

# Public Records Law Essentials for Law Enforcement

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

Taylor County

May 22, 2019

Medford, 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

- 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

- 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
- *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.





# 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

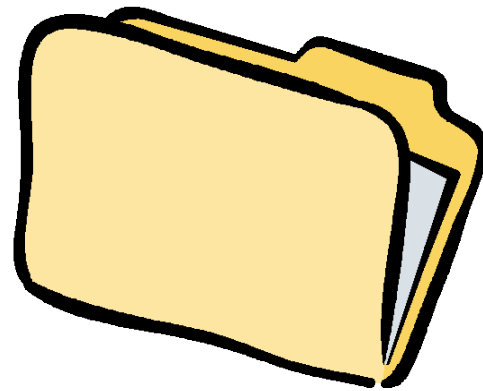


# Records



# “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.”



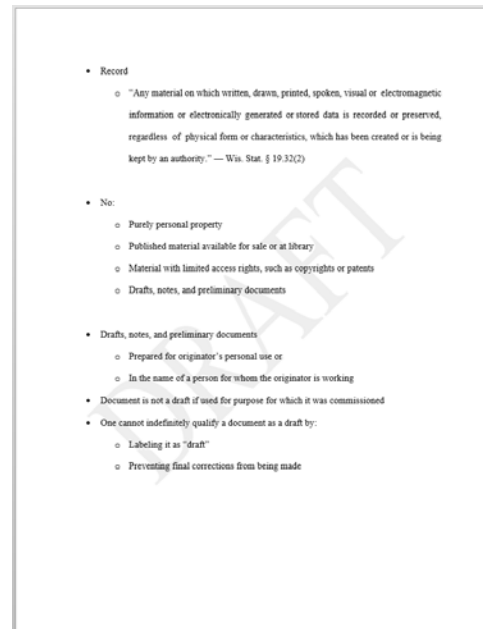
# Is it a Record?

- Records **include** the following:
  - **Material not created by the authority but in the authority's possession**
  - Electronic records, including:
    - Audio and video
      - Police body cameras and dashboard cameras; surveillance video
      - Accompanying audio
    - 911 recordings
    - 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



# 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 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



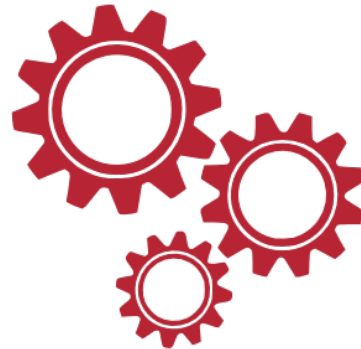
# Receiving and Processing a Request





# Public Records Request Process

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



# 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. *See Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.



# Absolute Right and 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



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



# Law Enforcement Investigations

- There is a strong public interest in investigating and prosecuting criminal activity
- *Linzmeier 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 Records - 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 Records - 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**. *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, e.g.:
    - 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, 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



# Redaction



# 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
- Digital editing programs and equipment for electronic records
  - Audio – accompanying video, dispatch recordings, etc.
  - Video – security video, police body and dashboard cameras, etc.

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# Responding to a Request



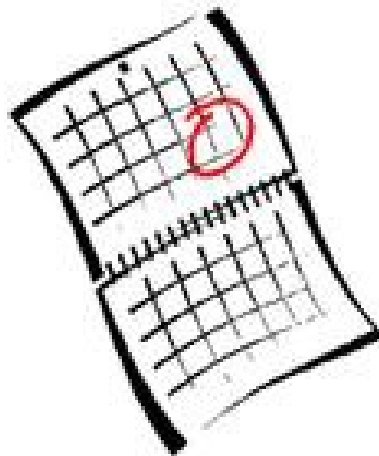
# Written Response

- **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



# 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
- **Tip:** If the requested records are already in a requested format, provide the records in that format unless there is a good reason for not doing so.



# 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/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



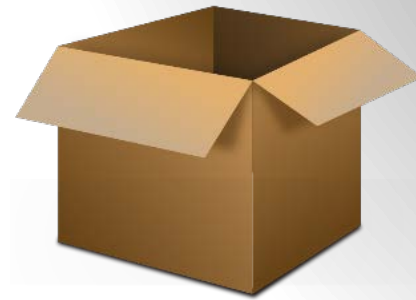
# Record Retention – Public Records Law

- 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)
    - E.g., 121 days for body camera video when there is no incident shown
- <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 – 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](mailto:fergusonpm@doj.state.wi.us)





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