

Task Force on Missing and Murdered Indigenous Women



Wisconsin Public Records and Open Government Essentials

Wisconsin Department of Justice

Office of Open Government

Task Force on Missing and Murdered Indigenous Women

May 28, 2021

Remote Training



INTRODUCTION



Presentation Overview

- Provide brief background on the Office of Open Government
- Cover public records law essentials
 - Including:
 - Explain what is a record and what is not a record
 - Who can request records
 - Discuss the receipt and processing of public records requests
- Address record retention
- Outline open meetings law essentials (time permitting)



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

- “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**
 - Sheds light on workings of government, acts of public officers and employees
 - Assists members of the public in becoming an informed electorate
 - Serves a basic tenet of democratic system by providing for public oversight
- **Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98**
 - The purpose of the open meetings law is to ensure openness
 - Only a few limited exemptions permit confidentiality
 - The open meetings law is to be broadly interpreted to promote openness



Transparency During COVID-19

- **Important:** An authority's obligations under the public records law and a governmental body's obligations under the open meetings law **do not cease** because of the COVID-19 public health situation.



The Public Records Law and Records Retention



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 RECORDS ROLES



Authorities and Custodians

- **Authority:** Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
 - Similar to the open meetings law's definition of "governmental body"
 - Includes boards, committees, councils, etc.
- **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
 - Examples:
 - Chairperson of a committee of elective officials or designee
 - Highest ranking officer and chief administrative officer, if any, of the authority or designee (in writing)
 - Custodial services: other staff may assist
 - All records belong to the authority



Requesters

- **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
 - Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.



PUBLIC RECORDS NOTICE



Public Records Notice Required

- **Wis. Stat. § 19.34(1)** – each authority must adopt and prominently display a notice describing the organization and providing information regarding the legal custodian; times, places, and methods to access records; costs of accessing records; and identifying each position of the authority that constitutes a local or state public office.
- As an example, DOJ’s public records notice is available on DOJ’s website at <https://www.doj.state.wi.us/sites/default/files/office-open-government/Public%20Records%20Notice%20-%20January%202020.pdf>

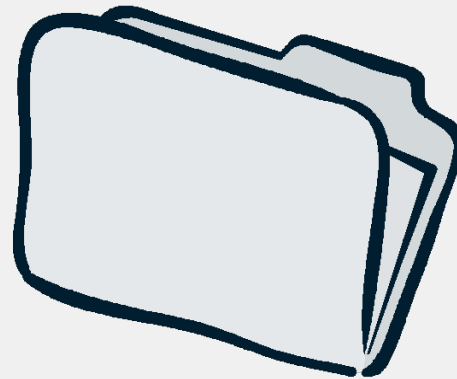


RECORDS



“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.”



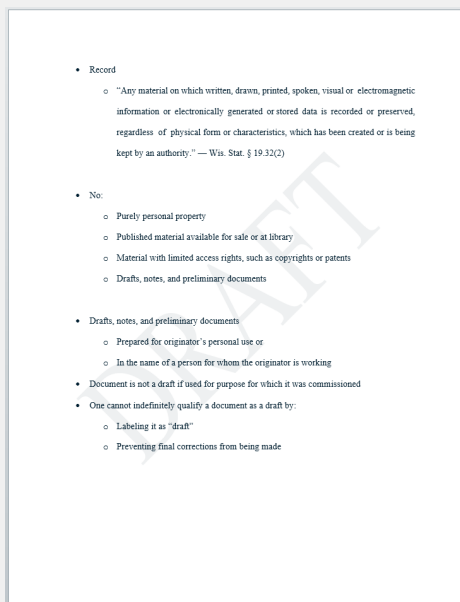
Is it a Record?

- 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, texts, and social media
 - Virtual workplace and remote meeting recordings, chats, and files
- 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



Electronic Records: Email, Texts, etc.

- **Personal** email, texts, 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 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, texts, calls, and documents on **personal accounts**:
 - These materials may be "records"
 - Content determines if something is a "record," not 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



Electronic Records: Virtual Workplaces

- Virtual workplaces and remote meeting programs create or contain records subject to disclosure
 - Recordings, chats, and shared files
 - Also, emojis, GIFs, photos posted
- **Recommendation for all electronic records:** Ensure you conduct a thorough search of all relevant accounts including emails, texts, chats, and other virtual workplace records.

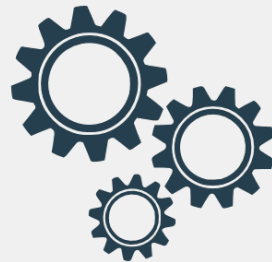


RECEIVING AND PROCESSING A REQUEST



Public Records Request Process

- PRR is received and forwarded to the authority's legal custodian
- The custodian begins the search for records
 - Reaches out to appropriate individuals within the authority as needed
- 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 a letter explaining any redactions



How are Requests Submitted?

- A request may be submitted to anyone with an authority
 - A request may be **verbal** or **in writing** (including emails and texts)
 - An authority may **not** require the use of a form
 - “Magic words” are not required



Communication with a Requester

- In order to be a **sufficient request**, it 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
- 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



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 and 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, for example:
 - 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, for example:
 - 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**
 - Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.
- Fact intensive; “blanket rules” disfavored
- Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- Identity of requester and the purpose of request are generally not part of the balancing test



SPECIAL ISSUES



Crime Victims

- Crime victims' rights expressed in statutes, constitutional provisions, and case law
 - Includes the family of crime victims
- **Marsy's Law**
 - Constitutional amendment to Article I, section 9m, of the Wisconsin Constitution
 - Created additional rights and protections for crime victims in Wisconsin
 - Marsy's Law's intersection with the public records law
 - Balancing test considerations
 - DOJ advisory issued on May 13, 2021 is available at <https://www.doj.state.wi.us/sites/default/files/news-media/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>



Children and Juveniles

- Law enforcement records of **children and juveniles** who are the subjects of investigations and other proceedings are **confidential with some exceptions**. See Wis. Stat. §§ 48.396 and 938.396.
 - Exceptions include news media, parents, and victims.
- Access to other records regarding or mentioning children are subject to general public records rules including the balancing test.



Health Records

- Confidentiality may be required by statutes, including:
 - Wis. Stat. § 51.30 (mental health records)
 - Wis. Stat. § 146.82
 - Federal Health Insurance Portability and Accountability Act (HIPAA)
- Balancing test considerations



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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RESPONDING TO A REQUEST



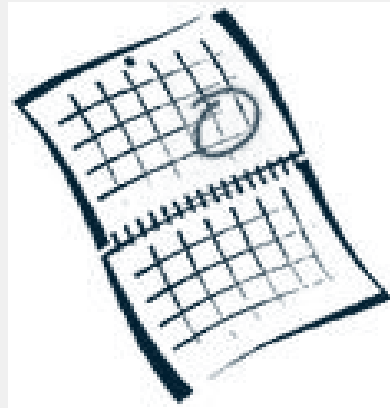
Written Response

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
 - **Any redaction constitutes a denial of access** to the redacted information
- **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: Give adequate notice of reasons for denial; ensure custodian exercised judgment
 - 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 a 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



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 employer other than the authority about employees of that employer
 - “Record subject” can try to prevent 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

- **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
- **Tip:** Keep careful records of time spent working on requests



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



Records Retention

- 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
- Wis. Stat. § 16.61 – records retention for state authorities
 - Records Retention Schedules:
 - General Records Schedules (GRSs)
 - Agency-specific Records Retention/Disposition Authorizations (RDAs)
- <http://publicrecordsboard.gov>



The Open Meetings Law



Public Policy

- “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)



Essentials

- Generally, open meetings law requires that all meetings of governmental bodies:
 - must be preceded by **public notice**; and
 - AND
 - must be **publicly held** in a place that is **reasonably accessible** and **open** at all times to all members of the public;
 - except in limited situations in which a **closed session** is specifically authorized.
- **Note:** For additional information regarding the open meetings law, including closed sessions, see **DOJ's Wisconsin Open Meetings Law Compliance Guide.**



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.).
- **Includes purely advisory bodies**, governmental corporations, quasi-governmental corporations, and formally constituted subunits
- Generally, a governmental body does not include a group of administrative staff of a government agency.



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).
 - Not limited to face-to-face gatherings or physical presence together.
 - Examples: telephone calls, emails, other electronic forms of communication
- **Showers Test**: Two-part test to determine if a meeting occurred. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
 - Members convene for the **purpose** of conducting governmental business
 - **Number** of members present is sufficient to determine the body's course of action
 - Includes **negative quorums**
- “**Walking**” **quorum**: meeting resulting from a series of gatherings among body members



Notice

- “Every meeting of a governmental body shall be preceded by public notice”
Wis. Stat. § 19.83(1).
- Notice must be communicated **at least 24 hours before** the meeting to:
 - The **public, news media** that have filed a **written request** for notice, and the **official newspaper** for the community in question.
- The meeting notice must reasonably inform the public of the **time, date, place,** and **subject matter** of the meeting.

NOTICE



COVID-19 Considerations: Reasonably Accessible

- Under the present circumstances, governmental bodies can typically meet their open meetings law obligations while practicing social distancing by conducting meetings via **telephone or video conference calls**.
 - However, **public must be provided an effective way to monitor the calls**.
- **Notices** should include instructions on how to attend, including any required call-in number and/or log-in information.
- The type of access that constitutes **reasonable access** in the present circumstances may be different from the type of access required in other circumstances.
- **Bottom line:** It is important to **focus** on the **purpose of the open meetings law** — to ensure government **openness and transparency** — during the public health situation.



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:
 - Location: AG's Capitol Office, 114 East
 - PROM Help Line: (608) 267-2220
 - Email: opengov@doj.state.wi.us



Questions





Thank you!

