



Task Force on Missing and Murdered Indigenous Women



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Wisconsin Public Records and Open Government Essentials

Wisconsin Department of Justice
Office of Open Government
Task Force on Missing and Murdered Indigenous Women
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Remote Training



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INTRODUCTION



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Presentation Overview

- Provide brief background on the Office of Open Government
- Cover public records law essentials
 - Including:
 - Explain what is a record and what is not a record
 - Who can request records
 - Discuss the receipt and processing of public records requests
- Address record retention
- Outline open meetings law essentials (time permitting)



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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



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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 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



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Transparency During COVID-19

• **Important:** An authority's obligations under the public records law and a governmental body's obligations under the open meetings law **do not cease** because of the COVID-19 public health situation.



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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



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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
 - Similar to the open meetings law's definition of "governmental body"
 - Includes boards, committees, councils, etc.
- **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
 - Examples:
 - Chairperson of a committee of elective officials or designee
 - Highest ranking officer and chief administrative officer, if any, of the authority or designee (in writing)
 - Custodial services: other staff may assist
 - All records belong to the authority



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Requesters

- **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)
- Requester generally **need not identify** himself or herself
- Requester **need not state the purpose** of the request
 - 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.



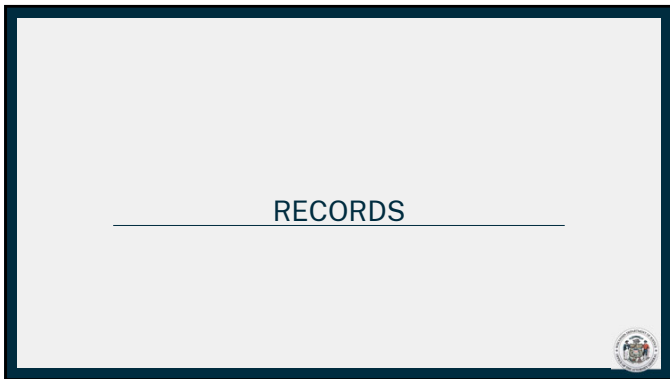
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“Record”

- 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.”



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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 and remote meeting recordings, chats, 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



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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



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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 authority's officers or employees
- *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 if 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



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Electronic Records: Virtual Workplaces

- Virtual workplaces and remote meeting programs create or contain records subject to disclosure
 - Recordings, chats, and shared files
 - Also, emojis, GIFs, photos posted
- **Recommendation for all electronic records**: Ensure you conduct a thorough search of all relevant accounts including emails, texts, chats, and other virtual workplace records.



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RECEIVING AND PROCESSING A REQUEST



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Public Records Request Process

- PRR is received and forwarded to the authority's legal custodian
- The custodian begins the search for records
 - Reaches out to appropriate individuals within the authority as needed
- Any responsive records subject to disclosure are reviewed:
 - **Presumption that they will be disclosed unless:**
 - They are exempt from disclosure pursuant to a **statute** or the **common law**
 - The **public records balancing test** weighs in favor of nondisclosure
- Records are released with a letter explaining any redactions



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How are Requests Submitted?

- A request may be submitted to anyone with an authority
 - A request may be **verbal** or **in writing** (including emails and texts)
 - An authority may **not** require the use of a form
 - "Magic words" are not required



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Communication with a Requester

- 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
- Don't understand the request? Contact the requester.
 - Send a written summary of your understanding and request clarification
 - Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
- Send the requester an acknowledgment and periodic status updates if the response will take some time



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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.



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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



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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 the purpose of request are generally not part of the balancing test



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SPECIAL ISSUES



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Crime Victims

- Crime victims' rights expressed in statutes, constitutional provisions, and case law
 - Includes the family of crime victims
- **Marsy's Law**
 - Constitutional amendment to Article I, section 9m, of the Wisconsin Constitution
 - Created additional rights and protections for crime victims in Wisconsin
- Marsy's Law's intersection with the public records law
 - Balancing test considerations
- DOJ advisory issued on May 13, 2021 is available at <https://www.doj.state.wi.us/sites/default/files/news-media/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>



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Children and Juveniles

- Law enforcement records of **children and juveniles** who are the subjects of investigations and other proceedings are **confidential with some exceptions**. See Wis. Stat. §§ 48.396 and 938.396.
 - Exceptions include news media, parents, and victims.
- Access to other records regarding or mentioning children are subject to general public records rules including the balancing test.



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RESPONDING TO A REQUEST



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Written Response



- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
 - **Any redaction constitutes a denial of access** to the redacted information
- **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: Give adequate notice of reasons for denial; ensure custodian exercised judgment
 - Reviewing court usually limited to reasons stated in denial
- Must inform requestor that denial is subject to review in an enforcement action for mandamus under Wis. Stat. § 19.37(1) or by application to a district attorney or Attorney General.



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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



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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



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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
- **Tip:** Keep careful records of time spent working on requests



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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.”



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RECORD RETENTION



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Records Retention

- Wis. Stat. § 19.35(5) – **after** receiving a request:
 - No destruction until request granted or until at least **60 days** after request is denied
 - **90 days** if requester is committed or incarcerated
 - No destruction during enforcement action
- Wis. Stat. § 16.61 – records retention for state authorities
 - Records Retention Schedules:
 - General Records Schedules (GRSs)
 - Agency-specific Records Retention/Disposition Authorizations (RDAs)
- <http://publicrecordsboard.gov>



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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)



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Essentials

- Generally, open meetings law requires that all meetings of governmental bodies:
 - must be preceded by **public notice**; and
- 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.
- **Note:** For additional information regarding the open meetings law, including closed sessions, see **DOJ’s Wisconsin Open Meetings Law Compliance Guide.**



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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.



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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, other electronic forms of communication
- **Showers Test**: Two-part test to determine if a meeting occurred. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
- Members convene for the **purpose** of conducting governmental business
- **Number** of members present is sufficient to determine the body’s course of action
 - Includes **negative quorums**
- “Walking” **quorum**: meeting resulting from a series of gatherings among body members



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Notice

- “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, and the **official newspaper** for the community in question.
- The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting.

NOTICE



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COVID-19 Considerations: Reasonably Accessible

- Under the present circumstances, governmental bodies can typically meet their open meetings law obligations while practicing social distancing by conducting meetings via **telephone or video conference calls**.
 - However, **public must be provided an effective way to monitor the calls**.
- **Notices** should include instructions on how to attend, including any required call-in number and/or log-in information.
- The type of access that constitutes **reasonable access** in the present circumstances may be different from the type of access required in other circumstances.
- **Bottom line:** It is important to **focus on the purpose of the open meetings law** – to ensure government **openness and transparency** – during the public health situation.



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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
 - PROM Help Line: (608) 267-2220
 - Email: opengov@doj.state.wi.us



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Questions



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Thank you!