

The Public Records Law: Compliance Essentials for Law Enforcement

Wisconsin Department of Justice
Office of Open Government
Portage County Area Training
June 13, 2019
Stevens Point, Wisconsin



Introduction



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



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
 - ▶ All records belong to the authority
 - ▶ Custodial services: other staff may assist



Requesters

- ▶ **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
 - ▶ 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. Ardel v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894:

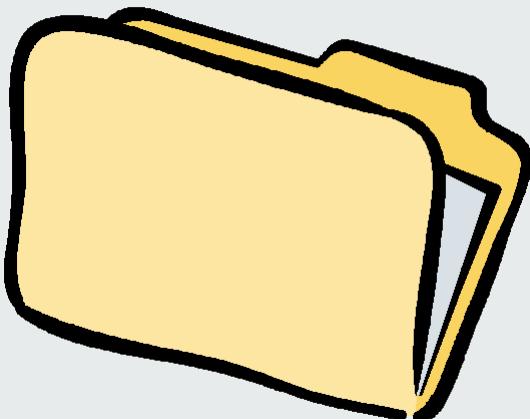


Records



“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.”



What Do Records Include?

- ▶ Records **include** the following:
 - ▶ Material not created by the authority but in the authority's possession
 - ▶ Electronic records, including:
 - ▶ Audio and video
 - ▶ Police body cameras and dashboard cameras; surveillance video
 - ▶ 911 recordings
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Social media



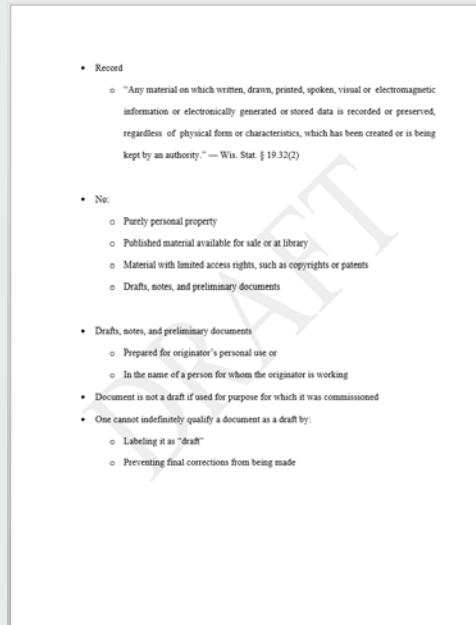
What Do Records Not Include?

- ▶ 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"
 - ▶ Preventing final corrections from being made



Email, Texts, 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 officers or employees of the authority
 - ▶ *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, 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



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 social media accounts and 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:
 - ▶ **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



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 the public records law in mind



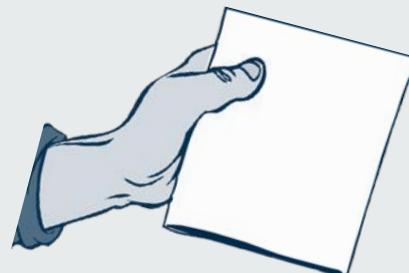
Receiving a Request

- ▶ A request may be submitted to anyone a DOJ
 - ▶ 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 a **sufficient request**, it 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
- ▶ 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
- ▶ **Tip:** Communication with the requester is key in such situations



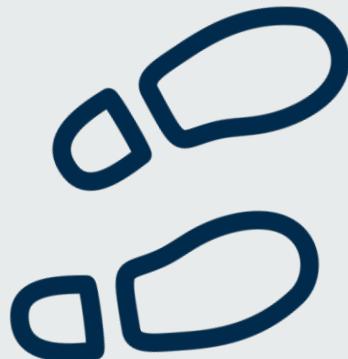
A Record Subject to Disclosure v. Disclosing A Record

- ▶ **Employee's Role:** Search for responsive records and give all responsive records to records custodian to review
 - ▶ All responsive records must be given to the records custodian, even if the employee thinks the records should not be disclosed or the employee does not want the records disclosed
- ▶ **Record Custodian's Role:** Review responsive records and determine if records must be disclosed
- ▶ **Bottom Line:** A record *subject* to disclosure does not necessarily mean it will be disclosed



Processing a Request: 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:
 - ▶ Examples:
 - ▶ 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**
 - ▶ Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.
- ▶ 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



Special Issues



Prosecutor's Files v. Law Enforcement Files

- ▶ 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 regular public records process, including application of the balancing test on a case-by-case basis, must be followed.



Investigation Considerations

- ▶ There is a strong public interest in investigating and prosecuting criminal activity
- ▶ *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
 - ▶ **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



Law Enforcement - Key Considerations

- ▶ 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
- ▶ Confidential Informants
 - ▶ Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise
- ▶ Children and juveniles
- ▶ Officer safety
 - ▶ Including the safety of officers' families and homes
- ▶ **Tip:** If an authority has a record that it did not create, it can reach out to the originating authority to see what concerns it may have



Law Enforcement - Questions to Ask

- ▶ 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 law enforcement techniques and procedures?
- ▶ Is there a possibility of threats, harassment, or reprisals?
 - ▶ Against victims, witnesses, officers, others, or their families?
 - ▶ Any such possibility is accorded appropriate weight depending on the likelihood
 - ▶ Generally, there must be a **reasonable probability**
 - ▶ See *Erpenbach*, 354 Wis. 2d 61.



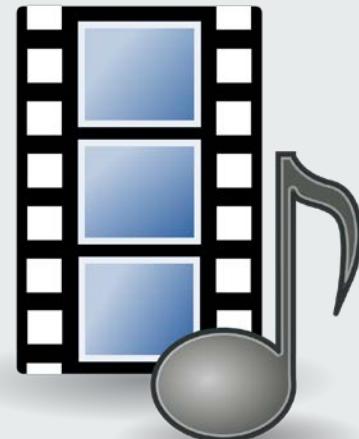
Children and Juveniles

- ▶ 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.



Audio and Video Considerations

- ▶ Voices and likenesses of victims and witnesses
- ▶ Home addresses
- ▶ Home interiors
 - ▶ Background items, for example:
 - ▶ Family photographs
 - ▶ Personal documents



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
- ▶ Wis. Stat. § 165.79: Crime Laboratory Privilege
- ▶ 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



Employee Records

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Generally, no access permitted to the following information:
 - ▶ 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



Responding to a Request



Redaction

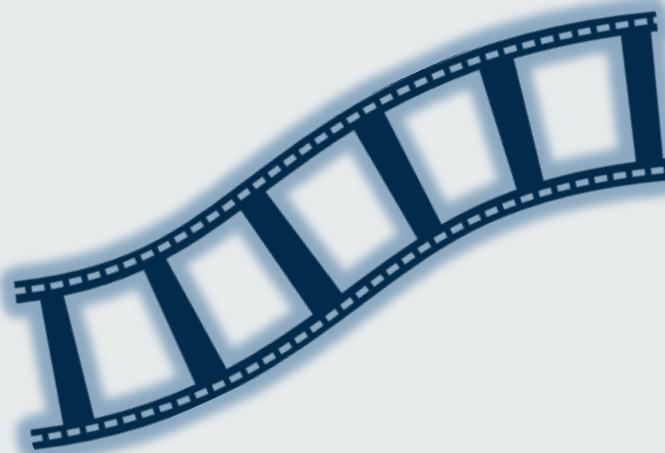
- ▶ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- ▶ **Redaction constitutes a denial of access to the redacted information**
 - ▶ Therefore subject to review by mandamus
- ▶ No specific way to redact: electronic redaction, black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

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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



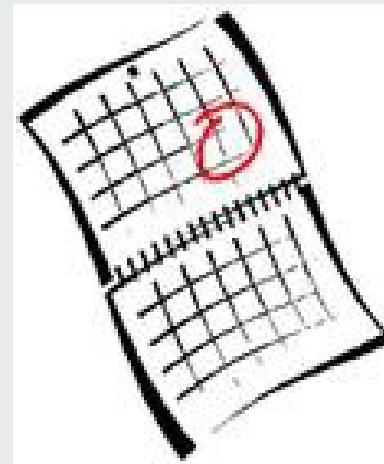
Written Response?

- ▶ 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
- ▶ 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/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>
 - ▶ 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 recently revised its fee schedule
 - ▶ Available at <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



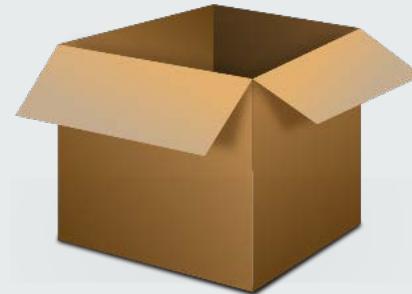
Record Retention—Public Records Law

- ▶ 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>
- ▶ Contact your legal counsel



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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