

Understanding and Complying with the Public Records Law

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

38th Annual Wisconsin Municipal Clerks Association Conference

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Green Bay, Wisconsin



Office of Open Government (OOG)

- ▶ Interpret and apply the Open Meetings Law, Public Records Law, and other open government statutes and rules
- ▶ Manage DOJ's public records request process
- ▶ Develop open government policies
- ▶ Provide legal counsel to DOJ and clients
- ▶ Run the PROM help line and respond to citizen correspondence concerning open government issues
 - ▶ Wis. Stat. §§ 19.39 and 19.98
 - ▶ Any person may request AG's advice
- ▶ Provide training and open government resources



Introduction



Government Transparency and the Wisconsin Public Records Law

- ▶ “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
- ▶ 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 members of the 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



Public Record Roles



Authorities and Custodians

- ▶ **Authority:** Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- ▶ **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
 - ▶ E.g., elective official or designee
 - ▶ Custodial services: other staff may assist
 - ▶ All records belong to the authority



Who Can Request?

- ▶ **Requester:** Defined at Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
 - ▶ Incarcerated or committed persons have more limited rights
 - ▶ Requester has greater rights to inspect personally identifiable information about himself or herself in a record. Wis. Stat. § 19.35(1)(am)
- ▶ Requester generally need not identify himself or herself
- ▶ Requester need not state the purpose of the request
 - ▶ Motive generally not relevant, but context appropriately considered

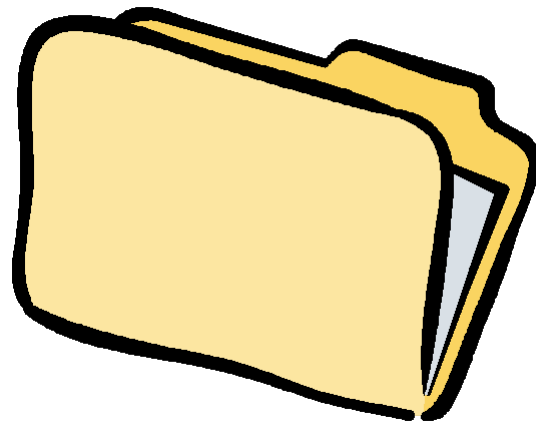


Records



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.”



Is it a Record?

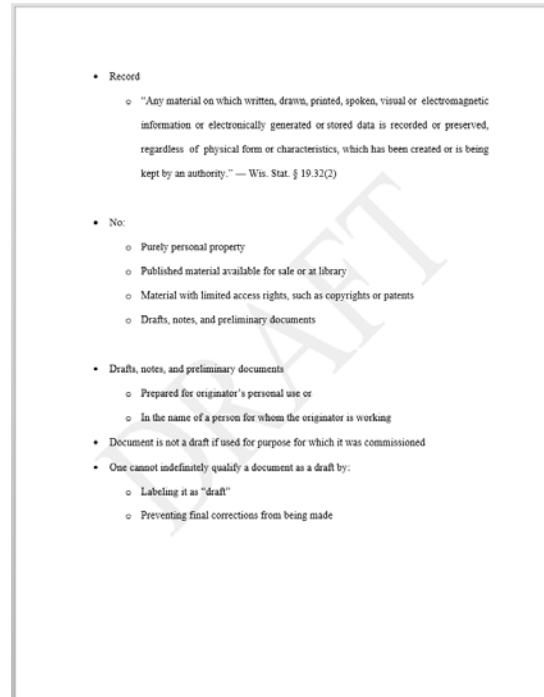
No:

- ▶ Published material available for sale or at library
- ▶ Purely personal property
- ▶ Material with limited access rights, such as copyrights or patents
- ▶ Drafts, notes, and preliminary documents



Drafts, Notes, Preliminary Documents

- ▶ Prepared for originator's personal use or in the name of a person for whom the originator is working
- ▶ Not a draft if used for purpose for which it was commissioned
- ▶ One cannot indefinitely qualify a document as a draft by:
 - ▶ Simply labeling it "draft" or preventing final corrections from being made



Is it a Record?

Yes:

- ▶ Not created by the authority but in the authority's possession
 - ▶ **Tip:** If an authority has a record that it did not create, they can reach out to the originating authority to see what concerns they may have
- ▶ Electronic records, including:
 - ▶ Audio and video
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Social Media
- ▶ Contractors' records



Audio and Video

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



Personal and Business Email, etc.

- ▶ 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 authority's officers or employees
 - ▶ Disclosure generally not required
 - ▶ *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
- ▶ 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
 - ▶ Personal materials on the private accounts are not subject to disclosure
 - ▶ Recommendation: Conduct a careful search of all relevant accounts



Electronic Records

- ▶ Social media accounts created or maintained by an authority
- ▶ 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
- ▶ It is important to check cell phones when gathering records in response to public records requests

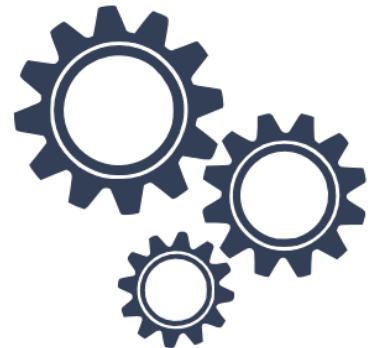


Receiving and Processing a Request



Public Records Request Process

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for records
- ▶ Any responsive records are reviewed:
 - ▶ Is there a statutory or common law exemption from disclosure?
 - ▶ Authority applies public records balancing test
- ▶ Records are released with letter explaining any redactions



Sufficient Request

- ▶ A request may be submitted to anyone with an authority
 - ▶ A request may be **verbal** or **in writing**
 - ▶ An authority may not require the use of a form
 - ▶ “Magic words” are not required
- ▶ In order to be sufficient, a request must:
 - ▶ Reasonably describe the information or records requested
 - ▶ Be reasonably specific as to time and subject matter
- ▶ A 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



Communication with a Requester

- ▶ Don't understand the request? Contact the requester
 - ▶ Send a written summary of your understanding and request clarification
- ▶ Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
 - ▶ A requester may not know how many responsive records exist
 - ▶ A requester may have no interest in many "technically" responsive records
- ▶ 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
- ▶ If there are no responsive records, inform the requester



Steps 2 & 3: Absolute Right/Denial

- ▶ **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
- ▶ **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 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



Special Issues



Employee Records

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Generally, access not permitted for information related to:
 - ▶ Employee's home address, email, phone number, SSN
 - ▶ Current investigation of possible criminal offense or misconduct connected with employment
 - ▶ Employee's employment examination, except the score
 - ▶ Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- ▶ Other personnel-related records, including disciplinary records may be subject to disclosure
 - ▶ Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356



Electronic Databases

- ▶ Direct access to electronic databases not required
- ▶ Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- ▶ Wis. Stat. § 19.36(4): computer program is not subject to examination or copying
 - ▶ However, 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



Other Special Issues

- ▶ Wis. Stat. § 905.03(2): Lawyer-Client Privileged Communications
- ▶ Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- ▶ Other statutes requiring confidentiality
- ▶ 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
 - ▶ **Accident reports:** permitted to be released unredacted
 - ▶ DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
 - ▶ **Incident reports:** release of DMV info. prohibited unless exception applies
 - ▶ Compliance with public records request not a "function"
 - ▶ **Information verified** using DMV records is not protected by DPPA
 - ▶ Presents problem of determining how info. was obtained



Children and 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 the balancing test



Prosecutor's Files v. Law Enforcement Records

- ▶ 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).
- ▶ However, for a law enforcement agency's records, the balancing test must be applied on a case-by-case basis



Law Enforcement Investigations

- ▶ There is a strong public interest in investigating and prosecuting criminal activity
 - ▶ 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
 - ▶ *See Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
- ▶ Key Considerations
 - ▶ Crime victim rights expressed in statutes, constitutional provisions, case law
 - ▶ Consideration of family of crime victims
 - ▶ Protection of witnesses
 - ▶ Confidential Informants. *See Wis. Stat. § 19.36(8)*
 - ▶ Children and juveniles
 - ▶ Officer safety, including the safety of officers' families and homes



Redaction



Redaction

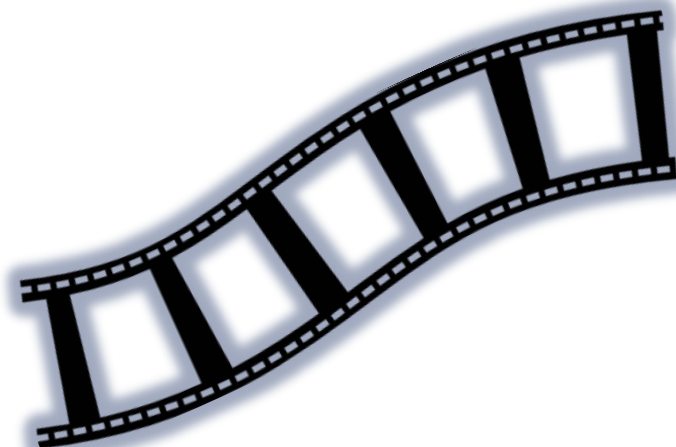
- ▶ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- ▶ No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- ▶ Redaction constitutes a denial of access to the redacted information
 - ▶ Therefore subject to review by mandamus

it affirmed [REDACTED] (For
[REDACTED] in- ion and dissent, see the
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Redaction—Audio and Video

- ▶ Audio—accompanying video, dispatch recordings, etc.
 - ▶ Digital editing programs and equipment
 - ▶ Partial redaction
- ▶ Video—security video, police body and dashboard cameras, etc.
 - ▶ Video blurring
 - ▶ Blacking out portions of video
- ▶ Technology
- ▶ Cost



Responding to a Request



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



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



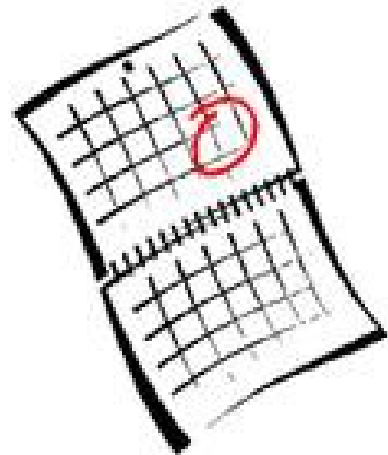
Reasons for Denial

- ▶ 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 and status updates
- ▶ Penalties for arbitrary and capricious delay



Notice Before Release

- ▶ Notice to record subjects is only required in limited circumstances
 - ▶ 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 of the authority holding state or local public office
 - ▶ “Record subject” may augment the record to be released
- ▶ OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- ▶ Courtesy notice



Costs



Costs

- ▶ Actual, necessary, and direct costs only—unless otherwise specified by law
 - ▶ Copying and reproduction
 - ▶ Location, if costs are \$50.00 or more
 - ▶ Location costs themselves must be \$50 or more: An authority cannot combine location costs with other costs to reach the \$50 threshold
 - ▶ Mailing/shipping to requester
 - ▶ Others specified in Wis. Stat. § 19.35(3)
- ▶ Authorities may not charge for redaction costs
- ▶ Prepayment may be required if total costs exceed \$5.00
- ▶ Authority may waive all or part of costs



Communicating Cost with a Requester

- ▶ A custodian should notify a requester if significant costs are anticipated
 - ▶ Cost estimates should be reasonable, based on information available before preparing the response or developed during preparation
- ▶ By clarifying or limiting a request, a requester may:
 - ▶ Reduce costs to requester
 - ▶ Eliminate records not of interest to the requester
 - ▶ Facilitate a quicker response
- ▶ A custodian should keep careful records in order to support and calculate requests for payment of costs



Enforcement



Enforcement

- ▶ 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
- ▶ 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.”



Record Retention



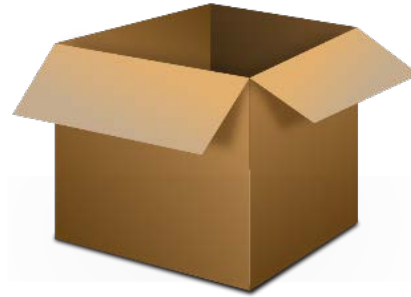
Record Retention—Public Records Law

- ▶ 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



Record Retention—Other Statutes

- ▶ Records retention laws
 - ▶ 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>



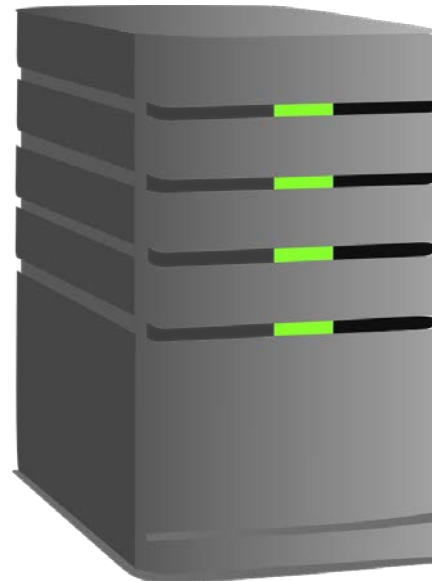
Record Retention—Format

- ▶ 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

- ▶ Accounting for record storage, archiving, and searching
- ▶ Concerns:
 - ▶ Costs
 - ▶ Equipment
 - ▶ Technological knowledge and expertise
 - ▶ Maintenance



Record Retention—Best Practices

- ▶ Establish agency policies regarding retention
- ▶ Ensure all agency-specific RDAs are up-to-date
 - ▶ RDAs sunset after 10 years
- ▶ Train agency records officers and other staff on record retention and relevant agency policies
- ▶ Follow your retention schedules
- ▶ Consult your legal counsel



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



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