

# WISCONSIN PUBLIC RECORDS LAW: BALANCING PUBLIC RECORDS AND PRIVACY RIGHTS

**Wisconsin Department of Justice  
Office of the Attorney General  
Office of Open Government**

Department of Corrections Public Records Law Training  
Madison, December 11, 2016



---

# 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



---

# Processing Public Records Requests

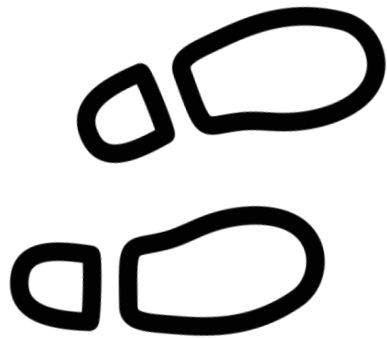
- “Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.” Wis. Stat. § 19.35(1)(a).
  - Is there a **statute** that prohibits disclosure of all 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

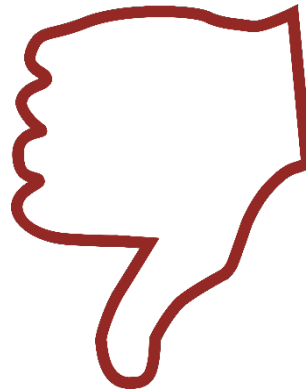


---

# 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

v.

- 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
  - *Milwaukee Journal Sentinel v. Wisconsin Dept. of Administration*, 2009 WI 79, ¶ 56
- Must conduct on **case-by-case basis**
  - *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 62.
- 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
  - *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339



---

# 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?



---

# 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



---

# 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

it affirmed [REDACTED] (For  
[REDACTED] in- ion and dissent, see the  
[REDACTED] sue.)  
tails). [REDACTED]  
[REDACTED] license [REDACTED] th  
[REDACTED] the purchase of [REDACTED] The  
[REDACTED] incorporated-by-referen  
ent misuse, render- of the intrinsic evidence  
[REDACTED] instruction. The incorpor  
[REDACTED] tional but instead was c  
[REDACTED] the claimed produ  
evidence [REDACTED] wa  
alternatives to the [REDACTED] purp  
y tied patents in the [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 PUBLIC RECORDS LAW: BALANCING PUBLIC RECORDS AND PRIVACY RIGHTS

**Wisconsin Department of Justice  
Office of the Attorney General  
Office of Open Government**

Department of Corrections Public Records Law Training  
Madison, December 11, 2016

