

# Wisconsin Digital Government Summit

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## eDiscovery and Records Management - Best Practices

Wisconsin Department of Justice  
Office of the Attorney General  
Office of Open Government  
Madison, November 30, 2017



# The Role of the Wisconsin Department of Justice

- ▶ Openness and transparency in government
- ▶ Office of Open Government
  - ▶ Interpret and apply open government laws
  - ▶ Develop open government policies
  - ▶ Provide legal counsel to DOJ and clients
  - ▶ Provide guidance, training, and open government resources
- ▶ Manage DOJ's public records request process



# The Role of the Wisconsin Public Records Board

- ▶ Responsibilities
  - ▶ Preservation of important State records
  - ▶ Orderly disposition of State records
  - ▶ Cost-effective management of records by State agencies
- ▶ Records Management Committee (RMC)
  - ▶ Responsible for review of proposed:
    - ▶ General Records Schedules (GRSs)
    - ▶ Agency-specific Record Retention/Disposition Authorizations (RDAs)



# Wisconsin Public Records Law

- ▶ Wis. Stat. §§ 19.31 to 19.39
- ▶ Objective: Provide the public access to government records
  - ▶ Shed light on government and acts of public officers and employees
- ▶ Basics:
  - ▶ Presumption of complete public access, consistent with the conduct of government business
  - ▶ Anyone can request a record
  - ▶ A governmental authority must provide the record unless a statute, the common law, or the public records balancing test prohibits release of all or part of a record
    - ▶ Redaction may be necessary
  - ▶ The law's definition of "record" quite broad



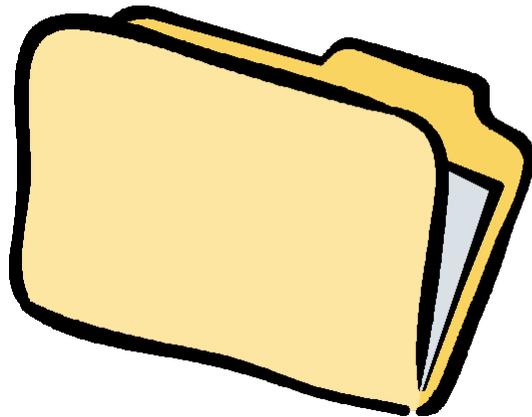
# Wisconsin Public Records Law, cont.

- ▶ Problem: The Public Records Law took much of its present form in 1981
- ▶ What happened in 1981?
  - ▶ End of Iranian hostage crisis
  - ▶ Ronald Reagan took office as President
  - ▶ *Raiders of the Lost Ark* was top-grossing movie
  - ▶ *Bette Davis Eyes* was biggest hit single
- ▶ Bottom Line: The Legislature did not envision the way we conduct business today when they drafted the law



# “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.”
- ▶ Definition includes electronic records



# Electronic Records

- ▶ Email
- ▶ Cell phone content, including content on phones issued by an authority and possibly content on personal phones used for government business
  - ▶ Phone call records, text messages, app content
- ▶ Social media accounts created or maintained by an authority
- ▶ Electronic databases
- ▶ Metadata
- ▶ Audio and video



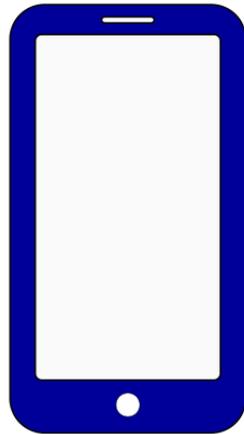
# Personal and Business Email

- ▶ 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
- ▶ 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



# Cell Phones

- ▶ Treatment of records stored on cell phones is similar to that of email content
  - ▶ Personal/governmental business on personal phones
  - ▶ Personal/governmental business on government phones
- ▶ However, archiving of cell phone content presents challenges



# Social Media

- ▶ Increased use of social media by authorities
  - ▶ Facebook
  - ▶ Twitter
- ▶ Content of an authority's accounts are records
  - ▶ Therefore, the content must be retained



# Electronic Databases

- ▶ Data = Records
- ▶ However:
  - ▶ Direct access to electronic databases not required
  - ▶ Computer program is not subject to examination or copying, but the following is:
    - ▶ Input: Material used as input for computer program
    - ▶ Output: Material produced as product of computer program
- ▶ Requester, within reasonable limits, may request a data run to obtain requested information



# Metadata

- ▶ No controlling Wisconsin precedent
  - ▶ A circuit court held metadata is not a record because it includes drafts, notes, preliminary computations, and editing information
  - ▶ Courts in other jurisdictions have held metadata must be disclosed in response to freedom of information laws
- ▶ Good rule of thumb: content determines whether it is a record, not the format



# Audio and Video

- ▶ Examples:
  - ▶ Police body cameras
  - ▶ Police dashboard cameras
  - ▶ Surveillance video
  - ▶ Accompanying audio
  - ▶ 911 recordings
- ▶ Retention issues
- ▶ Redaction



# Format of Records

- ▶ Wis. Stat. § 19.35(1)(b), (c), (d): a copy substantially as readable/audible/good as the original
- ▶ *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
  - ▶ Whether records must be produced in requested format not squarely addressed
  - ▶ PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester
  - ▶ Sufficient to provide a copy of relevant data in an appropriate format



# Record Retention

- ▶ Records retention laws
  - ▶ Public Records Law: Wis. Stat. § 19.35(5)
    - ▶ Only after receiving a request
  - ▶ State authorities: Wis. Stat. § 16.61
  - ▶ Local authorities: Wis. Stat. § 19.21
- ▶ Record Retention Schedules
  - ▶ Includes:
    - ▶ General Records Schedules (GRSs)
    - ▶ Agency-specific Records Retention/Disposition Authorizations (RDAs)
- ▶ <http://publicrecordsboard.gov>



# Record Retention Format

- ▶ 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



# Record Retention Considerations

- ▶ Storage, archiving, searching
  - ▶ Technology
  - ▶ Equipment
  - ▶ Maintenance
  - ▶ Know how
- ▶ Cost



# Enforcement

- ▶ 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.”
- ▶ 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



# 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:
  - ▶ Write: Office of Open Government  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857
  - ▶ Tel: (608) 267-2220
  - ▶ Email: [fergusonpm@doj.state.wi.us](mailto:fergusonpm@doj.state.wi.us)



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