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
Processing a Request
“Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.” Wis. Stat. § 19.35(1)(a).

- Is there a **statute** that prohibits disclosure of all or part of the requested record?

- Does the **common law** prohibit disclosure of all or part of the requested record?

- Does the public records **balancing test** weigh in favor of nondisclosure of all or part of the requested record?
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 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
The Balancing Test

- Weigh:
  - the public interest in disclosure of the record
  - the public interest and public policies against disclosure
Presumption of Complete Public Access

- Denial of access only in exceptional cases. See Hempel v. City of Baraboo, 2005 WI 120, ¶ 63.

- An exceptional case exists when the public interest favoring nondisclosure outweighs the public interest favoring disclosure

- **Remember**: The presumption of complete public access

- The public interest in release is presumed
  - The question is **not**: What is the public interest in releasing the record?
  - The question **is**: What is the harm to the public interest in releasing the record?
Applying the Balancing Test

- There are no blanket exemptions
- Must conduct on *case-by-case* basis
- Take into consideration the totality of circumstances
Applying the Balancing Test, continued

- **Identity** of the requester and the **purpose** of the request are generally **not** part of the balancing test

- **However:**
  - *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
  - *Wis. Stat. § 19.35(1)(am)*

- A requester has greater rights to inspect personally identifiable information about himself or herself
Sources of Public Policies
Some Sources of Public Policies

- 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 other statutes
  - E.g., patient health care records, student records
    - Including federal law: HIPAA, FERPA
  - Wis. Stat. §§ 801.19, 801.20, 801.21
    - Effective July 1, 2016, certain personally identifiable and financial information required to be redacted from records filed with Wisconsin’s circuit courts
Some Sources of Public Policies, cont.

- Policies expressed in evidentiary privileges
  - E.g., Wis. Stat. § 905.03

- Public records law provisions concerning privacy:
  - Wis. Stat. § 19.36(10): Employee personnel records
  - Wis. Stat. § 19.36(11): Local or state public office holder
  - Wis. Stat. § 19.36(13): Financial identifying information

- Public interest in reputation and privacy of individuals
  - See Woznicki v. Erickson, 202 Wis. 2d 178 (1996)

- Court decisions
Special Considerations

- 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

- Driver’s Privacy Protection Act (DPPA)
  - Purpose: limit release of an individual’s personal information contained in driver’s license record
Special Considerations, 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
    - Including application of the balancing test
Special Considerations, continued

- Crime victim rights expressed in statutes, constitutional provisions, and case law
  - Consideration of family of crime victims
- Protection of witnesses
  - Safety and security; “chilling” future cooperation with law enforcement
- Law enforcement officer safety
  - Including the safety of officers’ families and homes
- Public availability weakens argument for denial
  - *Milwaukee Journal Sentinel, 2009 WI 79, ¶ 61*
Balancing Test Application: Law Enforcement Investigations
Investigation Considerations

- *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811

- Public oversight of police investigations is important
  - There is a strong public interest in investigating and prosecuting criminal activity

- Generally, law enforcement records more likely to have an adverse effect on public interests if released
  - 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?
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
Response to Requests
Redaction

- Wis. Stat. § 19.36(6)
  - If part of a record is disclosable, that part must be disclosed
  - Non-disclosable portions must be redacted
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
  - Must have a factual basis for reasons for denial
  - See *Kroeplin v. Wis. Dep’t of Natural Res.*, 2006 WI App 227, ¶ 37.
Written Response, continued

- Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
  - See *Portage Daily Register v. Columbia County Sheriff’s Department*, 2008 WI App 30, ¶ 16

- Reviewing court usually limited to reasons stated in denial

- Explain:
  - The public interest in need of protection
  - Reasons why release would harm that public interest
  - Harm to that public interest outweighs public interest in disclosure
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
  Madison, WI 53707-7857
Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
Department of Corrections Public Records Law Training
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