

Wisconsin Department of Justice Office of Open Government



Intersection of Public Records and Confidentiality Concerns

Wisconsin Public Utility Institute
Public Utilities Law Update 2025
March 18, 2025
Madison



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
- Brief note on 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



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.

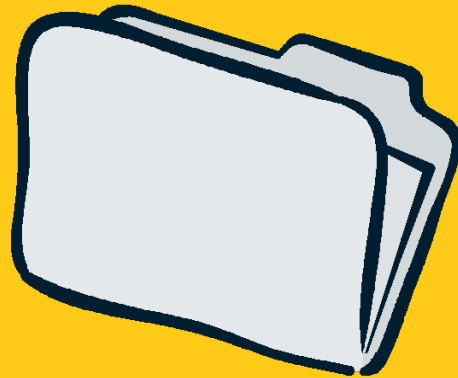


RECORDS



“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.”



What is a Record?

- Records **include**:
 - Paper and PDF documents
 - Data in a database
 - Emails, texts, social media, virtual workplace content, audio and video recordings
 - Other electronic records
 - **Material not created by the authority but in the authority's possession**
- Records **do not include**:
 - 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



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
 - DOJ encourages communication between an authority and requester



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
 - E.g., Wis. Stat. ch. 196 contains provisions regarding disclosure of records
 - 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



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



CONFIDENTIALITY ISSUES



Confidential Handling of Records

- Wis. Stat. § 196.135(2): Commission shall promulgate rules establishing requirements and procedures for the confidential handling of filed records.
 - Pre-release notice required before disclosure under the public records law.

CONFIDENTIAL



Customer Information

- Wis. Stat. § 196.137(2): Municipal utility may not release customer information to any person except with the consent of the customer (via a form)
 - Statute provides exceptions.
- Wis. Stat. § 196.137(3): Customer information is not subject to inspection or copying under the public records law.
 - Customer information: Any information received from customers, which serves to identify customers individually or by usage or account status. Wis. Stat. 196.137(1)(a)



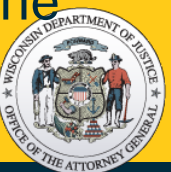
Accident Reports

- Wis. Stat. § 196.72(1)(a): Public utilities are required to record or report accidents that occur on their premises or arise from, or are connected to, their maintenance or operation.
- Reports filed with the commission: Neither the reports nor any of their content may be made available to any other person.



Information Permitted to be Withheld

- Wis. Stat. § 196.14: Commission may withhold from public inspection any information, which would aid a competitor of a public utility in competition with the public utility.
 - Commission not required to withhold (“may”)
- Public records law contains similar language for trade secret information.
 - Wis. Stat. § 19.36(5): Authority may withhold access to any record or portion of a record containing trade secret information
 - “Trade secret” defined in Wis. Stat. § 134.90(1)(c)
 - Information, including a formula, pattern, compilation, program, device, method, technique, or process to which all of the following apply:
 - Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
 - Subject of efforts to maintain its secrecy that are reasonable under the circumstances.



Addressing Confidentiality Concerns

- Entities or individuals may have concerns regarding the confidentiality of filed records and information.
- Educate entities and individuals on the public records law's requirements.
 - Important to remember that records are presumed public.
 - One cannot contract around the public records law's requirements.
 - Generally, one cannot make a record confidential simply by writing "confidential" on it or otherwise designating it confidential.



Addressing Confidentiality Concerns, continued

- **Bottom line:** If an authority does not have one's confidential content in the first place, it cannot be subject to public disclosure.
 - An entity or individual should not unnecessarily file records or information that raise confidentiality concerns.
 - Only file what is required or necessary.
 - Consider filing redacted records or items if possible.
- Those concerned should contact their legal counsel prior to filing.

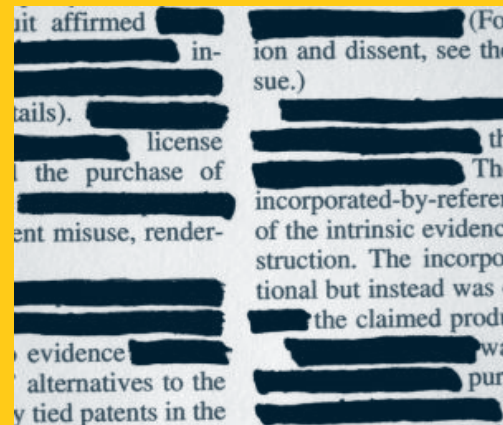


REDACTION



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: black magic marker, cover up with white paper when photocopying, electronic redaction, including audio and video redaction technology
- **Redaction constitutes a denial of access to the redacted information**
 - Therefore, subject to review by mandamus



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 informed of a pending public records request, work to gather responsive records as soon as practicable.



PRE-RELEASE NOTICE



Notice Before Release

- Generally, an authority is not required to notify a records subject prior to disclosing the records in response to a public records request.
 - “Except as authorized under this section . . .”
 - Wis. Stat. § 19.356 (notice before release under the public records law)
 - “... or as otherwise provided by statute”
 - Wis. Stat. § 196.135 (notice before release under Wis. Stat. ch. 196)

NOTICE



Notice Before Release – Public Records Law

- 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



Notice Before Release – Wis. Stat. ch. 196

- Notice to the person who filed a record required prior to disclosure under the public records law.
 - Required by Wis. Stat. § 196.135(3) if any of the following applies:
 - Commission granted confidential handling status to record
 - Commission has not acted on filer's request for confidential handling status
 - Commission denied request for confidential handling status and a petition for review of that decision is pending
 - Notice subject can try to prevent disclosure in court
 - Follows process outlined in Wis. Stat. § 19.356(3) to (8).



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 Wis. Stat. § 19.35(3)(h) (law enforcement authorities' audio and video recordings).
- 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 the Office of Open Government section of DOJ's website.
 - 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 the Office of Open Government section of DOJ's website.



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.”

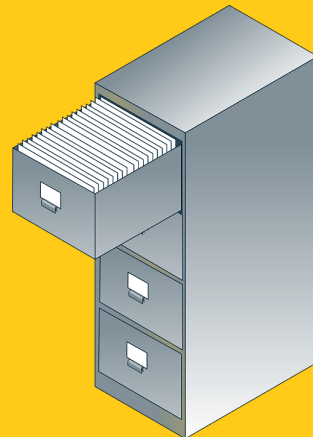


RECORDS RETENTION



Records Retention

- **Wis. Stat. § 19.35(5):** Governs records retention following receipt of a request
- **Wis. Stat. § 16.61:** Governs records retention for state authorities
- **Wis. Stat. § 19.21:** Governs records retention for local authorities
- Questions about records retention?
 - Consult your legal counsel
 - Visit the PRB's website: <http://publicrecordsboard.gov>



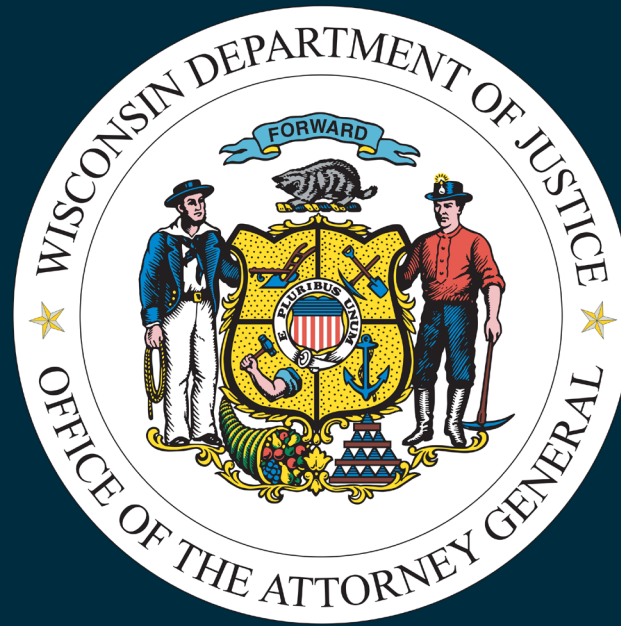
QUESTIONS?



Further Information

- Download **DOJ Compliance Guides** and other resources at the Office of Open Government section of DOJ's website.
- 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
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Thank You!

