

**RESPONSES TO QUESTIONS ABOUT THE PUBLIC RECORDS LAW
SUBMITTED DURING DOJ'S OCTOBER 20, 2011, WEBINAR**

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1. Is DOJ going to be publishing the compliance guidelines for the open meetings law and the public records law?

DOJ's *Open Meetings Law Compliance Guide* (2010) and *Public Records Compliance Outline* (2010) may be downloaded or printed free of charge from the DOJ website, <http://www.doj.state.wi.us/>. Click on the brown "Open Meetings and Public Records" box in the lower left corner of our home page; the next page will provide links to both publications. There is no 2011 edition of either publication.

2. Regarding the principle that the public records law provides access to records, not answers to questions: Our authority provides a weekly status report each week. One recipient of the status report usually has many questions about matters included in the weekly status report. Must we answer these questions?

The public records law does not require your authority to answer follow up questions regarding the content of documents provided to the public. The authority may choose to answer some or all questions if it has sufficient resources available, but is not required to do so. See pages 1 and 18 of the *DOJ Public Records Compliance Outline* (2010) for more information.

3. Do drafts and notes have to be marked "draft" or "note" to be considered as such for purposes of the public records law, or can a record be a "draft" or "note" for public records law purposes even if it is not marked as such?

Whether something is a "draft" or a "note" as those terms are defined for public records law purposes determines whether it is a "record" subject to disclosure in response to a public records request. Labeling something as a "draft" indefinitely does not in and of itself make that document a draft for public records law purposes. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589 (1989). The same would be true for a "note." Instead, how the document is used and circulated will determine whether it remains a "draft" or "note" for purposes of the

public records law. See page 4 of the *DOJ Public Records Compliance Outline* (2010) for more information.

4. Are videos from security cameras in a school public records that may be obtained pursuant to a public records request?

The answer to this question depends on the specific circumstances involved, such as what is recorded and for what purpose. No one definitive answer is possible. Video recordings depicting students may constitute pupil records subject to the access limitations of Wis. Stat. § 118.125. A different analysis would govern other types of recordings, such as after hours building or parking lot security video that does not depict any students.

5. If a public record is provided to a law enforcement agency, is that agency considered a second holder of that record and does the law enforcement agency have retention responsibilities?

Records retention is not governed by the public records law. For state agencies and entities, records retention is governed by Wis. Stat. § 16.61. For local agencies and entities, records retention is governed by Wis. Stat. § 19.21 and local ordinances enacted pursuant to that statute. A good source of information about records retention obligations is the State Public Records Board, <http://publicrecordsboard.wi.gov/> or (608) 266-2770.

However, a “record” as defined in Wis. Stat. § 19.32(2) for public records law purposes includes “any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” When one authority shares copies of its records with a second authority, and the second authority subsequently receives a public records request to which those shared records would be responsive, DOJ encourages the agency receiving the public records request to consult with the other agency about how to respond to that public records request. Legal responsibility for responding to the request remains with the agency that received the request.

6. What is the public records law stance on police investigations? Example: Police find marijuana plants growing and are currently investigating the incident. Do they have to give me the records to let me know how the investigation is going?

There is no blanket rule regarding disclosure of the reports of open law enforcement investigations. Disclosure decisions are subject to the public records balancing test, which

must be applied on a case-by-case basis. While a police investigation remains ongoing, public policy interests against disclosure most likely will outweigh the interests in favor of disclosure. *Linzmeier v. Forcey*, 2002 WI 84, ¶¶ 15-18, 254 Wis. 2d 306, 646 N.W.2d 811. Applicable public policies favor effective investigation and prosecution of crime, and protection of public safety. Status of the investigation at the time a public records request is made is a significant consideration in deciding whether any related records may be released at that time. The public records balancing test therefore will weigh against disclosure of records related to open law enforcement investigations if release of the records at that time would undermine the ongoing investigation, interfere with the conduct of police business, facilitate destruction of evidence or flight of suspects, improperly influence the memories or statements of persons yet to be interviewed, unfairly damage the privacy and reputation of persons discussed in the reports, reveal confidential law enforcement techniques, create danger for persons named in the reports, make it impossible for a criminal defendant or suspect to obtain a fair trial, or cause other public policy problems that outweigh the usual presumption of disclosure. See pages 32-33 of the *DOJ Public Records Compliance Outline* (2010) for more information.

7. If a police agency provides a copy of a police report to another authority, and stamps on the report that it is not to be redisclosed, may the other authority release the police report in response to a public records request received by that authority to which the police report is responsive?

The conditions under which the police agency provided the police report to the other authority will affect whether or not the other authority may redisclose the police report in response to a public records request. The “no redisclosure” stamp in and of itself is not controlling, but may reflect relevant factual conditions under which the police agency provided the police report to the other authority—for example, redisclosure is prohibited by some applicable law; or the report was needed by the second authority for the conduct of its public business, the second authority had no other way to obtain the information set forth in the report, and the authority provided the report to the second authority only on the condition that the contents of the report not be redisclosed. When one authority has provided a record to a second authority pursuant to conduct of their respective public business, and the second authority receives a public records request to which that record is responsive, DOJ recommends that the second authority consult with the other authority in order to make an informed decision about how to respond to the public records request.

8. If an investigator makes notes in the field—which may include information like distances, measurements or statements—and then uses those notes to create a final report, are the investigator’s notes subject to disclosure in response to a public records request?

Notes and data made by the investigator for his or her own personal use in creating a final document, and are not used in any other way or shared with anyone, likely are the kind of “drafts, notes, preliminary computations and like materials prepared for the originator’s personal use” excluded from the Wis. Stat. § 19.32(2) definition of a “record” subject to disclosure in response to a public records request. If the notes and computations also are used for other purposes, such as maintaining them to memorialize their contents, then they likely will not be excluded from the definition of a “record.”

9. Are medical records pertaining to animals treated differently than for humans?

Neither medical records for humans nor medical records for animals are specifically addressed in the public records law itself. Applicable provisions of substantive law governing medical records for humans or animals therefore must be considered in responding to public records requests for those types of records. Depending on the circumstances presented, the public records balancing test also may need to be considered. A complete answer to this question is beyond the scope of this program, and would be highly fact specific. However, both the Wisconsin patient health care records law—Wis. Stat. §§ 146.81-146.82—and the federal HIPAA medical records privacy law apply only to the records of humans.

10. If an authority’s public records policy identifies specific hours for access to records, is the authority required to fill requests immediately when made during those hours, or may the authority fill the requests later and notify the requester when the records are ready?

The authority does not have to fill public records requests immediately upon presentment. The public records law requires only that a response be provided “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a). So long as the agency has a fair process for fulfilling public records requests “as soon as practicable and without delay,” it may locate and review responsive records as time permits in connection with other official duties that also must be performed. For some responses, the agency may wish to estimate costs of the response and require prepayment before proceeding to locate and review responsive records. Pre-release notices also may be required in some circumstances, which also would prohibit immediate response. The agency then should contact the requester promptly when the

records are ready. It may be possible for an authority to fulfill certain simple requests for a small number of routinely kept records immediately upon presentment of a public records request for those records. What constitutes a response “as soon as practicable and without delay” depends on the totality of circumstances including the nature of the request, the staff and other resources available to process the request, the extent of the request, and other considerations. See pages 13-14 of the *DOJ Public Records Compliance Outline* (2010) for more information.

11. When are closed session minutes available to the public in response to a public records request?

Closed session minutes may be provided in response to a public records request if and when the reason for going into closed session no longer exists. For example, if a meeting is closed under Wis. Stat. § 19.85(1)(e) to deliberate purchase of public property, it may be possible to provide access to the closed session minutes after the property purchase has been completed. Depending on the specific reason for going into closed session, however, it may be that some closed session minutes never will be appropriate for public disclosure.

12. If a board member requests a draft of board meeting minutes, what is the time frame to respond and are the minutes available immediately for public viewing?

The answer depends on the specific circumstances presented and no one answer is possible. Under some circumstances, a board member’s request for a draft of the minutes of a meeting of a board on which the board member serves may be an internal operations matter rather than a request pursuant to the public records law. If a board member does make a public records request for the draft minutes, then the following considerations would be relevant. First, have the draft minutes been prepared? If not, the public records law does not dictate the timetable for preparation of the draft minutes. The public records law generally applies to records that already exist at the time the request is made. Second, if some draft minutes exist, are they still being revised and finalized by the person preparing them, or are they in the form in which they will be presented to the board for final approval? If the person preparing the minutes still is working on revising and finalizing the draft minutes, then they probably are preliminary documents that do not constitute a “record” as defined in Wis. Stat. § 19.32(2) for public records law purposes. If the draft minutes have been finalized and are ready for board approval, or have been circulated in pre-meeting materials or otherwise, then they may be “records” subject to disclosure in response to a public records request from a board member or a member of the public. Response to public records requests is required “as soon as practicable and without delay,” not immediately. Whether or not the draft minutes have received final approval from the board may not be the controlling factor in

determining whether they should be disclosed in response to a public records request; other relevant considerations would include the status of their preparation, how they have been circulated, and how they have been used.

13. May a member of the public go to an authority's office and inspect records instead of paying to receive copies? If a member of the public may come and inspect records, is the authority required to have a staff person sit with the requester or make copies of the records for the requester to inspect instead of requiring the requester to purchase copies of the records?

A requester generally may choose whether to inspect or obtain copies of a requested record. A requester therefore may choose to come to an authority's office and inspect requested records. How those records are provided for inspection will depend on the form in which they are kept, paper or electronic, and if any information must be redacted from them before providing them to the requester for inspection. Depending on the circumstances, it may be appropriate to allow the requester to inspect paper copies without having an employee sit next to the requester. If the records are fragile, or if necessary to protect the integrity of the records, the authority may determine that it is necessary to have a staff person closely monitor inspection of the records by the requester. If the requester asks to inspect electronic records, the authority will have to determine how that can be accomplished efficiently and realistically given technological and other issues raised by those records. Some possibilities may include providing a CD or DVD containing the records to the requester at no charge, allowing the requester to view the records at a computer terminal without access rights to other records of the authority, or assigning a staff member to supervise or display the electronic records at one of the authority's computers. Generally, a requester who wishes only to inspect records may not be required to pay to purchase copies. Please note, however, that the answer to these questions in any specific context will depend on the specific circumstances presented.

14. If records are kept in an Excel spreadsheet, can I request that a copy of the file be emailed to me?

This question presents two issues. First, a requester may ask that electronic records be provided in the same format they are kept by the authority. When proprietary or licensed software is used to maintain the records, the authority may need to provide the data file in a format consistent with any software licensing or copyright restrictions. Second, the public records law does not require authorities to respond by email. Some authorities choose to do so; others do not. A requester may ask that electronic records be provided by email, but it

will be up to the authority whether to provide the records as email attachments or in some other way, such as mailing a CD or DVD.

15. If someone requests an electronic copy of a record that already has been prepared in response to an earlier public records request submitted by someone else, may the authority charge the second requester for the time previously spent in preparing the record for the first requester?

The authority may charge its actual costs of reproducing and/or copying the records in electronic form for the second request. Even if records responsive to a public records request already have been located and compiled in response to the earlier request, for which the first requester paid any applicable location costs, there still may be costs to the authority for providing the records electronically to the second requester—such as staff time to scan the records or computer time to download large data files—and those costs properly may be charged to the second requester.

16. May an authority charge a per page copy cost if requested records are sent to a requester in PDF form?

The authority may charge its actual, necessary, and direct costs of preparing a PDF copy of the records. Wis. Stat. § 19.35(3)(a). Some authorities determine this cost by calculating their actual costs per page to prepare a PDF copy, including factors such as equipment usage and staff time.

17. The Department of Justice has moved for permission to file an amicus, or “friend of the court” brief in *Milwaukee Journal Sentinel, et al. v. City of Milwaukee, et al.*, Case No. 2011AP1112. What is DOJ’s position on the case?

In this case, the Milwaukee County Circuit Court held that an authority could charge a public records requester for the costs of redacting information from records before releasing those records to the requester. The newspaper appealed that decision to the Wisconsin Court of Appeals, and has filed a motion asking the Wisconsin Supreme Court to decide the case on “bypass” instead of the usual process in which the Court of Appeals first considers and decides a case before Supreme Court review may be requested. As of November 9, 2011, the Wisconsin Supreme Court has not yet announced whether it will hear the case on bypass from the Wisconsin Court of Appeals.

If authorized to file an amicus brief, DOJ will argue that Wis. Stat. § 19.35(3) [the fees section of the public records law] does not authorize authorities to charge for the costs of redacting and that no other provision in the public records law authorizes such charges. DOJ also will argue that the circuit court erred in concluding that the Wisconsin Supreme Court decisions in *Osborn v. Board of Regents*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, and *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, authorize authorities to charge requesters for the costs of redactions notwithstanding absence of statutory authority to so charge. DOJ will argue that it is the exclusive province of the Legislature to determine what costs may be charged to requesters of public records, and that if the Legislature revisits the statute to address costs of redaction it should formulate a solution that balances the interests of authorities and requesters.

See page 51 of the *DOJ Public Records Compliance Outline* (2010) for background information about redaction costs.

18. Wouldn't redaction time be considered location cost/staff time?

Characterizing redaction costs as a component of the staff time associated with locating records, and thus a location cost that may be charged pursuant to Wis. Stat. § 19.35(3)(c), is one possible way of viewing redaction costs. That is not DOJ's view of redaction costs, which is that they are not authorized in current provisions of Wis. Stat. § 19.35(3)(c). We expect that the status of redaction costs will be clarified by the appellate court decision in *Milwaukee Journal Sentinel, et al. v. City of Milwaukee, et al.* See the response to Question No. 17 above for additional information.

19. Can the records location fee that may be charged to a requester pursuant to Wis. Stat. § 19.35(3)(c) be based on the total hourly cost of the employee who located the records, including benefits, or only on the employee's hourly rate of pay?

Location fees generally are based on the staff time necessary to locate responsive records, calculated as time x hourly rate. In calculating the total hourly cost charged for a specific employee, it is permissible to include the cost of benefits.

20. Is there any limit on an authority's ability to allow records to be copied off-site by a service arranged for by a requester?

The authority is responsible for maintaining its records pursuant to applicable records retention laws and ordinances. The public records law would not prohibit an authority from

allowing certain records to be copied by an off-site vendor arranged by a records requester. The choice of whether to allow such an arrangement is the authority's to make, and it need not agree to such an arrangement. Any authority contemplating such an arrangement should satisfy itself that neither the integrity of its records nor any confidential content would be compromised by allowing the records to be copied off-site.