

WISCONSIN PUBLIC RECORDS LAW

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
2016 New Chiefs and Sheriffs Conference
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Introduction



Wisconsin Public Records Law

- Wis. Stat. §§ 19.31 to 19.39
- Objectives:
 - Shed light on workings of government and acts of public officers and employees
 - Assist public in becoming an informed electorate
 - Serve a basic tenet of our democratic system by providing opportunity 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



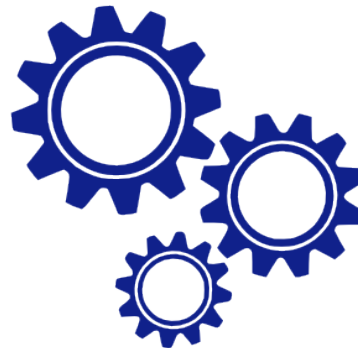
Government Transparency

- “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



Public Records Request Process

- PRR received and forwarded to authority's records custodian
- Authority begins search for records
- Any responsive records are reviewed:
 - Does a statute or the common law prohibit disclosure?
 - Authority applies public records balancing test
- Records are released with letter explaining any redactions



Public Record Roles



“Authority”

- Wis. Stat. § 19.32(1): any of specified entities having custody of a record
- Very similar to “governmental body” in Open Meetings Law
- Includes quasi-governmental corporation
- Public records law obligations apply separately to each authority
- *Wis. Prof'l Police Ass'n v. Wis. Cntys. Ass'n*, 2014 WI App 106, 357 Wis. 2d 687 (unincorporated association is not an authority)



“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
- Elective official, chairperson of a committee of elected officials, or designee
 - Includes an elected assessor
 - A contracted assessor is not the custodian
- Other authorities to designate one or more positions
- Defaults are highest ranking officer and chief administrative officer, if any



“Legal Custodian,” continued

- All records belong to the authority (e.g., municipality); the assessor is a custodian of records
- Custodial services
 - Other authority staff may participate or assist
 - Helpful to establish an internal public records procedure



“Requester”

- Defined at Wis. Stat. § 19.32(3)
 - Generally, any person who requests to inspect or copy a record
- More limited rights for persons committed under mental health laws or incarcerated
 - Must be requesting records containing specific references to themselves or minor children



“Requester,” continued

- Wis. Stat. § 19.35(1)(am)
 - A requester has greater rights to inspect personally identifiable information about himself or herself



Who Can Request?

- Requester **need not state the purpose** of the request
- Requester generally **need not identify** himself or herself
- Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, 354 Wis. 2d 471: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test



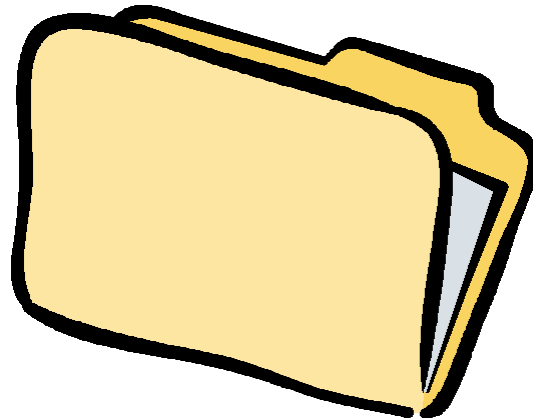
Records



“Record”

“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.”

— Wis. Stat. § 19.32(2)



Is it a Record?

- Yes:

- Not created by the authority but in the authority's possession
- Data in a database
- Social media
- Contractors' records
- Police body camera and dash camera video



Is it a Record?, continued

- Yes:
 - **Personal** email, texts, calls, and documents on an **authority's** accounts
 - Includes purely personal email
 - Disclosure generally not required
 - **Business** email, texts, calls, and documents on a **personal** accounts
 - Content determines whether something is a record, not the medium, format, or location
 - Personal materials on the same private accounts are not subject to disclosure



Is it a Record?, continued

- No:
 - Drafts, notes, and preliminary documents
 - Published material available for sale or at library
 - Purely personal property
 - Material with limited access rights, such as copyrights or patents



Is it a Record?

- The bottom line is that content not format determines if something is a record

**CONTENT
NOT
FORMAT**



Receiving a Request



Sufficient Request

- A request need not be in writing; it may be verbal
- An authority may not require the use of a form
- “Magic words” are not required



Sufficient Request, continued

- Reasonably describes the information or records requested
- Reasonably specific as to time and subject matter
 - Important for requests involving electronic records
- Custodian should not have to guess what records the requester wants



Scope of Request

- A large number of responsive records—by itself—does not make a request too broad
- But a request cannot so burden an authority that its normal functioning would be impaired
- A requester may have no way of knowing how many responsive records exist
- A requester may have no interest in many “technically” responsive records
- Keep purpose and objective of public records law in mind



Processing a Request



Evaluating a Request

- Carefully assess to determine what is needed to respond
- Don't understand the request?
 - Contact the requester
 - Send a written summary of your understanding
 - Request clarification



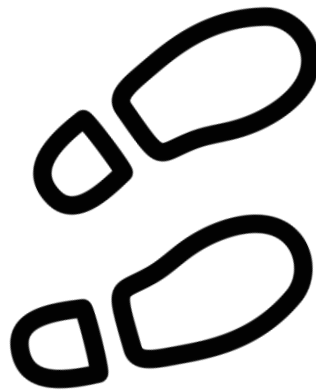
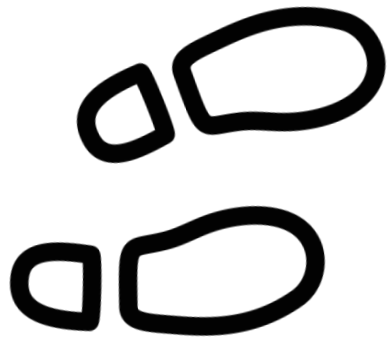
Evaluating a Request, continued

- 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



Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the balancing test



Step 1: Does the Record 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



Step 1, continued

- Search for records that might be responsive
- If there are no responsive records, inform the requester
- *Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563: It is problematic to deny access to records on substantive grounds, then respond later that there are no responsive records



Step 2: Absolute Right of Access

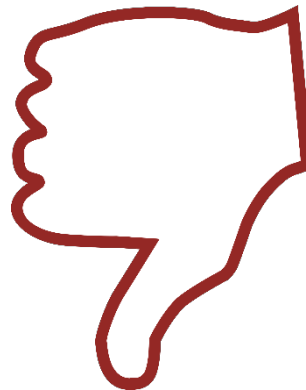
- **Absolute Right:** Not many exist:
 - Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
 - Daily arrest logs or police “blotters” at police departments



Step 3: Absolute Denial of Access

- **Absolute Denial:**

- Can be located in public records statutes:
 - 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:
 - Patient health care records; pupil records



Step 4: The Balancing Test

- Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
- Fact intensive; “blanket rules” disfavored
- Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- Identity of the requester and the purpose of the request are generally not part of the balancing test



Some Sources of Public Policies

- Policies expressed in other statutes
 - E.g., patient health care records, student records
- Court decisions
- Exemptions to open meetings requirements found in Wis. Stat. § 19.85(1)
 - Only if there is a specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
- Public interest in reputation and privacy of individuals

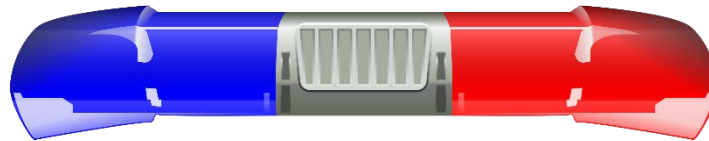


Balancing Test: Law Enforcement Investigations



Law Enforcement Considerations

- Presumption of complete public access
 - The public's right to know
- Crime victim rights expressed in statutes, constitutional provisions, and case law
 - Consideration of family of crime victims



Law Enforcement Considerations, cont.

- Protection of witnesses
 - Safety and security
 - “Chilling” future cooperation with law enforcement
- Children and juveniles
- Officer safety
 - Including the safety of officers’ families and homes



Investigation Considerations

- *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



Investigation Considerations, continued

- There is a **strong public interest in investigating and prosecuting criminal activity**
- If the investigation or prosecution is ongoing, the general presumption of openness will likely be overcome if the release of records would interfere with the ongoing investigation or prosecution



Investigation Considerations, continued

- Would the release endanger the safety of persons involved?
- Are there reputation and privacy interests involved?
 - The public interest is found in the public effects of failing to honor the individual's privacy interests not the individual's personal interests
- Do the records contain rumor, hearsay, or potentially false statements?
- Were potentially biased witnesses interviewed?
- Do the records discuss confidential techniques and procedures used by law enforcement and prosecutors?



Investigation Considerations, continued

- Is there a possibility of threats, harassment, or reprisals?
 - Against victims, witnesses, officers, others, or the families of those involved?
 - Any such possibility is accorded appropriate weight depending on the likelihood
 - Generally, there must be a reasonable probability
 - *See John K. MacIver Inst. for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61



Special Issues



Special Issues

- 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).
 - Law enforcement records: balancing test must be applied on a case-by-case basis
- Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise



Special Issues, continued

- Records related to children or 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



Special Issues, continued

- Audio:
 - Voices of victims and witnesses
- Video:
 - Home addresses, home interiors
 - Information in the background
 - Family photographs, personal documents
- Driver's Privacy Protection Act (DPPA)
 - *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339



Special Issues, continued

- DPPA, continued:
 - **Accident reports:** permitted to be released unredacted
 - Other statutes or balancing test: redactions permissible
 - **Incident reports:** release of DMV information prohibited unless DPPA exception applies
 - Compliance with public records request not a “function”
 - Information **verified** using DMV records is not protected by DPPA

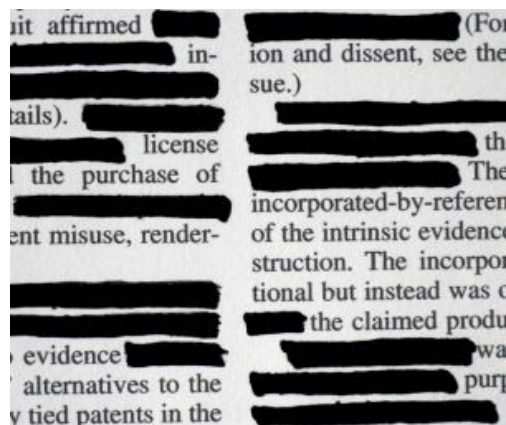


Redaction



Redaction

- If part of a record is disclosable, that part must be disclosed
 - Wis. Stat. § 19.36(6)
- Non-disclosable portions must be redacted
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying



Redaction, continued

- Redaction constitutes a denial of access to the redacted information
 - Therefore subject to review by mandamus
- Effective July 1, 2016, certain personally identifiable and financial information required to be redacted from records filed with Wisconsin's circuit courts
 - See Wis. Stat. §§ 801.19, 801.20, 801.21

ACCESS DENIED



Responding to a Request



Written Response?

- A written request requires a written response, if the request is denied in whole or in part
- May respond in writing to a verbal request
- A request for clarification, without more, is not a 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 district attorney or Attorney General



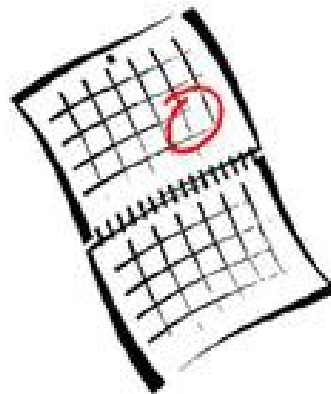
Reasons for Denial

- Reasons for denial must be specific and sufficient
- Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
- Reviewing court usually limited to reasons stated in denial
- Availability of same records from other sources generally not a sufficient reason



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
- May be prudent to send an acknowledgement
- Penalties for arbitrary and capricious delay



Notice Before Release

- Required by Wis. Stat. § 19.356(2)(a)1
 - Records containing information relating to an employee that is the result of a 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 an employer other than the authority about employees of that employer
 - “Record subject” can try to stop disclosure in court
- Required by Wis. Stat. § 19.356(9)—officer or employee holding state or local public office
 - OAG-07-14 (October 15, 2014)
- Courtesy notice



Costs



Costs

- **Actual, necessary, and direct** costs only—unless otherwise specified by law
 - Copying and reproduction
 - Paper copies v. electronic copies
 - Location, if costs are \$50.00 or more
 - Mailing/shipping to requester
 - Others specified in Wis. Stat. § 19.35(3)



Permissible Charges

- Authorities **may not** charge for redaction costs
- Prepayment may be required if total costs exceed \$5.00
- Authority may choose to provide records for free or reduced charge



Enforcement



Enforcement

- Wis. Stat. § 19.37: **Mandamus action** if an authority:
 - **Withholds** a record or part of a record
 - **Delays** granting access to a record or part of record
- Authority may be ordered to release records
- Attorney's fees and costs may be awarded if mandamus action was a cause of the release
- Wis. Stat. § 946.72: Class H felony to destroy, damage, remove, or conceal any public record
 - With intent to injure or defraud



Record Retention



Record 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
- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21
- Record Retention Schedules (RDAs)



Record Retention, continued

- Hard copies v. electronic copies
 - Copies of records in electronic formats permissible
 - State authorities: Wis. Stat. § 16.61(5)(a)
 - Local authorities: Wis. Stat. § 19.21(4)(c)
 - Local government unit or agency may provide for retention of records in electronic format
 - Local government unit or agency shall make for such provision by ordinance or resolution



Further Information

- Consult legal counsel
- Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Call the Office of Open Government: (608) 267-2220
- Write to: Office of Open Government
Department of Justice
P.O. Box 7857
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