

Wisconsin Department of Justice

2023 Legislative Staff Training



Wisconsin Public Records Law: Essentials for Legislative Staff

Wisconsin Department of Justice

Office of Open Government

January 20, 2023

Madison



INTRODUCTION



Presentation Overview

- Describe the importance of the public records law
- Define what is a record and who can request records
- Discuss the receipt and processing of public records requests
- Detail how to respond to public records requests
- Offer the opportunity for questions



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
- **Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39**
 - Sheds light on workings of government and 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 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



Presumption of Openness

- Presume that every document (paper or electronic), email, text, etc., that enters your office is subject to public disclosure
- Public policy favors disclosure
- There are statutes requiring non-disclosure of certain information



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
 - Includes each legislator and each chief clerk's office
 - 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

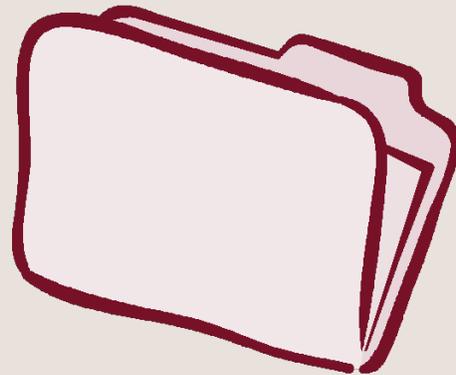


RECORDS



“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.”



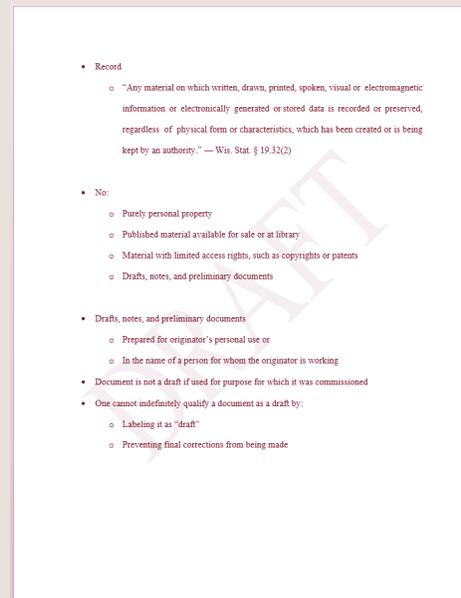
Is it a Record?

- 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



Records Request Process

Received and forwarded to the authority's records custodian

Authority begins the search for records

Responsive records subject to disclosure are reviewed:

Assumption that they will be disclosed unless:

Records are exempt from disclosure pursuant to a **statute** or the **common law**

public records balancing test weighs in favor of nondisclosure

Records are released with a letter explaining any redactions



ing a Request

It may be submitted to anyone working for an authority

Request may be **verbal** or **in writing**

Authority may **not** require the use of a form

“Magic words” are not required

To be a **sufficient request**, it must:

Clearly describe the information or records requested

Reasonably specific as to time and subject matter

Requester should not have to guess what records the requester wants

Records Must Exist

Only **records that exist** at the time of the request must be produced
and, an authority **need not create** new records

Records law does **not require** answering questions

For example, if a request asks a question and an existing record answers the question,
the authority must produce the record or inform the requester

Speculative requests are not contemplated by the public records law

If there are no responsive records, inform the requester. See *Journal Times v. Police & Fire*
Commission, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.



Balancing Test

public interest in disclosure of the record **against** the **public interest** and **public policies against disclosure**

or public policies expressed in other statutes, court decisions, exemptions to reporting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.

dispositive; “blanket rules” disfavored

Decide on **case-by-case basis** taking into consideration totality of circumstances

Whether requester and the purpose of request are generally not part of balancing test



REDACTION

tion

§ 19.36(6): If part of a record is disclosable, must disclose that part and non-disclosable portions

Best way to redact: electronic redaction, black magic marker, cover up with tape when photocopying

Redaction constitutes a denial of access to the redacted information

Redaction is subject to review by mandamus

it affirmed [redacted] [redacted] (For
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RESPONDING TO A REQUEST

Response Preparation

Review the request

Communicate with the requester for clarification

Identify

Work with other offices, chief clerks, etc.

Identify all of confidential attorney-client privileged communications



Response Format

the request

or copies

formats (*Lueders v. Krug* case)

requested in electronic format, where no redactions were applied, **must** be

in electronic format

and copies of requested records were not sufficient

responses

of background, context, or additional information



n Response

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
requestor 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

inform the requestor that denial is subject to review in an enforcement action for
non-compliance under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney

and in writing to a verbal request

of Response

is required, **“as soon as practicable and without delay”**

specific time limits, depends on circumstances

y: 10 business days generally reasonable for response to simple,
requests

for arbitrary and capricious delay



Before Release

Record subjects is only required in limited circumstances

and by Wis. Stat. § 19.356(2)(a)1:

Records containing information resulting from closed investigation into a disciplinary
action 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

Records of a "record subject" can try to prevent disclosure in court

and by Wis. Stat. § 19.356(9):

Records of an officer or employee of the authority holding state or local public office

Records of a "record subject" may augment the record to be released

PERMISSIBLE FEES

necessary, and direct costs only – unless otherwise specified by law

and reproduction

only, if costs are \$50.00 or more

do not combine location costs with other costs to reach the \$50 threshold

for shipping to requester

as specified in Wis. Stat. § 19.35(3)

agencies **may not** charge for redaction costs

fees may be required if total costs exceed \$5.00

agencies may waive all or part of costs

ENFORCEMENT

ement

§ 19.37: Mandamus action to challenge withholding a record or part of a record
in granting access

us action may be filed by:

ester, with or without attorney

ct attorney

ney General

y may be ordered to release records

medies

§ 916.72: Tampering with public records and notices

RECORDS RETENTION

Records Retention and Preservation

Records are exempt from records retention requirements. See Wis. Stat. § 16.61(2)(b)1.

Records are subject to Wis. Stat. § 19.35(5) records preservation requirement when a public records request is submitted

Do not destroy records which are subject to a pending public records request

Preserve records for 60 days after denial (90 days if requester is incarcerated);
Extend to 180 days if litigation is filed



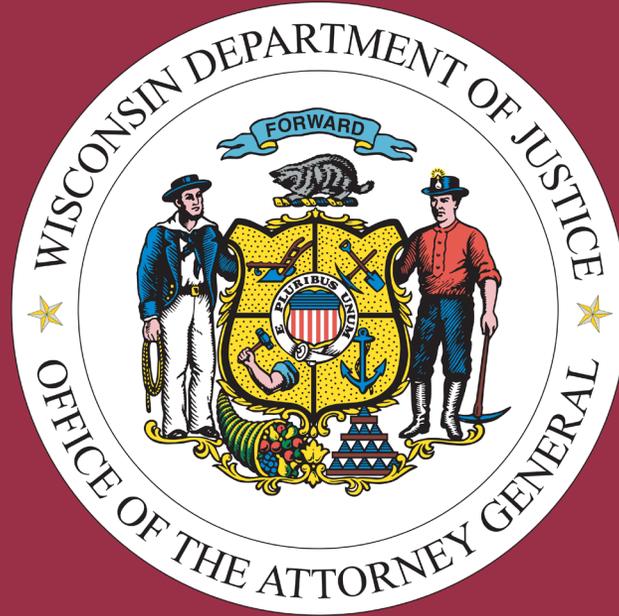
Resources and Further Information

Download DOJ Compliance Guides and other resources at
<https://www.doj.state.wi.us/office-open-government/office-open-government>

Contact:

- Chief clerk
- Legislative Council's Open Records Task Force: (608) 266-1304
- DOJ's Office of Open Government PROM Help Line: (608) 267-2220





Thank You!

