

Wisconsin Department of Justice Office of Open Government



The Public Records Law: Essentials

Wisconsin Department of Justice

Office of Open Government

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League of Wisconsin Municipalities

Food for Thought-Monthly Brown Bag Lunch Series

Remote Training



INTRODUCTION



Presentation Overview

- Provide a brief background on DOJ's Office of Open Government
- Cover public records law essentials, including:
 - Explain what is a record and who can request records
 - Discuss the receipt and processing of public records requests
 - Outline how to respond to public records requests
- Address records retention
- Offer the opportunity for questions



DOJ's Office of Open Government (OOG)

- Interpret and apply the Public Records Law, Open Meetings 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 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 ROLES



Authorities and Custodians

- **Authority:** Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
 - Any of specified entities having custody of a record
 - Public records law obligations apply separately to each authority
 - The authority that receives a request **must** respond
- **Legal Custodian:** 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

- 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)
- Requesters may be anonymous, and generally, **need not identify** themselves
 - However, public records requests are records subject to disclosure
- Requesters **need not state the purpose** of their requests
 - 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.



RECORDS



“Record” Defined

- 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.”



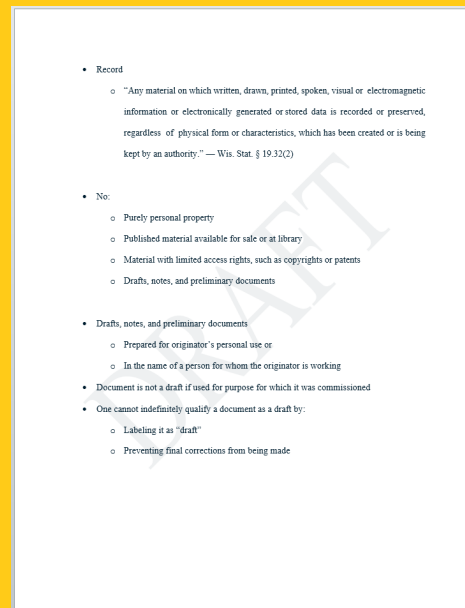
Is it a Record?

- 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 chat content, channel discussions, 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 officers or employees of the authority
 - *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 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 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



Receiving a Request

- A request may be submitted to anyone working for an authority
 - A request may be **verbal** or **in writing**
 - An authority may **not** require the use of a form
 - “Magic words” are not required
- 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
 - **Tip:** You can contact the requester if you do not understand the request



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** considering the totality of circumstances
- Identity of requester and purpose of request are generally not part of the balancing test



ISSUES TO NOTE



Employee Records

- Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - Unless required by Wis. Stat. § 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.



Other Special Issues

- Law enforcement records: Often require careful review
- 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.
 - Access to other records regarding or mentioning children are subject to general public records rules including the balancing test
- Wis. Stat. § 165.87: Law enforcement **body cameras**; includes provisions regarding:
 - Retention of body camera data
 - Legal custodian of body camera data
 - Possible exceptions to disclosure, including victims of sensitive or violent crimes, minors, and certain locations.
- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Other statutes requiring confidentiality

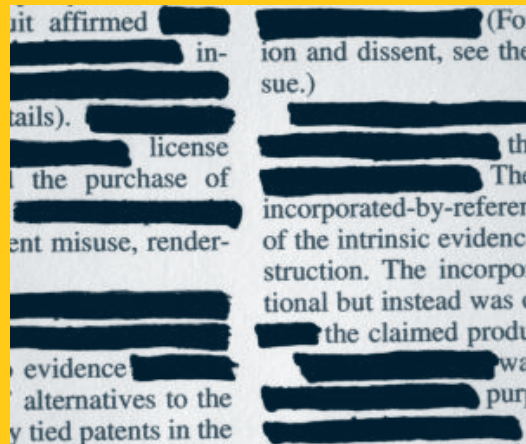


REDACTION



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



RESPONDING TO A REQUEST



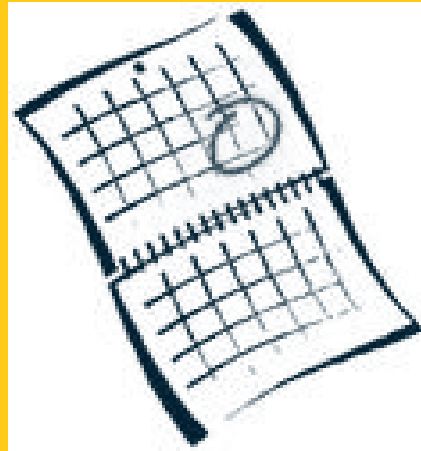
Written Response

- **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 the custodian has exercised judgment
 - Reviewing court usually limited to reasons stated in denial
 - **Availability of the same records from other sources generally not a sufficient reason**
 - Must inform the 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
- 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



PERMISSIBLE FEES



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
 - Result of 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
 - Mandamus action may be filed by:
 - Requester, with or without attorney
 - District attorney
 - Attorney General
 - 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.”



RECORDS RETENTION



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
 - Generally, a **7-year retention period** for most records
 - The Public Records Board (PRB) may set shorter retention periods
- **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



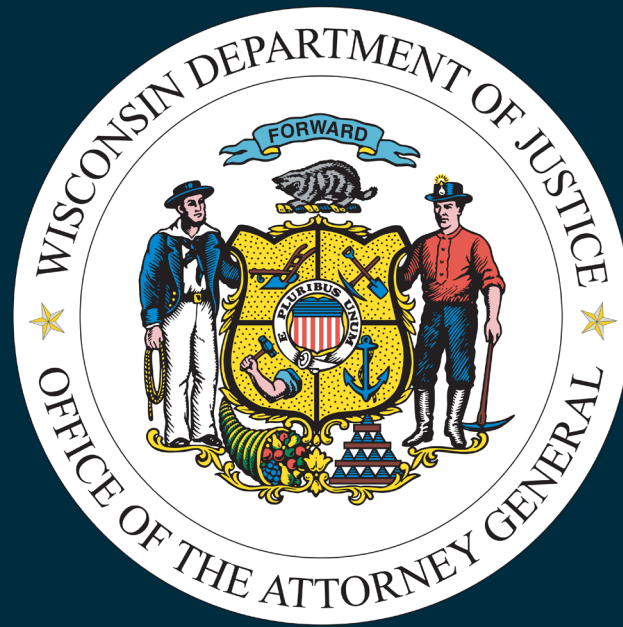
QUESTIONS?



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
fergusonpm@doj.state.wi.us





Thank You!

