted
 - ▶ Exempt from disclosure (statutory or common law)
 - ▶ Withheld or redacted under public records balancing test
- ▶ Records are released with letter explaining any redactions



Receiving a Request, Generally

- ▶ A request may be **verbal** or **in writing**
 - ▶ Tip: Summarize verbal request and send written acknowledgement
 - ▶ An authority may not require the use of a form
 - ▶ “Magic words” are not required
 - ▶ Request can be made to *anyone* at agency
- ▶ In order to be a **sufficient** request, it must:
 - ▶ Reasonably describe the information or records requested
 - ▶ Be reasonably specific as to time or subject matter
- ▶ *Bottom Line*: 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 the public records law in mind
- ▶ Tip: Communication with the requester is key in such situations



Communication with a Requester

- ▶ Don't understand the request? Contact the requester
 - ▶ Send a written summary of your understanding and 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



Processing a Request: Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the public records 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 record or inform requester
- ▶ Continuing requests are not contemplated by the public records law
- ▶ If there are no responsive records, inform the records custodian so the requester can be notified



Steps 2 & 3: Absolute Right/Denial

- ▶ **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



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



Notice Before Release

- ▶ 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
- ▶ OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- ▶ *Courtesy notice*—reach out to other LE agencies if you have their records



Special Considerations for Law Enforcement Records



Prosecutor v. LE Records

- ▶ Prosecutor's files
 - ▶ Not subject to public inspection under 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



LE Investigation Considerations

- ▶ There is a strong public interest in investigating and prosecuting criminal activity
- ▶ *Linzmeier v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
 - ▶ Police investigation reports can be particularly sensitive
 - ▶ Generally, LE records more likely to have an adverse effect on public interests if released
 - ▶ ***Public oversight of police investigations is important***



Open v. Closed Investigations

- ▶ *Question:* Is there difference between records of open investigations v. closed investigations:
 - ▶ Can all records of open investigations be denied outright?
 - ▶ Must access to all records of closed investigations be granted?
- ▶ *Answer:* No.
 - ▶ Must still do PRL balancing test analysis for each record
 - ▶ Must have clear, articulable, legally justifiable reasons to withhold any records



Key Considerations—LE Records

- ▶ 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
 - ▶ LE records of children and juveniles, respectively, are confidential with some exceptions
 - ▶ Wis. Stat. §§ 48.396 and 938.396
 - ▶ Access to other records regarding or mentioning children subject to general public records rules
- ▶ Officer safety
 - ▶ Including safety of officers' families and homes
- ▶ Tip: If an authority has a record that it did not create, it can reach out to the originating authority to see what concerns it may have



Key Questions to Ask— Reputation/Privacy Interests

- ▶ 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
 - ▶ The individual's *personal privacy* interests are *not* relevant
- ▶ Do the records contain rumor, hearsay, or potentially false statements?
- ▶ Were potentially biased witnesses interviewed?



Key Questions to Ask— Safety/Security

- ▶ Do the records discuss confidential law enforcement techniques and procedures?
- ▶ Would the release endanger safety of persons involved?
- ▶ Is there a possibility of threats, harassment, or reprisals?
 - ▶ Against victims, witnesses, officers, others, their families?
 - ▶ Any such possibility is accorded appropriate weight depending on the likelihood
 - ▶ Generally, there must be a **reasonable probability**
 - ▶ *See Erpenbach*, 354 Wis. 2d 61



Employee Personnel Records

- ▶ Wis. Stat. § 19.36(10): Generally, access *not* permitted for 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 record subjects may be required in limited circumstances (Wis. Stat. § 19.356)



Special Privileges or Confidentiality

- ▶ Attorney/client privilege (Wis. Stat. § 905.03) and attorney work product (Wis. Stat. § 804.01(2)(c)1.)
- ▶ Crime Laboratory Privilege (Wis. Stat. § 165.79)
- ▶ Other statutes requiring confidentiality
 - ▶ Educational records (Wis. Stat. § 118.125)
 - ▶ Health care records (Wis. Stat. § 146.82)
 - ▶ Mental health records (Wis. Stat. § 51.30(4))
- ▶ Driver's Privacy Protection Act (DPPA)
 - ▶ Accident reports: can be released unredacted
 - ▶ Incident reports: release of DMV info prohibited unless exception applies

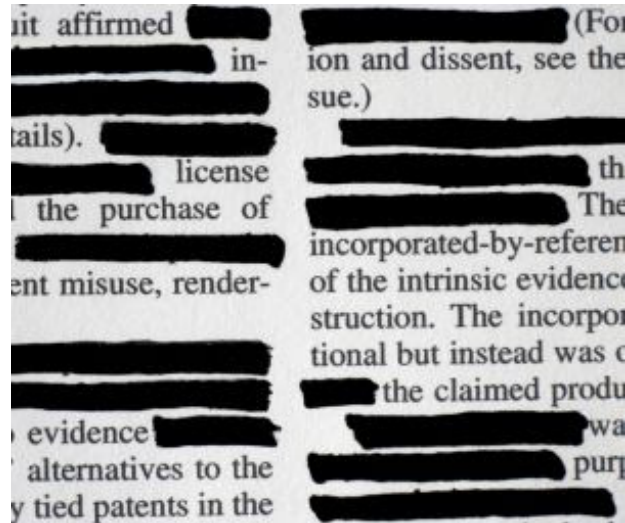


Other Issues: Redaction,
Timing, Format, Costs,
Enforcement, Retention



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, redaction is subject to review by mandamus (court action)



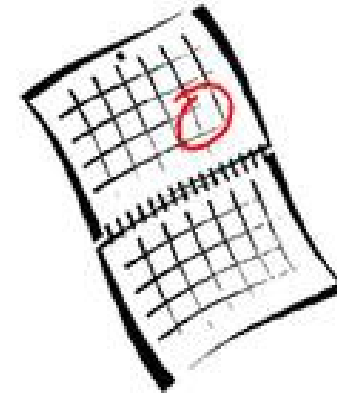
Written Response

- ▶ If a written request is denied in whole or in part, it requires a written response, with reasons for denial
 - ▶ Reviewing court usually limited to reasons stated in denial
 - ▶ Availability of same records from other sources generally not a sufficient reason for a denial
 - ▶ 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



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
- ▶ DOJ policy: 10 business days generally reasonable for a response to simple, narrow requests
- ▶ *Bottom line*: When you are informed of a pending public records request, work to gather responsive records **as soon as practicable**



Costs

- ▶ **Actual, necessary, and direct costs only**—unless otherwise specified by law
 - ▶ Copying and reproduction
 - ▶ Location costs, if costs are \$50.00 or more
 - ▶ Location only: Cannot aggregate/combine costs to reach \$50.00
 - ▶ Mailing/shipping to requester
 - ▶ Other costs 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 public records requests



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; or 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

- ▶ Wis. Stat. § 19.35(5) – after receiving a PR 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
- ▶ Wis. Stat. §§ 16.61 and 19.21: Record retention statutes for state and local authorities, respectively
- ▶ Record Retention Schedules
 - ▶ GRS's and RDA's
 - ▶ Generally, 7-yr retention
 - ▶ Publicrecordsboard.wi.gov
- ▶ Electronic retention generally permitted



For 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 (main OOG line)
 - ▶ Email Assistant Attorneys General:
 - ▶ Paul Ferguson: fergusonpm@doj.state.wi.us
 - ▶ Sarah Larson: larsonsk@doj.state.wi.us



Questions?



Thank you for your time and attention!

