

State Bar of Wisconsin
COVID Relief Legislation & Current Issues in
Administrative & Local Government Law 2022

Wisconsin Department of Justice
Office of Open Government



Electronic Public Records and Open Meetings Compliance

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Presentation Overview

- **Electronic Public Records**
 - Outline the public records request process
 - Explain what constitutes a record, including audio and video recordings
 - Locating electronic records and determining permissible fees
 - Reviewing and redacting audio and video recordings
 - Retaining electronic records
- **Remote Meetings**
 - Overview of open meetings law essentials
 - Explain reasonable accessibility
 - Discuss Covid's impact on open meetings
 - Provide best practices for conducting remote meetings



ELECTRONIC PUBLIC RECORDS: CONSIDERATIONS FOR VIDEO, VOICEMAIL, AND OTHER AUDIO RECORDINGS



Importance of Public Records Law

- “Transparency and oversight are essential to honest, ethical governance.” *John K. Maclver 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 our democratic system by providing for public oversight



Presumption

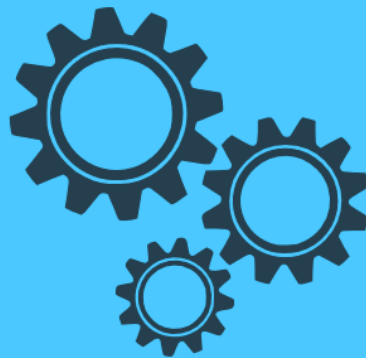
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



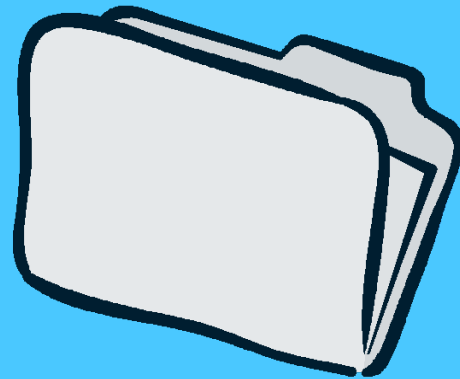
Public Records Request Process

- PRR is received and forwarded to the authority's records custodian
- The authority begins the 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 a letter explaining any redactions



What is a 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.”



Records

- Records **include** the following:
 - Material not created by the authority but in the authority's possession
 - Audio and video recordings
 - Data in a database
 - Emails, texts, and social media
 - Virtual workplace chat content, channel discussions, and files
 - Other electronic records



Electronic Records: Audio and Video Recordings

- **Audio Recordings**

- Voicemails
- Voice memos
- Recorded interviews
 - E.g., criminal investigations; workplace investigations
- Recordings of meetings
 - E.g., workplace meetings; governmental body meetings, including open and closed sessions
- 911 and dispatch audio recordings

- **Video Recordings**

- Recordings of meetings
- Surveillance video
- Police dashboard camera recordings
- Police body camera recordings
 - Wis. Stat. § 165.87 includes provisions regarding retention, defining the custodian of such recordings, and possible exceptions to disclosure



Locating Electronic Records

- The increasing use of electronic records has made locating many records easier and faster.
 - However, this is not always the case.
 - Searching for some electronic records can be time consuming.
- “Locating” a record means to find it by searching, examining, or experimenting.
- Location costs of \$50.00 or more are one of the few permissible fees an authority may assess
 - Only the actual, necessary, and direct costs of locating records may be assessed
 - An authority cannot combine location costs with other costs to reach the \$50 threshold
 - Review and redaction are separate processes for which a requester may not be charged
- Location costs include time spent by specialists
 - Limit the amount of time spent by specialists
 - Charge the lowest hourly rate of the individual capable of searching
- Authority staff should keep track of the time spent locating records



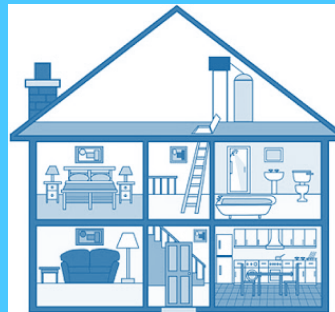
Review Each Requested Record

- Each requested record must be reviewed to determine the following:
 - Whether all or part of the requested record is prohibited from disclosure pursuant to a statute or the common law
 - Statutes may be found within the public records law itself or elsewhere
 - Common law
 - Whether the public records balancing test weighs in favor of not disclosing all or part of the requested record
 - Presumption that the records will be disclosed
- Records or information exempt from disclosure must be redacted
- This process can be time consuming for audio and video recordings
 - It may be helpful to communicate this to the requester



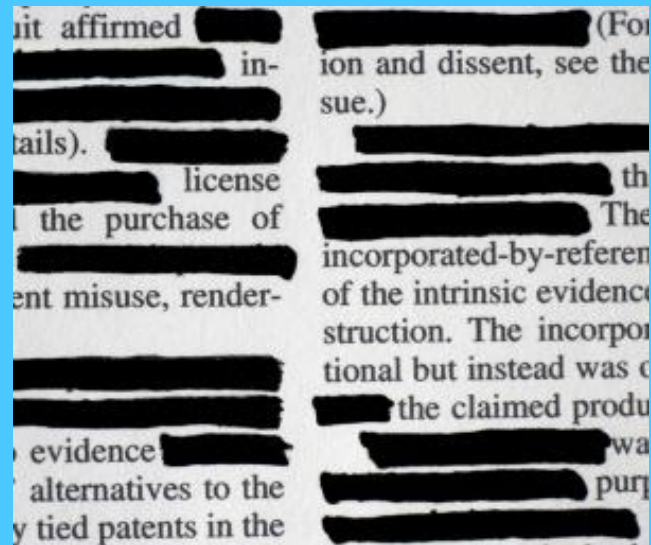
Special Considerations for Audio and Video

- Audio and video recordings may present issues not found in other types of records, for example:
 - Voices and likenesses of crime victims and confidential informants
 - Purely personal information such as:
 - Home interiors
 - Family photographs
 - Personal documents
- May require attention when determining whether information requires redaction



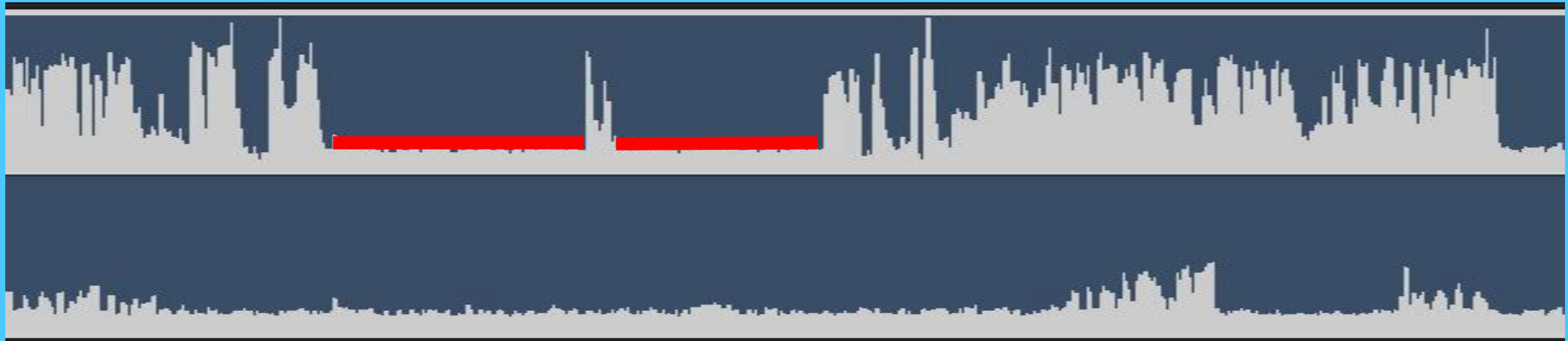
Redaction

- 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, covering when photocopying
- **Redaction constitutes a denial of access to the redacted information**
 - Therefore, any redaction is subject to review by mandamus



Redaction: Audio Recordings

- Computer software is available that provides redaction capabilities.
 - Ability to redact portions of audio while leaving the rest intact
 - Example: redaction of a crime victim's voice



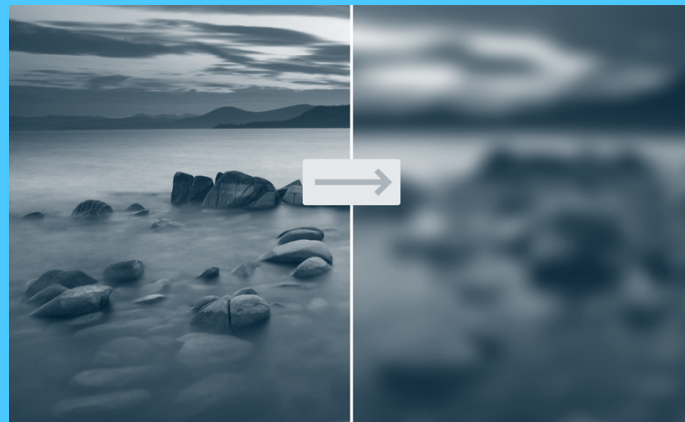
Redaction: Video Recordings

- Computer software is available that provides redaction capabilities.
 - Ability to redact portions of video while leaving the rest intact
 - E.g., blurring, blacking out portions of video, removing sections of video



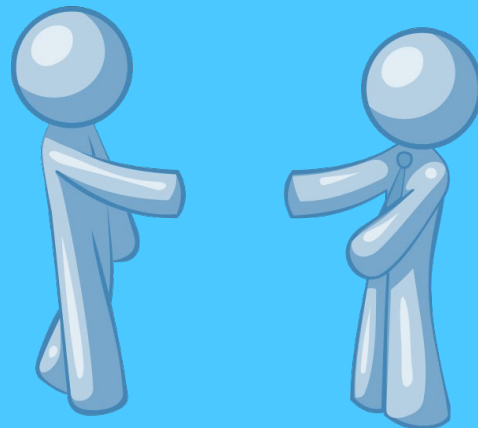
Redaction: Audio and Video Recordings

- 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)



Communication with a Requester

- Inform the requester if there is a large number of responsive records or complex electronic records
 - A requester may not know how many or what types of responsive records exist
 - A requester may not be aware of the time or resources required to review and potentially redact records, especially electronic records
- It is important to maintain an open line of communication with a requester



Records Retention under the Public Records Law

- Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - **Wis. Stat. § 19.35(5):** Governs retention **following receipt of a request:**
 - No destruction until the request is granted or until at least **60 days** after the authority denies the request
 - **90 days** if requester is committed or incarcerated
 - No destruction during enforcement action



Other Records Retention Statutes

- **Wis. Stat. § 16.61:** State authorities
- **Wis. Stat. § 19.21:** Local authorities
- **General Records Schedules (GRSs)**
 - State agencies are bound to follow
 - Unless they opt out and adopt corresponding RDAs within 12 months
 - Local government units may opt in
- Agency-specific **Records Retention/Disposition Authorizations (RDAs)**
 - Deviate from the GRSs to meet specific agency needs
- **Important:** Records retention schedules are based on the content of the record and not its format
 - For example, there can be no retention schedule for “all voicemails”



Records Retention Considerations

- Accounting for record storage, archiving, and searching
- Concerns:
 - Costs
 - Equipment
 - Technological knowledge and expertise
 - Maintenance
- For additional information, including guidance and best practices on electronic records management, visit the Public Records Board (PRB) website:
<http://publicrecordsboard.gov>



OPEN MEETINGS COMPLIANCE: CONDUCTING MEETINGS REMOTELY



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)



Open Meetings Law Essentials

- Generally, the open meetings law requires that all meetings of governmental bodies:
 - must be preceded by **public notice**; 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



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).
- The Wisconsin Supreme Court established a two-part test to determine if a meeting occurs. *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 (**purpose** requirement)
 - The number of members present is sufficient to determine the body's course of action (**numbers** requirement)
 - Includes **negative quorums**



Meetings: “Convening” of Members

- Members must convene for there to be a meeting
- Not limited to face-to-face gatherings or physical presence together
 - Examples: telephone calls, emails, virtual meetings, other electronic forms of communication
- Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority



Open Sessions: Reasonably Accessible

- Three aspects to public accessibility:
 - Physical **location** in the community
 - Meetings should be held within the body's geographic area
 - May not be held on private premises unless open and reasonably accessible to public
 - **Room size** and acoustics
 - Must be reasonably calculated to accommodate all citizens who wish to attend
 - Body members must take reasonable steps to make it possible to be heard
 - **Physical accessibility**
 - In open session, the room should be **unlocked**
 - If doors must be closed due to noise, notice should be posted inviting entry
 - Accessibility for people with disabilities
 - State bodies must meet in facilities people can access w/o assistance. Wis. Stat. § 19.82(3).
 - Statute not applicable to local bodies, but they must provide reasonable access



Reasonably Accessible: Covid's Impact

- The law requires meetings to be held in places “**reasonably accessible**” to the members of the public and open to all citizens at all times unless otherwise provided by law. Wis. Stat. § 19.81(2).
 - The type of access that constitutes reasonable access during pandemic circumstances may be different from the types of access required in other circumstances.
 - Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.
- DOJ's past guidance on remote meetings stated that telephone conference calls and video conferences were acceptable means of conducting meetings.
 - However, past guidance envisioned a physical place where members of the public could go to hear the telephone conference call or view the video conference.
 - The circumstances surrounding the pandemic have made this challenging.



Reasonably Accessible: Covid's Impact (cont.)

- OOG issued guidance to address inquiries regarding holding meetings during the pandemic.
 - Three advisories:
 - March 16, 2020 – provided key guidance on holding remote meetings
 - March 20, 2020 – offered additional information addressing technological and practical issues
 - March 15, 2021 – encouraged bodies to make open meetings accessible remotely until the pandemic is over and, following the pandemic to continue using practices developed during the pandemic that increase transparency
- Under pandemic circumstances, governmental bodies can typically meet their open meetings law obligations while being mindful of the public health situation by conducting meetings via **telephone or video conference calls**.
 - However, the **public must be provided an effective way to monitor the calls**.
- **Meeting notices** must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.



Remote Meetings: Best Practices

- For certain types of meetings, only providing remote access may not always be permissible.
 - For example:
 - Telephone conferences involving complex plans, drawings, or charts
 - When the demeanor of a witness is significant
- Practical Tips:
 - The body chair should encourage body members to **identify themselves** before speaking.
 - Body members should **refrain** from speaking over one another.
 - Body members should **avoid** texting or email one another during meetings.
 - Bodies should **post a recording** of a meeting on its website as soon as practicable after a meeting concludes.
- Bodies that meet remotely can and should consider steps to ensure that their meetings remain open and accessible to the public.



Remote Meetings: Best Practices (cont.)

- It is advisable for bodies to keep the public health situation, government guidance, and health concerns of the public in mind when making decisions regarding conducting open meetings.
- Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
 - Bodies should **facilitate reasonable access** to meetings for such individuals.
 - For example, bodies could hold meetings in person with a remote option.
- If a body meets in person, the public must be afforded the opportunity to also attend in person.
- **Bottom Line:** The more access to meetings, the better. Providing multiple options — even post-pandemic — to the public to attend meetings helps to fulfill the purpose of the open meetings law.

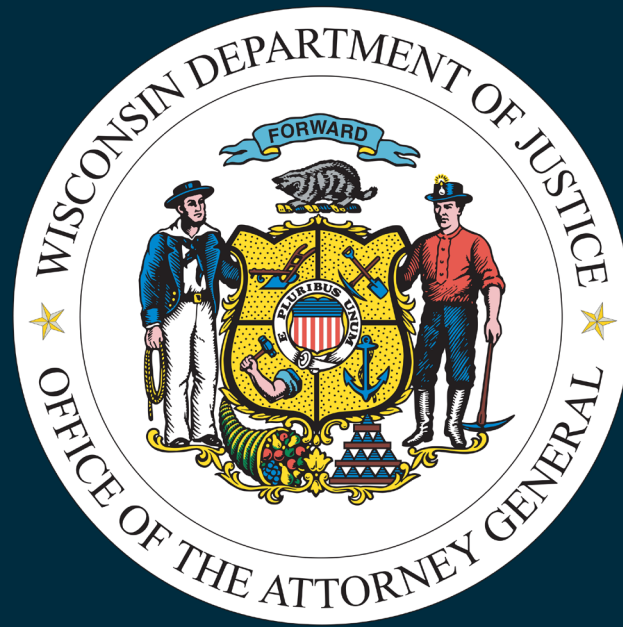


Further Information

- 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
 - Main Tel: (608) 267-2220
 - OOG Email: opengov@widoj.gov

 - Paul Ferguson: (608) 264-9464
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Thank You!

