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# Wisconsin Department of Justice Office of Open Government



# Public Records Law Essentials for Clerks of Circuit Court

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Wisconsin Department of Justice

Office of Open Government

February 15, 2024

Clerks of Circuit Court Institute

Wisconsin Dells, WI



# 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
  - 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. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
- **Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39**
  - Sheds light on workings of government, acts of public officers and employees
  - Assists members of the public in becoming an informed electorate
  - Serves a basic tenet of our democratic system by providing for public oversight



# Presumption

The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



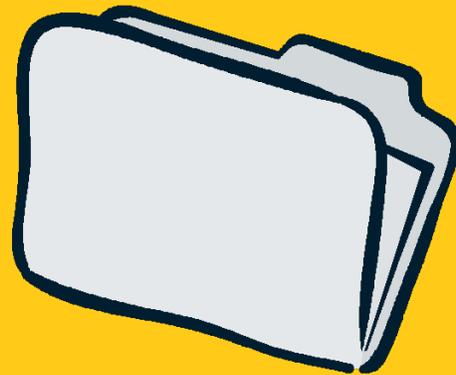
# RECORDS

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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.”



# Is it a Record?

- Records **include** the following:
  - **Material not created by the authority but in the authority's possession**
  - Electronic records, including audio and video
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files
- Records **do not include** the following:
  - Published material available for sale or at library
  - Material with limited access rights, such as copyrights or patents
  - Purely personal property
  - Drafts, notes, and preliminary documents



# RECEIVING AND PROCESSING A REQUEST

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# Who Can Request?

- **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)
- 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.



# 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
    - See **Wis. Stat. § 59.20(3)(a)**
  - 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



# RESPONDING TO A REQUEST



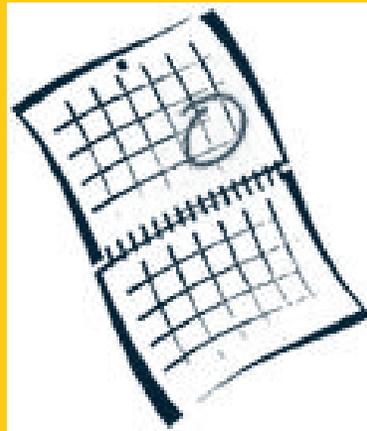
# Written Response

- **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 an authority receives a public records request, it should work to complete processing the request as soon as practicable



# PERMISSIBLE FEES

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# Costs

- **Actual, necessary, and direct** costs only – unless otherwise specified by law
  - **Copying and reproduction**
    - E.g., **Wis. Stat. § 814.61(10)(a)** (establishes fees of the clerk of court, including a general copy fee of \$1.25 per page)
  - **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
  - 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
- For additional information, visit the PRB's website: <http://publicrecordsboard.gov>



QUESTIONS?

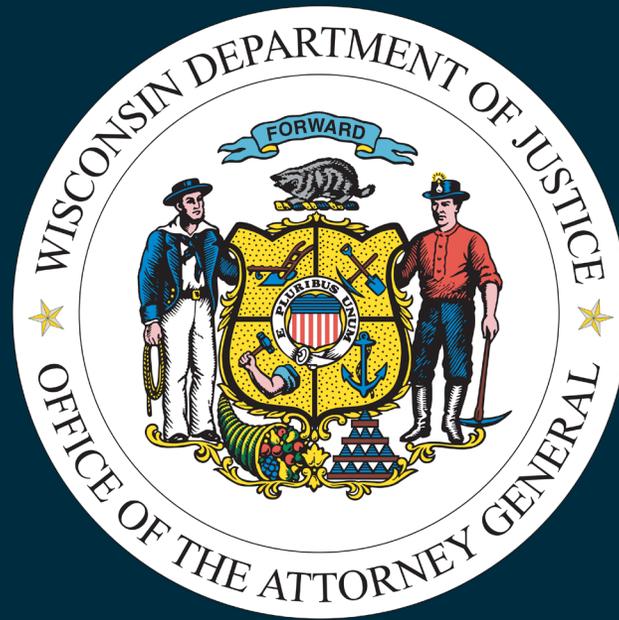
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# Further Information

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





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**Thank You!**

