An Overview of the Public Records Law

Wisconsin Department of Justice
Office of Open Government
Milwaukee County Public Records Training
September 12, 2019
Milwaukee, Wisconsin
Presentation Overview

- Provide background on the Office of Open Government
- Cover public records law essentials
- Explain what a record is and who can request records
- Discuss the receipt and processing of public records requests
  - Including:
    - Application of the public records balancing test
    - Special issues
    - Employee records
- Outline how to respond to public records requests
- Detail permissible costs that may be assessed
- Address record retention
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
    - Any person may request AG’s advice
- Provide training and open government resources
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

- Wis. Stat. § 19.31:
  - 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.”
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
Requesters

- **Requester**: Defined in 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)
- **Employees can submit records requests**
  - Wis. Stat. § 19.35(1)(am)
  - Wis. Stat. § 103.13
    - Pertains only to records requested by an employee or a former employee
    - An employee may authorize a representative to obtain records on his/her behalf, but also, in practice, attorneys may make requests under § 103.13 on behalf of employees
    - Applies to public and private employers
Requesters, continued

- Requester generally **need not identify** himself or herself
  - Requesters may be anonymous
    - However, public records requests are records subject to disclosure
- Requester **need not state the purpose** of the request
  - Motive generally not relevant, but context appropriately considered
  - Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.
    - See *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894:
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?

- Records **include** the following:
  - Material not created by the authority but in the authority’s possession
  - Electronic records, including:
    - Audio and video
    - Data in a database
    - Emails
    - Social media
- Records **do not include** the following:
  - Published material available for sale or at library
  - Material with limited access rights, such as copyrights or patents
  - Purely personal property
  - 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

[Diagram or image of text that is not clearly visible]
Email, Texts, etc.

- **Personal** email, calls, texts, 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
  - *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
    - Generally, disclosure not required of purely personal e-mails sent or received by employees that evince no violation of law or policy

- **Government business** emails, calls, texts, 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 same private accounts are not subject to disclosure
  - **Recommendation**: Conduct a careful search of all relevant accounts
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 subject to disclosure are reviewed:
  • Presumption that they will be disclosed unless:
    • They are exempt from disclosure pursuant to a statute or the common law
    • The public records balancing test weighs in favor of nondisclosure
• Records are released with letter explaining any redactions
Sufficient Request

- A request need **not be in writing**; it may be **verbal**
- An authority may not require the use of a form
- “Magic words” are not required
- A request must:
  - **Reasonably describe** the information or records requested
  - **Be reasonably specific as to time and subject matter**
- Custodian should not have to guess what records the requester wants
Records Must 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. *See Journal Times v. Police & Fire Com’rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.
Absolute Right & Denial 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

- **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
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
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 application of the balancing test.
Other Special Issues

- Wis. Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Wis. Stat. § 165.79: Crime Laboratory Privilege
- **Driver’s Privacy Protection Act (DPPA)**
  - Federal law that limits the release of an individual’s personal information contained in a driver’s license record
    - Accident reports: permitted to be released unredacted
    - 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
  - New Richmond News v. City of New Richmond, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339
- Other statutes requiring confidentiality
Special Issues: Employee Records
Employee Records

- Wis. Stat. § 19.35(1)
  - Anyone can request
  - Applies to public entities and quasi-governmental entities
  - Any records, with exceptions
  - Presumption of openness
  - Private right of action
  - Cannot require written request
  - Respond as soon as practicable and without delay
  - Written explanation of denial

- Wis. Stat. § 103.13
  - Employee/former employee
  - Applies to public and private employers
  - Narrow category of records
  - No presumption of openness
  - No private right of action
  - Employer may require written request
  - Allow inspection within 7 days
  - No written response or denial letter
Employee Records, continued

- Wis. Stat. § 19.36(10): Treatment of employee personnel records
  - Unless required by § 103.13, prohibits the disclosure of 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
Employee Records, continued

• Wis. Stat. § 103.13(6)
  • Exceptions generally limit the right of access but do not prohibit disclosure, except subject to § 19.36(10)
  • Exempts records of investigations of possible criminal offenses but not employee misconduct (does not say “current”)
  • Performance evaluations not exempt
  • Not entitled to records about another employee
Responding to a Request
Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- Redaction constitutes a denial of access to the redacted information
  - Therefore subject to review by mandamus
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
    • 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
    • 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
  • May respond in writing to a verbal request
  • A request for clarification, without more, is not a denial
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 containing 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
• Attorney General opinions regarding notice: 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
- **Recommendation**: Keep careful records of time spent working on requests
OOG Fee Advisory

- Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
  - Available at [https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf)
  - Overview of costs permissible under the law
  - Recent inquiries pertaining to high fees charged by some authorities
    - Copy costs that are not actual, necessary and direct
    - Location costs including time spent by specialists
      - Limit amount of time spent by specialist
      - Charge lowest hourly rate of individual capable of searching
  - DOJ’s fee schedule is available at [https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf](https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf)
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
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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