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# Wisconsin Department of Justice Office of Open Government



# The Public Records Law and the Open Meetings Law: Wisconsin's Sunshine Laws

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Wisconsin Department of Justice

Office of Open Government

November 14, 2023

Pierce County, Wisconsin

Remote Training



# INTRODUCTION

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# Presentation Overview

- Provide brief background on DOJ's Office of Open Government
- **Public Records Session:** 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
- **Open Meetings Session:** Outline open meetings law essentials, including:
  - Define what constitutes a governmental body
  - Explain when a meeting occurs
  - Detail meeting notice requirements
- 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
- **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



# The Public Records Law and Records Retention

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# 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:** Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- **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
  - E.g., elective official or designee
  - Custodial services: other staff may assist
  - All records belong to the authority
- **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)



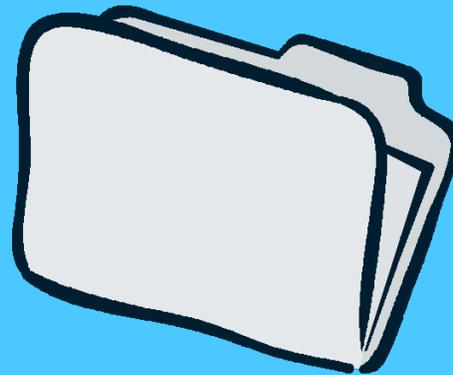
# RECORDS

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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**



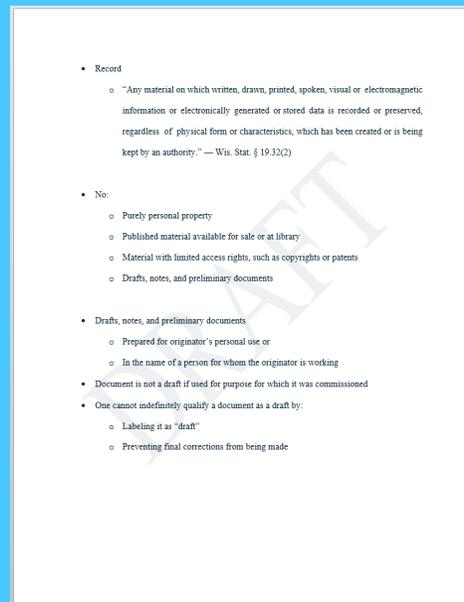
# Not Records

- 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: 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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# Who Can Request?

- 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.



# 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



# 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.



# 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
  - 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



# 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).
  - Applies to documents integral to the criminal investigation and the prosecution process, as well as historical data leading up to the prosecution. *Nichols v. Bennett*, 199 Wis. 2d 268, 275 n.4, 544 N.W. 2d 428 (1996); *Foust*, 165 Wis. 2d at 434.
- 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
  - Includes family of crime victims
  - **Marsy’s Law:** Balancing test considerations
    - Office of Open Government Advisory: Marsy’s Law and Public Records (May 13, 2021): <https://www.doj.state.wi.us/sites/default/files/news-media/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>
- 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



# Law Enforcement Records – Key Considerations, continued

- 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.
- Officer safety, including the safety of their 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?



# Law Enforcement – Questions to Ask, continued

- 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



# Ongoing Investigations and Prosecutions

- The public records law does **not** include a prohibition against the release of records regarding an ongoing investigation or prosecution.
  - Exception under § 19.36(10)(b):
    - Unless required by § 103.13
      - **prohibits** the disclosure of information related to the **current** investigation of possible crime or misconduct connected with employment by **employee**.



# Ongoing Investigations and Prosecutions

- Ongoing investigation/prosecution is a factor under the balancing test; considerations:
  - Impact on the ability to have a fair trial
    - Influence on jury pool or judge
  - Influence on potential witnesses and impact on the ability to determine veracity
  - Availability of requested records prior to ongoing investigation/prosecution
    - E.g., an individual's personnel file; Acadis records
- **Tip:** A law enforcement agency that receives a public records request related to an ongoing prosecution should **contact the prosecutor** to see if there are concerns related to release.



# Body Camera Recordings – Retention

- **Wis. Stat. § 165.87(2):**

- 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 result in a custodial arrest
    - A search during an authorized temporary questioning
    - Encounters that include the use of force by a law enforcement officer
  - Other situations in which longer retention may be required
    - Including when body camera data is used in criminal, civil, or administrative proceedings



# Body Camera Recordings – Definitions

- **Wis. Stat. § 165.87(3)(a):**
  - “Authority” and “requester” have the same meanings as in the public records law
  - “Record subject” means an individual recorded by a body camera to whom **all** the following apply:
    - Individual is depicted or the individual’s voice is audible
    - Individual’s identity is known to the law enforcement agency
    - Individual is **not** a law enforcement officer acting in an official capacity
      - Unless a crime or other violation of law has been committed or alleged to have been committed against the officer while present at the location that was recorded



# Body Camera Recordings – Disclosure

- **Wis. Stat. § 165.87(3)(b):**
  - Generally, data from a body camera are records subject to disclosure
- **Wis. Stat. § 165.87(3)(c):**
  - Outlines public policy **weighing in favor of nondisclosure** of certain content:
    - Privacy of victims of sensitive or violent crimes
    - Privacy of minors
    - Privacy of record subjects in a location where a record subject has a reasonable expectation of privacy
  - Such an 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



# Body Camera Recordings – Disclosure, continued

- **Wis. Stat. § 165.87(3)(d):**
  - 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
- **Wis. Stat. § 165.87(3)(e):**
  - Statute does not prohibit release of body camera data under Wis. Stat. § 175.47(5)(b) (release of reports related to reviews of officer-involved deaths)



# 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



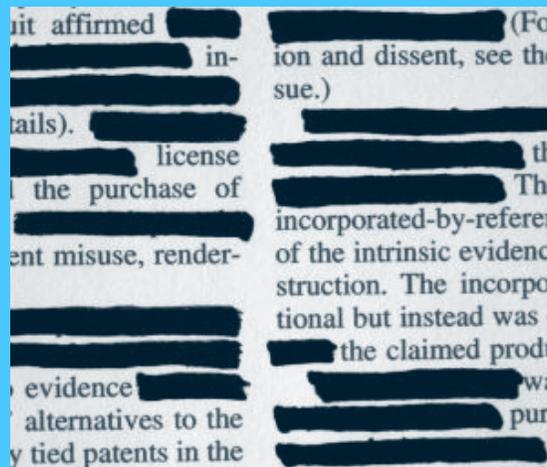
# REDACTION

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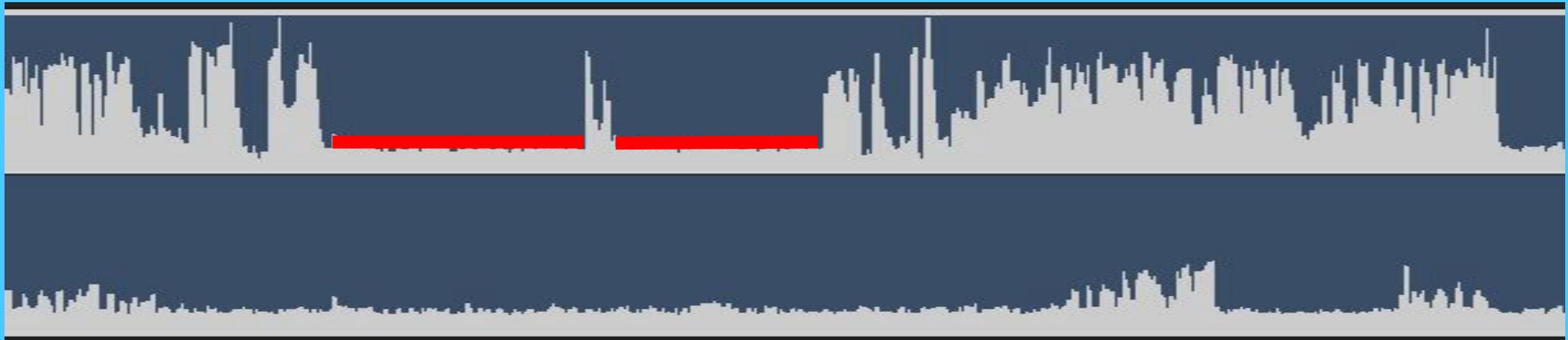
# Redaction

- 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



# 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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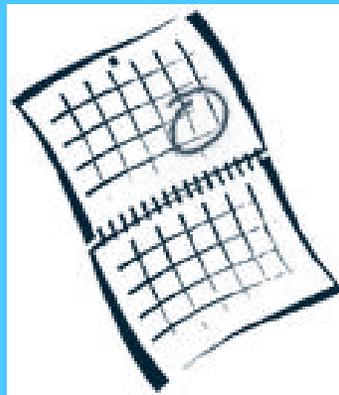
# Written Response

- **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



# 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

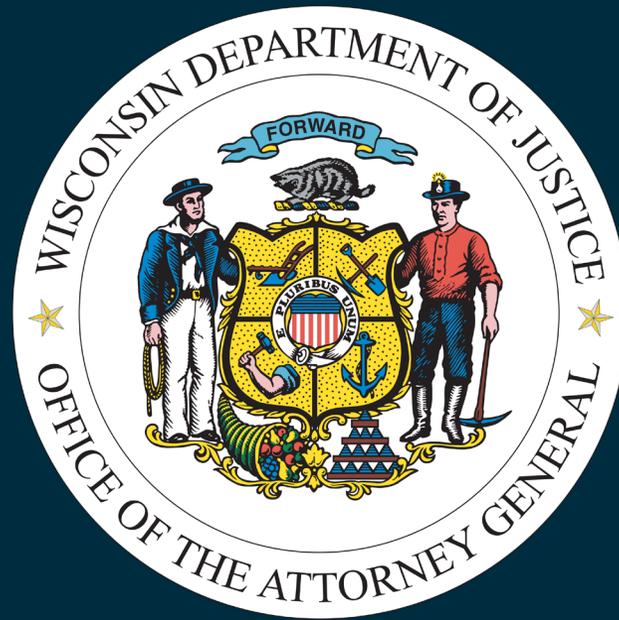
- **Wis. Stat. § 16.61:** State authorities
- **Wis. Stat. § 19.21:** Local authorities
  - Generally, a **7-year retention period** for most records
  - The Public Records Board (PRB) may set shorter retention periods
- **General Records Schedules (GRSs)**
  - State agencies are bound to follow
    - 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



# PUBLIC RECORDS LAW QUESTIONS?

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**Short Break!**



# The Open Meetings Law

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# 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, 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.



# GOVERNMENTAL BODIES

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# 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.
  - Highly fact-specific issue.



# Governmental Bodies: Creation

- “[C]reated by constitution, statute ordinance, rule or order . . . .”
  - Refers not to the kind of power wielded by a governmental body, but rather to how the body is created.
- How to determine whether a body is created by constitution, statute, ordinance or rule?
  - Look it up.
- How to determine whether a body is created by order?
  - An order can include **any directive** — whether formal or informal — that creates a body and assigns it some governmental responsibilities. See 78 Op. Att’y Gen. 67 (1989).
  - Such a directive may be issued by any governmental official or entity that has the power to delegate the governmental responsibilities in question.
  - **Note:** This is a very fact-specific standard, so there are no bright-line rules.



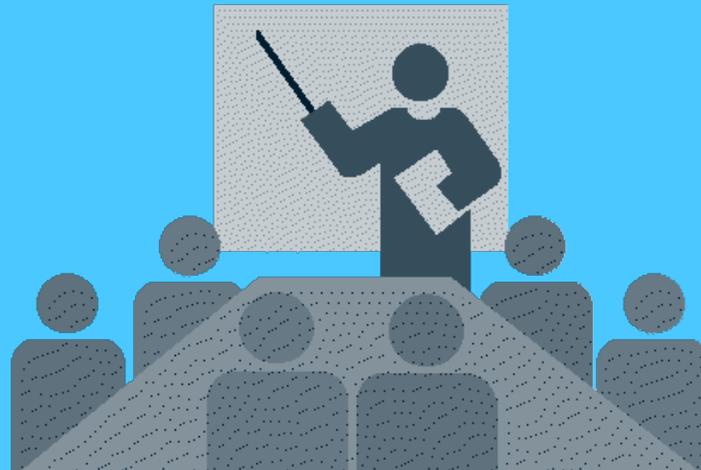
# MEETINGS

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# 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, virtual meetings, other electronic forms of communication



# Meetings: The *Showers* Test

- The Wisconsin Supreme Court established a two-part test. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
  - A meeting occurs whenever:
    - **Purpose** requirement:
      - Members convene for the purpose of conducting governmental business
    - **Numbers** requirement:
      - The number of members present is sufficient to determine the body's course of action
        - Includes **negative quorums**



# Meetings: “Purpose” Requirement

- “Conducting governmental business” is an expansive concept that is not limited to formal or final decision making.
- “Conducting governmental business” includes:
  - preliminary decisions
  - discussion
  - information gathering
  - interaction among members is not required
- *State ex rel. Badke v. Greendale Vill. Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).



# Meetings: “Numbers” Requirement

- This number is not necessarily equal to a majority of the membership or to a quorum of the body.
- A sufficient number of members to determine a body’s course of action can refer to either:
  - the affirmative power to pass an action or
  - the negative power to defeat an action
    - Sometimes referred to as a “**negative quorum**”
- Fact-specific depending on the governmental body



# Meetings: “Convening” of Members

- Members must convene for there to be a meeting
- Not limited to face-to-face gatherings or physical presence together
- Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority
- If members communicate without physically gathering together, the key question is:
  - **To what extent do their communications resemble a face-to-face exchange?**



# Meetings: “Convening” of Members (cont.)

- A “**convening**” of members can occur through **written correspondence, telephone and video conference calls, emails**, and other forms of **electronic messaging**.
- **Technology** creates risk of private communication that should be held at public meetings
  - Important to keep in mind with increase in use of virtual workplace platforms
- To minimize the risk of violations, **caution is advised**:
  - Use only for one-way transmissions
    - Do not send replies or minimize their distribution
    - If a reply is needed, do not reply to all; reply only to the sender
  - Do not use for debate/discussion or polling/voting
    - Could be construed as a “walking quorum”
  - Limit the use of attachments/editing among members



# Meetings: Serial or “Walking” Quorum

- “Walking” Quorum: A meeting resulting from a series of gatherings among body members
- Elements of a “walking” quorum:
  - A series of gatherings among groups of members
  - Each smaller in size than a quorum
  - Agreement to act uniformly
  - In sufficient number to control the body
- The “walking” quorum concept is intended to prevent circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.
- **Practical Tips:**
  - “Walking” quorum issues are complex and fact-specific
  - Consult with your legal counsel



# NOTICE

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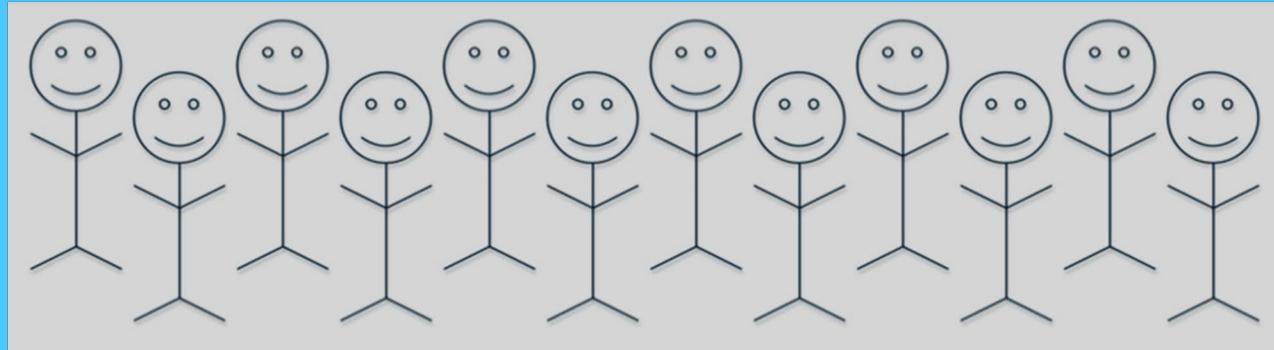
# General Notice Requirement

- “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
  - The **official newspaper** for the community in question
    - If none, then a news medium likely to give notice in the area
- The meeting notice must reasonably inform the public of the **time, date, place,** and **subject matter** of the meeting.
- Presiding officer is legally responsible for ensuring notice requirements are met
  - Tasks may be delegated but presiding officer liable for any violations



# Manner of Notice to the Public

- Notice to the public **must** be made using one of the following methods:
  - **Posting** in at least **3 public places** likely to give notice to persons affected
  - **Posting** in at least **1 public place** and on the body's **Internet site**
  - **Paid publication** in news medium likely to give notice to persons affected



# Content of Public Notice: Subject Matter

- How detailed must a notice be in describing the subject matter of a meeting?
  - The Wisconsin Supreme Court has said that the description must be **reasonable under all of the relevant circumstances** of the particular case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
- Relevant circumstances include:
  - The burden of providing more detail
  - The degree of public interest in the subject
  - Whether the subject is non-routine
- Notice should **not** use generic, uninformative subject-matter designations, such as:
  - Old or new business
  - Agenda revisions
  - Miscellaneous business, etc.
- Notice should include the subject matter of any contemplated closed session



# OPEN SESSIONS

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# Open Session Requirements

- “[A]ll meetings of all state and local governmental bodies shall be **publicly held in places reasonably accessible** to members of the public and **shall be open** to all citizens at all times **unless otherwise expressly provided by law.**” Wis. Stat. § 19.81(2).
- “‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times . . . .” Wis. Stat. § 19.82(3).



# 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 & **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 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.
- The Attorney General has long advised that bodies may convene their meetings **via telephone or video conference**.
  - However, courts have not resolved the question of whether the practice of convening meeting in this matter is always permissible.
  - The **public must be provided an effective way to monitor the meetings**.
- **Notices** must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.



# Reasonably Accessible: Covid's Impact (cont.)

- Best practices:
  - 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.
  - Bodies are encouraged to retain practices adopted to promote transparency during the pandemic to the extent those practices increase accessibility.
  - **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.



# Open Sessions: Citizen Participation

- The open meeting law ensures the right to **attend and observe** open session meetings
- The law does **not** require a body to allow the public to speak or actively participate
- However, the law **permits** a portion of an open meeting to be set aside as a **public comment period**
  - Public comment periods are **not** required
  - Such a period must be included on the meeting notice
- During a public comment period, a body:
  - may **receive information** from the public and
  - may **discuss** any subject raised by the public but
  - may **not** take formal action



# Open Sessions: Recording

- Wis. Stat. § 19.90:
  - Bodies must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session.
  - Recording or photographing activities may not disrupt the meeting.
- The open meetings law does not require governmental bodies to permit citizens to record closed sessions.



# Open Sessions: Voting

- Unless otherwise specifically provided, no secret ballots may be used except for electing officers of the body.
- Any member may require a roll-call vote.



# Open Sessions: Record Keeping

- All motions and roll call votes must be recorded and preserved
  - Law does not specify a timeframe in which such records must be created.
    - However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable
- Voting records must be open to public inspection to the extent required under the public records law
- The open meetings law does not itself require bodies to keep formal minutes of meetings
  - However, minutes are often required by **other statutes** for certain types of bodies



# CLOSED SESSIONS

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# Closed Sessions: Required Procedure

- Every meeting must begin in open session
- To go into closed session, a motion must be duly made and carried in open session
- The vote of each member must be recorded
- Before a vote to go into closed session, the presiding officer must announce:
  - The statutory exemption(s) authorizing the closed session and
  - The nature of the business to be considered



# Closed Sessions: Scope and Attendance

- Limited scope
  - When a governmental body is in closed session, it must **limit** its discussion:
    - to the **specific business** for which the closed session was **authorized** and
    - may **not** take up any other matters
- Attendance
  - A body has discretion to allow anyone to attend a closed session
  - No duly elected or appointed member of a body may be excluded from any meeting of that body—whether closed or open
  - A member also may not be excluded from a meeting of a subunit of the body, unless the body has a rule to the contrary



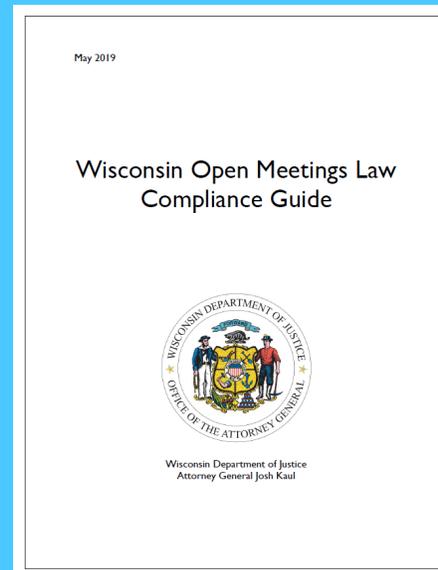
# Closed Sessions: Voting

- Under a prior version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, **if the vote is integral to the authorized subject of the closed session**. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
  - The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.
- DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.



# Closed Sessions: Authorized Subjects

- The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).
- The following slide includes some commonly used exemptions; it is not a complete list. For a more complete discussion of this topic, see **DOJ's *Wisconsin Open Meetings Law Compliance Guide***.



# Closed Sessions: Authorized Subjects (cont.)

- (a) **Deliberating about a case** that has been the subject of a judicial or quasi-judicial trial or hearing before the body.
- (b) Considering **dismissal, demotion, licensing or discipline of a public employee** or the investigation of charges against the employee.
- (c) Considering **employment, promotion, compensation, or performance evaluation data** of a public employee.
- (d) Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention.**
- (e) Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting “other specified public business” whenever **competitive or bargaining reasons require a closed session.**
- (f) Considering **sensitive personal information** that would be likely to have a substantial adverse effect upon an individual’s reputation.
- (g) **Conferring with legal counsel** about strategy related to litigation.



# ENFORCEMENT

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# Enforcement: Options and Penalties

- The open meetings law may be enforced by the attorney general, local district attorney, or by a private relator. Wis. Stat. § 19.97:
- Penalties:
  - Civil forfeiture of \$25 to \$300 per violation for any **member** of a body who **knowingly** attends a meeting held in violation of the open meetings law or otherwise violates the law
  - A member is **not** liable for attending an unlawful meeting if the member makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.
  - Members of a body who — acting openly and in good faith — seek and rely upon the advice of the body’s official legal counsel may not be found liable for any violation
- An **action** taken at an unlawful meeting may be **voidable** if:
  - the court finds that the public interest in the enforcement of the open meetings law outweighs the public interest in sustaining the validity of the action



# OPEN MEETINGS LAW QUESTIONS?

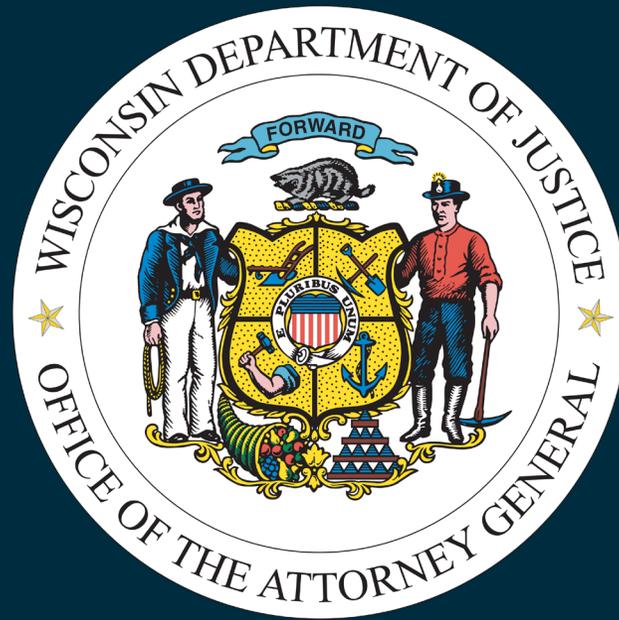
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# Further Information

- 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)





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Thank You!

