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# Wisconsin Department of Justice Office of Open Government



# Public Records for Law Enforcement

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Wisconsin Department of Justice

Office of Open Government

January 23, 2023

Wisconsin New Chiefs and Sheriffs Training

Madison



# INTRODUCTION

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# Presentation Overview

- Provide a brief background of DOJ's Office of Open Government
- Cover public records law essentials, including:
  - The importance of the public records law
  - What is a record and who can request records
  - The receipt and processing of public records requests
  - The review and redaction of records
  - How to respond to public records requests
- Address records retention
- Offer the opportunity for questions



# 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. 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 ROLES

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# 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.



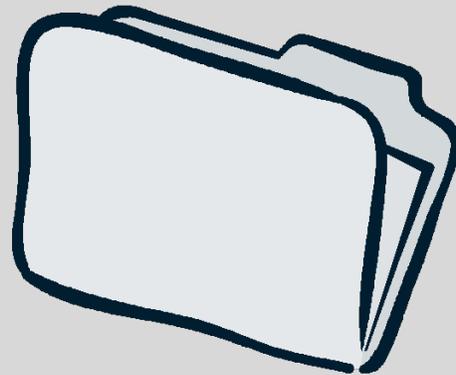
# RECORDS

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# “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.”



# Records

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



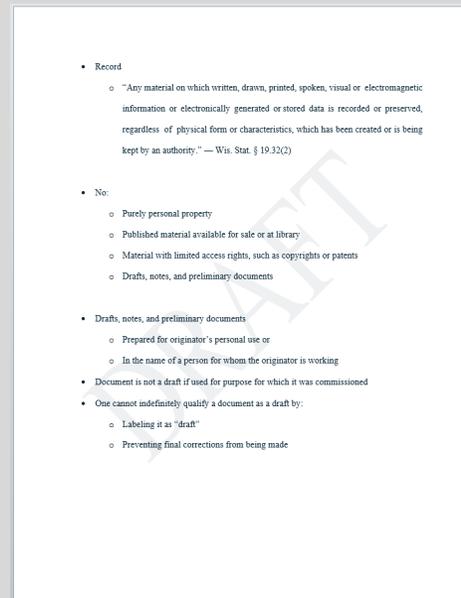
# Not Records

- 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: Audio and Video Recordings

- **Audio Recordings**

- Voicemails
- Voice memos
- Recorded interviews
- 911 and dispatch audio recordings

- **Video Recordings**

- 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



# 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 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



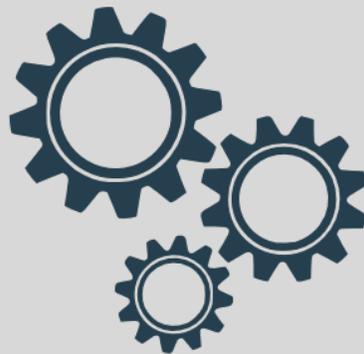
# RECEIVING AND PROCESSING A REQUEST

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# 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



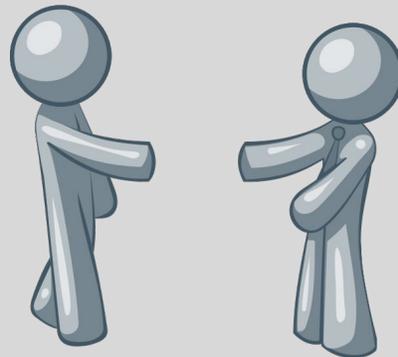
# Receiving a Request

- 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:** It is okay to contact the requester to clarify



# 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 if there is a large number of responsive records, or large estimated costs, and suggest or solicit alternatives
  - A requester may not know how many responsive records exist
  - A requester may have no interest in many “technically” responsive records
- 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 purpose of request are generally not part of the balancing test



# ISSUES TO NOTE

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# Prosecutor's Files v. Law Enforcement Records

- A **prosecutor's files** are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433–34, 477 N.W.2d 608, 610 (1991).
- However, for a **law enforcement agency's records**, the regular public records process, including application of the balancing test on a case-by-case basis, must be followed.
  - 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
    - **Public oversight of police investigations is important**
    - Police investigation reports can be particularly sensitive
    - Generally, law enforcement records more likely to have an adverse effect on public interests if released



# Law Enforcement Records – Key Considerations

- Crime victims’ rights expressed in statutes, constitutional provisions, and case law
  - Consideration of family of crime victims
  - **Marsy’s Law:** Balancing test considerations
- 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
- Children and juveniles
- Officer safety, including the 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



# Law Enforcement – Questions to Ask

- Would the release endanger the safety of persons involved?
- 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 **not** the individual's personal interests
- Do the records contain rumor, hearsay, or potentially false statements?
- Were potentially biased witnesses interviewed?
- Do the records discuss confidential law enforcement techniques and procedures?
- Is there a possibility of threats, harassment, or reprisals (against victims, witnesses, officers, others, or their families)?
  - Any such possibility is accorded appropriate weight depending on the likelihood
    - Generally, there must be a **reasonable probability**
      - *See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



# Body Camera Recordings

- Wis. Stat. § 165.87 – Body Cameras and Law Enforcement
  - Must retain all data from law enforcement body cameras for at least **120 days**
    - Exceptions that require longer retention, including:
      - Encounters that result in death or actual or alleged injury
      - Encounters that in a custodial arrest
      - A search during an authorized temporary questioning
      - Encounters that include the use of force involved
    - Other situations in which longer retention may be required



# Body Camera Recordings, cont.

- Wis. Stat. § 165.87, continued
  - Generally, data from a body camera are records subject to disclosure
    - Public policy **weighing in favor of nondisclosure** of content relating to:
      - Victims of sensitive or violent crimes
      - Minors
      - Locations where a record subject has a reasonable expectation of privacy
    - The individual's face and other identifiers must be redacted
      - **Unless** they do **not** object or the public interest is **so great** that it outweighs the public policy weighing in favor of nondisclosure
  - For the purposes of public records requests, the law enforcement agency that created the body camera recording is the legal custodian
    - Other authorities possessing the recording must **deny** requests for it



# Children and Juveniles

- **Wis. Stat. ch. 48:** Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 48.396.
- **Wis. Stat. ch. 938:** Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 938.396.
- Access to other records regarding or mentioning children subject to general public records rules, including application of the balancing test.



# Driver's Privacy Protection Act (DPPA)

- 18 U.S.C. § 2721 et seq. - federal statute enacted in 1994
- Purpose: limit release of personal info contained in driver's license records
- Concerns about threats from stalkers and criminals and states' practice of selling personal information to businesses
- Law prohibits release of certain types of information (with exceptions):
  - Personal information
    - Individual's photograph, SSN, driver ID number, name, address, telephone number, medical or disability information
  - Highly restricted personal information
    - Individual's photo or image, SSN, medical or disability information



# Driver's Privacy Protection Act (DPPA)

- **Accident reports:** permitted to be released unredacted
  - DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
- **Incident reports:** release of DMV info. prohibited unless exception applies
  - Compliance with public records requests is not an exception (not a “function”)
- Information **verified** using DMV records is not protected by DPPA
  - Presents problem of determining how information was obtained
- See *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339



# Mental Health Records

- Wis. Stat. § 51.30(4): Generally, **mental health registration and treatment** records are **confidential** and **privileged** to the subject individual.
  - May only release with the subject individual's **informed written consent**, court order, or other certain limited circumstances. See Wis. Stat. § 51.30(4)(b).
  - **Includes** duplicate copies of **statements of emergency detention** in the possession of a law enforcement agency, absent written informed consent or a court order. See *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
    - Supreme Court found that such records were registration records even if in the possession of the law enforcement agency.
      - Treatment records include registration records. See Wis. Stat. § 51.30(1)(b).
- Consult your legal counsel



# 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 Issues to Note

- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Wis. Stat. § 165.79: Crime Laboratory Privilege
- Other statutes requiring confidentiality



# REDACTION

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# Redaction

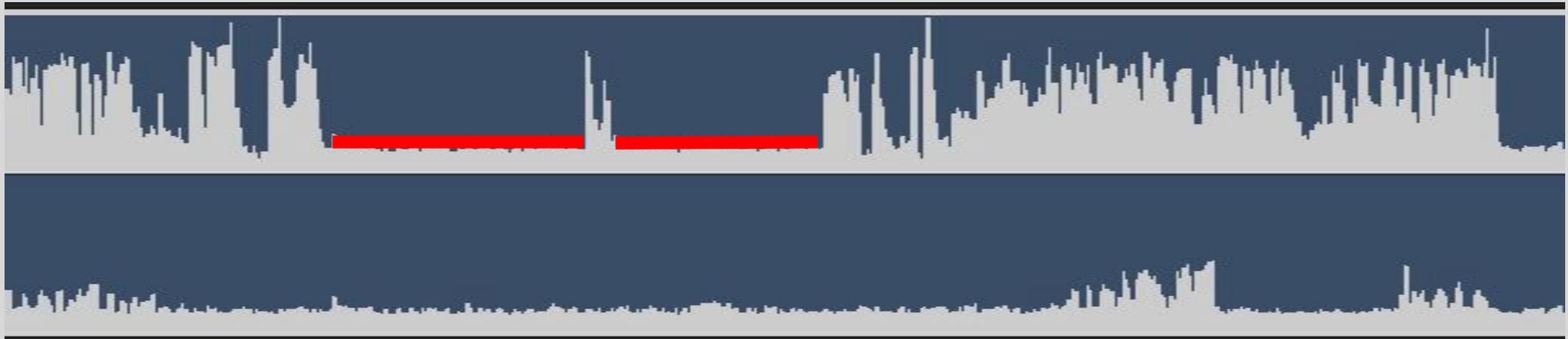
- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information**
  - Therefore, subject to review by mandamus

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# 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)



# RESPONDING TO A REQUEST

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# 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



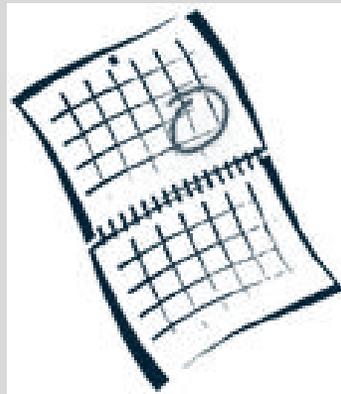
# Format of Records

- *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898
  - Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
    - Printed copies of requested records were not sufficient
      - Printed copies do not include metadata (data about data)
    - Because emails were requested in electronic format, associated metadata was also requested
- *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
  - PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester



# 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
- **Bottom line:** When the OOG informs you of a pending public records request, work to gather responsive records as soon as practicable



# 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

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# 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](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

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# 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

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# 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



# Records Retention – Best Practices

- Establish agency policies regarding retention
- Ensure all agency-specific RDAs are up-to-date
  - RDAs sunset after 10 years
- Train agency records officers and staff on records retention and relevant agency policies
- Follow your retention schedules
- Consult your legal counsel
- For additional information, visit the PRB's website: <http://publicrecordsboard.gov>



# QUESTIONS?

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# 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](mailto:opengov@widoj.gov)
  - Paul Ferguson: (608) 264-9464  
[fergusonpm@doj.state.wi.us](mailto:fergusonpm@doj.state.wi.us)
  - Jad Itani: (608) 261-5805  
[itanijm@doj.state.wi.us](mailto:itanijm@doj.state.wi.us)





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Thank You!

