

Wisconsin Department of Justice Office of Open Government



Public Records for Law Enforcement

Wisconsin Department of Justice

Office of Open Government

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2024 CIB Conference

Green Bay



INTRODUCTION



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



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.

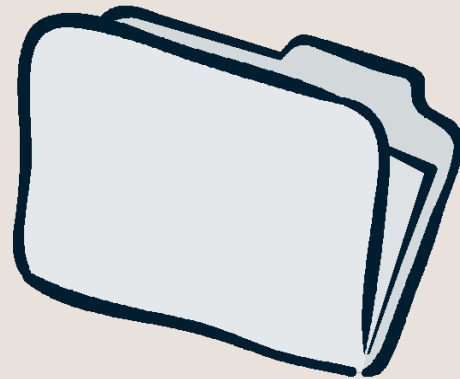


RECORDS



“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.”



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**



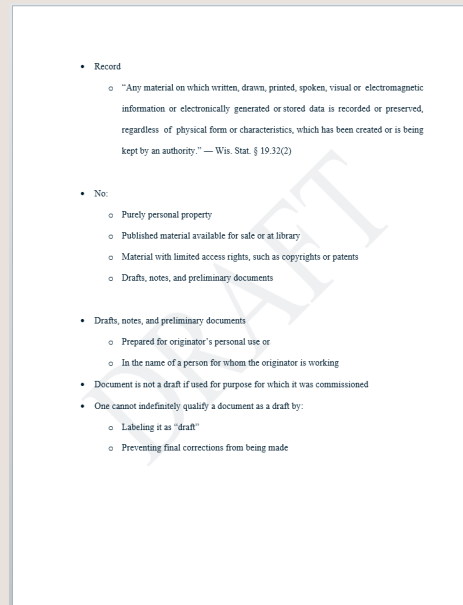
Not Records

- 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



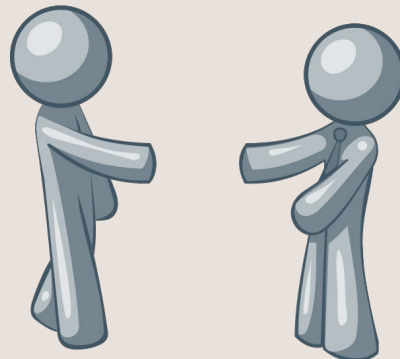
Receiving a Request

- 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
- 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.



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



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

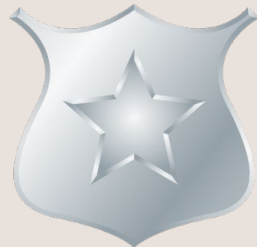


ISSUES TO NOTE



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
 - *Linzmeyer 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



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
- 18 U.S.C. § 2721 et seq.: Driver's Privacy Protection Act (DPPA)
 - Information on the intersection of DPPA and the public records law is found in the Wisconsin Public Records Law Compliance Guide.
- 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

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RESPONDING TO A REQUEST



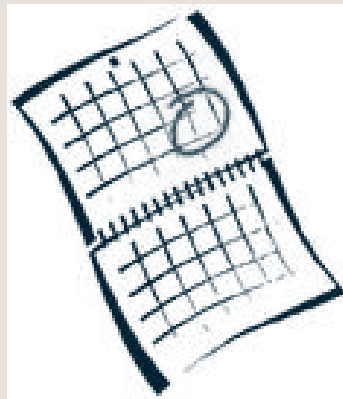
Written Response

- **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
- **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



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, except as provided by the newly enacted Wis. Stat. § 19.35(3)(h).
- 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



Redaction Fees: Audio and Video Recordings

- Wis. Stat. § 19.35(3)(h) enacted in Spring 2024.
 - An authority that is a law enforcement agency may impose a fee for the actual, necessary, and direct cost of redacting recorded audio or video content.
 - An authority may **not** impose a fee if two requirements are met:
 - Requester must provide **written certification** that the requester will not use the audio or video content for financial gain (not including an award of damages in a civil action).
 - An individual who provides a false certification is subject to a \$10,000 forfeiture for each violation.
 - Requester cannot have submitted **more than 10 requests** for records containing audio or video content from the same authority during the calendar year (including the current request but excluding requests subject to Wis. Stat. § 19.35(3) 4. or 5.).



Redaction Fees: Audio and Video Recordings, con't

- An authority may **not** impose a fee for redaction if:
 - Requester is an individual **directly involved** in the event to which the requested records relate, the individual's attorney or other authorized representative, or the individual's parent or guardian if the individual is under 18 years of age.
 - The event to which the requested records relate is an **officer-involved shooting**.
- Fee calculation:
 - The rate for the actual, necessary, and direct charge for staff time spent redacting **must** be based on the pay rate of the authority's lowest paid employee capable of performing the task.
- An authority may not impose a redaction fee **unless** the authority provides the requester with a written estimate of the fee prior to fulfilling the request.



Redaction Fees: Audio and Video Recordings, con't

- Public access to law enforcement agencies' audio and video recordings helps ensure transparency.
- Time and resources required to review and redact audio and video recordings can be substantial.
 - This appears to be the primary concern behind the development of the new provisions.
- The new provisions raise several questions that require legislative attention to address.
- In the meantime, here are a few best practices:
 - Keep the purpose of the public records law in mind when determining whether to impose fees.
 - The provisions cannot be used to dissuade or discourage requesters from submitting requests.
 - Authorities and requesters should maintain an open line of communication and work together to tailor requests to ensure requesters receive the desired records while reducing redaction costs.
 - The public records law provides that authorities may waive fees.
 - If you have questions, consult your legal counsel.



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
 - **Note:** This advisory pre-dates Wis. Stat. § 19.35(3)(h).
- 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 must follow; may 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 about records retention?
 - Consult your legal counsel
 - Visit the PRB's website: <http://publicrecordsboard.gov>



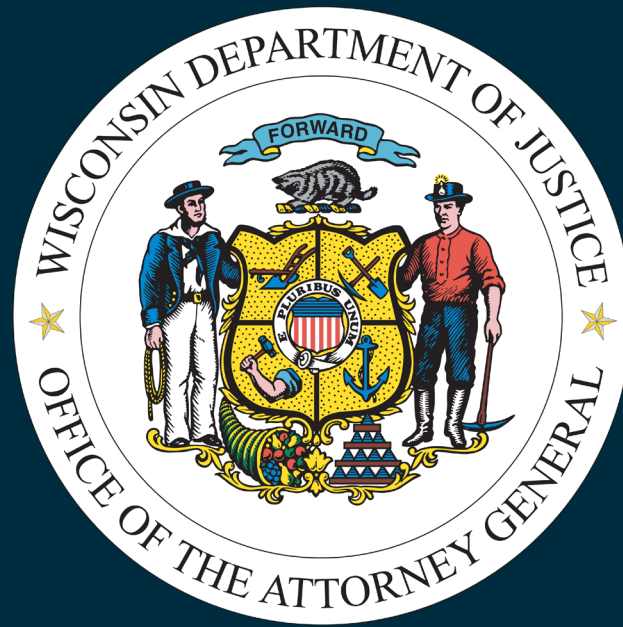
QUESTIONS?



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
 - Lili Behm: (608) 266-1447
BehmL@doj.state.wi.us





Thank You!

