

WISCONSIN PUBLIC RECORDS LAW

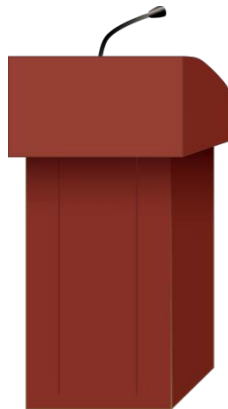
**Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government**

2016 New Chiefs and Sheriffs Training Conference
January 4, 2016



Today's Presentation

- **PURPOSE**: Introduce/review basic principles; answer your questions
- Time has been reserved for your questions at the end of today's presentation.
- Following the presentation, I will be available to answer questions one-on-one.



Presumption

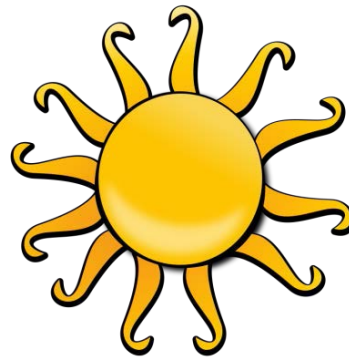
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Objectives

- Shed light on workings of government and acts of public officers and employees



- Assist members of the public in becoming an informed electorate
- Serve a basic tenet of our democratic system by providing opportunity for public oversight



“Authority”

- Defined in 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. Cnty. 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
- Other authorities to designate one or more positions
- Defaults are highest ranking officer and chief administrative officer, if any
- 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



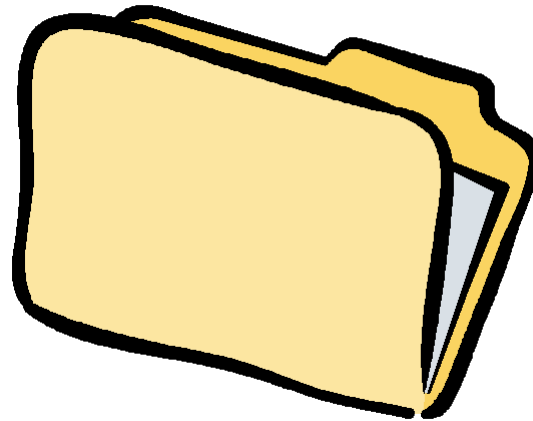
- More limited rights for persons committed under mental health laws or incarcerated (must be requesting records containing specific references to themselves or minor children)
- Per Wis. Stat. § 19.35(1)(am), a requester has greater rights to inspect personally identifiable information about himself or herself in a record containing personally identifiable information



“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)



Not a “Record”

- 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”?

- Not created by the authority but in the authority’s possession
- Personal email, texts, calls, and documents on an authority’s accounts
- Business email, texts, calls, and documents on personal accounts
- Social media
- Contractors’ records



Personal Email, 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 officers or employees of the authority
- Disclosure generally not required
- *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177



Communications to public officials

- Persons who communicate political views to their elected lawmakers should be prepared to see their views made public, with their names attached
- Depending on the totality of circumstances, it may be appropriate to redact personal financial, health, or other similarly sensitive information as “purely personal”
- Possibility of threats, harassment, or reprisals is a legitimate consideration; weight to be accorded depends on likelihood of actual occurrence, however
- *John K. MacIver Inst. for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61



Government Business Emails, Calls, and Documents on Private Accounts

- These materials may be “records”
- Content determines whether something is a “record,” not the medium, format, or location
- **Recommendation:** Conduct a careful search of all relevant accounts
- Personal materials on the same private accounts are not subject to disclosure



Social Media



- Increased use of social media by authorities (Facebook and Twitter)
- Likely to be a “record” if created or maintained by an authority
- Recommended considerations
 - Be familiar with the site – Are the records archived? Who may post, manage, or control? How long is content available?
 - Will third-party messages or posts be “records”?
 - Does the authority have a social media policy?



Contractors' Records

- Records produced or collected under a contract with the authority are “records” for public records law purposes
 - Records produced or collected “in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of” a contract
 - Records produced “in the course of” the contracted-for matter
- *Juneau Cnty. Star-Times v. Juneau Cnty.*, 2013 WI 4, 345 Wis. 2d 122



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
- Limited rights for incarcerated or committed persons



Sufficient Request

- Written request or form not required—but may be a good idea
- “Magic words” not required
- Reasonably describes the information or records requested
- Reasonably specific as to time and subject matter
- 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



Making a Good Request

- Frame requests carefully to produce records actually of interest
- If requesting a particular document, identify it by date, author and title
- Search terms can be useful in requests for email records
- Direct the request to the custodian or other person identified in the authority's public records notice
- Indicate when cost is a concern



January 3, 2016

Charlie Chairperson
Cheese Town Board Chairperson
250 Main Street
Cheese Town, WI 53000

Dear Mr. Chairperson,

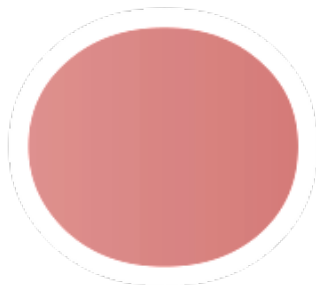
Please send me copies of all town records related to redevelopment of the old quarry site.

If I do not receive the records by January 28, 2016, I will assume you are denying my open records request and will take all appropriate legal action.

I expect you will not charge me for these records because of the high public interest in this important matter.

Thank you for your prompt attention.

Yours truly,



Ralph Requester
123 Quarry Road
Cheese Town, WI 53000

321 Quarry Road
Cheese Town, WI 53000

January 3, 2016

Carly Clerk
Town Clerk
250 Main Street
Cheese Town, WI 53000

Dear Ms. Clerk:

Pursuant to the Wisconsin Public Records Law, please send me copies of all 2015 Cheese Town Board minutes discussing the Vacation Company's proposed redevelopment of the old Bedrock Quarry site. I only need pages of the minutes on discussing the proposed quarry redevelopment, and I don't need copies of any related documents distributed at the Town Board meetings. Also, please send me copies of all emails between the Town Board members regarding the quarry redevelopment from May 1 through September 15, 2015. I would prefer to receive the responsive records by email, if possible.

If the cost of fulfilling my request will be more than \$25.00, please contact me before proceeding. Also, please contact me if you have any questions about this request.

Thank you,

Rebecca Requester
rebecca@internet.com
555-1234

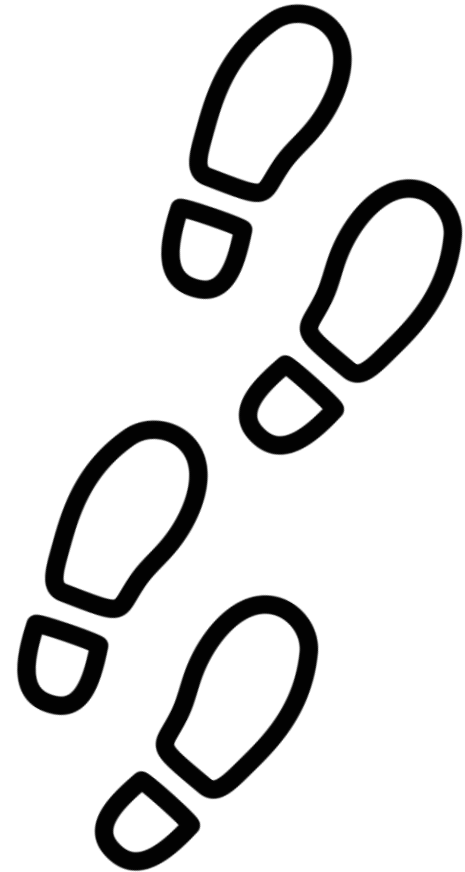
Evaluating a Request

- Assess carefully to determine what will be needed to prepare a response
- Don't understand the request? Send the requester a written summary of your understanding or request for clarification
- Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
- Consider sending the requester an acknowledgment, especially if the response will take some time



Useful Analysis – 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



Existing Records

- Generally, only records that exist at the time of the request must be produced—to respond, an authority need not create new records
- Continuing requests are not contemplated by the public records law
- Public records law does not require answering questions
- Records retention law – Wis. Stat. § 16.61 for state authorities, Wis. Stat. § 19.21 for local authorities
- <http://publicrecordsboard.wi.gov/>



No Records Exist

- 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



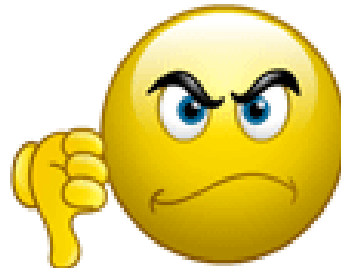
Absolute Right of Access

- 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 of Access

- Can be located in public records statutes
 - Information related to a current investigation of possible employee criminal conduct or misconduct prior to disposition of the investigation
 - Plans or specifications for state buildings
- Can be located in other statutes or case law (might be conditioned on meeting specified criteria)
 - Patient health care records
 - Pupil records



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 (such as patient health care records, student records)
- Court decisions
- Crime victim rights expressed in statutes, constitutional provisions, and case law
- Exemptions to open meetings requirements in Wis. Stat. § 19.85(1) – but only if there is specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
- Public interest in protecting privacy of individuals



Special Issues

- *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
- Driver's Privacy Protection Act (DPPA)



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



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



Redaction

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- Redaction constitutes denial of access to the redacted information (and therefore subject to review by mandamus)
- Effective July 1, 2016, certain personally identifiable and financial information will be required to be redacted from records filed with Wisconsin's circuit courts.





**Cheese Town Hall
250 Main Street
Cheese Town, WI 53005**

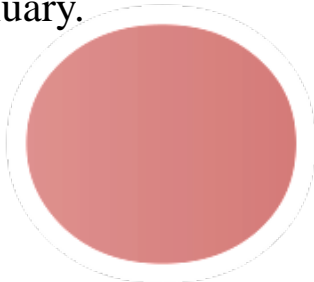
January 25, 2016

Ms. Rebecca Requester
321 Quarry Road
Cheese Town, WI 53000

Dear Mr. Requester:

Enclosed are the records you requested. Confidential information has been redacted.

The cost of this response is \$130. Please send a check in that amount to me at the address above by the end of January.



Thank you,

Carly Clerk
Town Clerk

Clerk, Carly – Cheese Town

From: Clerk, Carly
Sent: Monday, January 25, 2016, 10:08 AM
To: rebecca@internet.com
Subject: Response to 01/03/2016 public records request
Attachment: quarryrecords.pdf

Dear Ms. Requester:

Attached are the records responsive to your January 3, 2016 public records request. I redacted home email addresses and home telephone numbers of the Town Board members pursuant to Wis. Stat. § 19.36(11). I also redacted purely personal information about sports activities of Town Board members' children from a few emails pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In applying the balancing test, I concluded that any public interest in the disclosure of this purely personal information is outweighed by public policies recognizing the privacy interests of local public officials and their families in matters unrelated to the conduct of government business. *See Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶ 9 & n. 4 (Abrahamson, C.J., lead op.); *id.*, ¶ 148 & n. 2 (Bradley, J., concurring); *id.*, ¶ 173 & n. 4 (Gableman, J., concurring), 327 Wis. 2d 572, 786 N.W.2d 177.

Locating the responsive records required 3 hours of staff time at \$20.00 per hour, for a total of \$60.00. Wis. Stat. § 19.35(3)(c). Please remit your payment within 30 days to Town Clerk, 250 Main St., Cheese Town, WI 53000.

Pursuant to Wis. Stat. § 19.35(4)(b), this determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to a district attorney or the Attorney General.

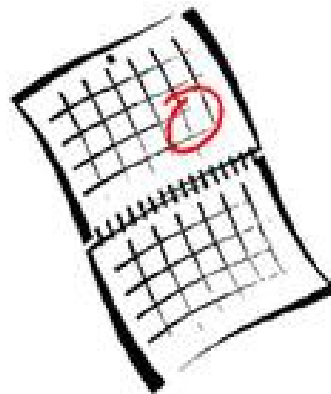
Please contact me if you have any questions.

Thank you,

Carly Clerk
Cheese Town Clerk

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 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 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



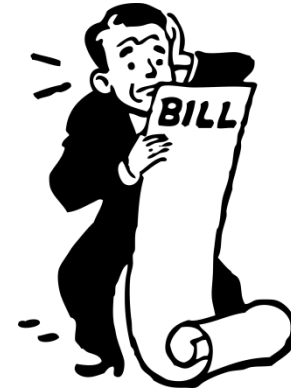
Costs—General Rules

- Actual, necessary, and direct costs only—unless otherwise specified by law
- Prepayment may be required if total costs exceed \$5.00
- Authority may choose to provide records for free or reduced charge



Permissible Charges

- Copying and reproduction
- Location, if costs exceed \$50.00
- Mailing/shipping to requester
- Others specified in Wis. Stat. § 19.35(3)
- Authorities **may not** charge for redaction costs
- Keep careful records in order to support and calculate requests for payment of costs



Cost of Response

- Clarifying or limiting a request may:
 - Reduce costs to requester
 - Eliminate records not of interest to requester
 - Facilitate a quicker response
- Cost estimates should be reasonable, based on information available before preparing the response or developed during preparation



Remedies and Enforcement

- Mandamus action to challenge:
 - Withholding a record or part of a record
 - Delay in granting access to 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



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:
Pamila Majewski, Legal Associate
(608) 267-2220
- Write to: Paul M. Ferguson, Assistant Attorney General
Office of Open Government
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857



Questions and Answers



WISCONSIN PUBLIC RECORDS LAW

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

2016 New Chiefs and Sheriffs Training Conference
January 4, 2016

