

The Public Records Law and Electronic Records: Considerations for Law Enforcement

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

Annual Wisconsin Sheriffs' Administrative Professionals Meeting

September 19, 2019

Green Lake, Wisconsin



Presentation Overview

- ▶ Provide background on the Office of Open Government
- ▶ Outline public records law essentials including:
 - ▶ Who can request records
 - ▶ Receipt and processing of public records requests
 - ▶ Explain the public records balancing test
- ▶ Address special issues including electronic records
- ▶ Detail permissible costs that may be assessed
- ▶ Discuss 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
- ▶ Oversee 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



Public Records Law Essentials



Presumption

- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ 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



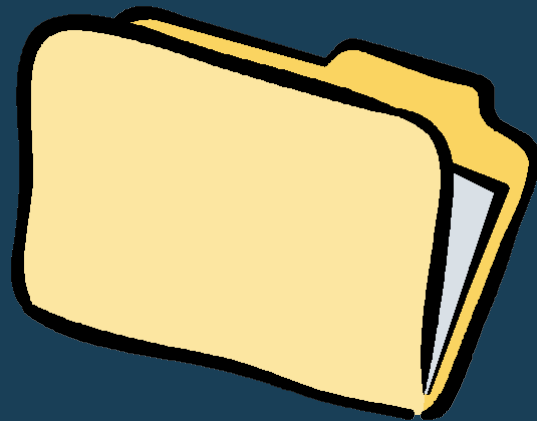
Requesters

- ▶ 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.



“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; dashboard cameras; surveillance video
 - ▶ 911 recordings
 - ▶ Data in a database
 - ▶ Emails and 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



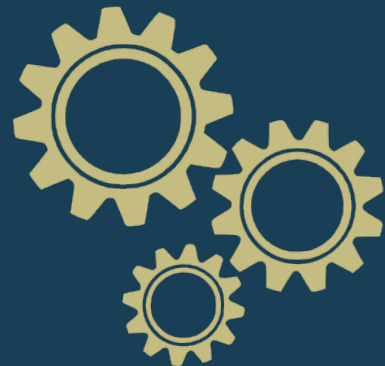
Email, Texts, etc.

- ▶ **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 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, and documents on **private accounts**:
 - ▶ **Remember**: 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



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



Receiving a 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 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



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



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, for example:
 - ▶ 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, for example:
 - ▶ 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



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

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On 01/04/2018, FOSO Deputy (Dep.) Craig Justice responded to a "assist motorist" call-for-service which had initially been called in to the dispatch center by a passing motorist. A short time later, Dep. Justice arrived at the scene and met the stranded motorist who was identified as Brandon Owen Cude. Dep. Justice assisted Cude by placing a portable charging unit upon the battery of the vehicle that Cude had been operating.

During his contact with Cude, Dep. Justice formally identified Cude by Cude's pictured Wisconsin operator's license. Dep. Justice performed a driver record query upon Cude. The driver record query resulted in notification that Cude had two outstanding extraditable warrants which originated from the State of Texas. Dep. Justice confronted Cude about the warrants. Dep. Justice additionally confirmed Cude's identity with the dispatch center by Cude's physical descriptors and the location of Cude's tattoos. As Cude sat on the front driver's seat inside the vehicle, Dep. Justice informed Cude that he was under arrest.



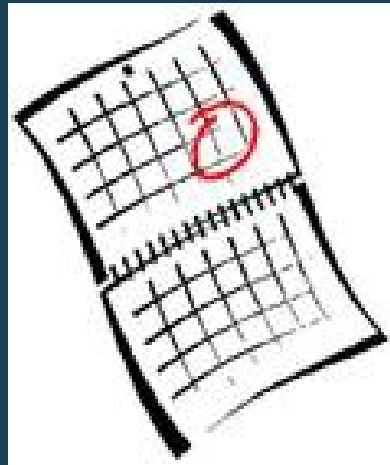
Written Response

- ▶ 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



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.”



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 balancing test must be applied on a case-by-case basis



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 *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



Mental Health Records

- ▶ Wis. Stat. § 51.30(4): Generally, **mental health registration and treatment** records are **confidential** and **privileged** to the subject individual.
 - ▶ May only release with the subject individual's **informed written consent**, court order, or other certain limited circumstances. See Wis. § 51.30(4)(b).
 - ▶ **Includes** duplicate copies of **statements of emergency detention** in the possession of a law enforcement agency, absent written informed consent or a court order. See *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
 - ▶ Supreme Court found that such records were registration records even if in the possession of the law enforcement agency.
 - ▶ Treatment records include registration records. See Wis. Stat. § 51.30(1)(b).
- ▶ Consult your legal counsel



Employee Records

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Unless required by Wis. Stat. § 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.



Other Special Issues

- ▶ Law enforcement records of **children and juveniles** who are the subjects of investigations and other proceedings are confidential with some exceptions. See Wis. Stat. §§ 48.396 and 938.396.
 - ▶ Access to other records regarding or mentioning children are subject to general public records rules including the balancing test
- ▶ 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)**
 - ▶ Accident reports: permitted to be released unredacted
 - ▶ Incident reports: release of DMV info. prohibited unless exception applies
 - ▶ Information verified using DMV records is not protected by DPPA
- ▶ Other statutes requiring confidentiality



Special Issues - Electronic Records



Special Considerations for Audio/Video

- ▶ Voices and likenesses of victims and witnesses
- ▶ Home addresses
- ▶ Home interiors
 - ▶ Background items, e.g.:
 - ▶ Family photographs
 - ▶ Personal documents



Redaction: Audio/Video

- ▶ Audio - accompanying video, dispatch recordings, etc.
 - ▶ Partial redactions (names, victim voices, addresses, etc.)
- ▶ Video - security video, police body and dashboard cameras, etc.
 - ▶ Video blurring
 - ▶ Blacking out portions of video
 - ▶ Removing sections



Redaction: Audio/Video, continued

- ▶ Technology
 - ▶ Software for blurring video can be difficult to find using the term “redaction”
 - ▶ Find software with tools including: Gaussian blur, Mosaic blur, and motion tracking
 - ▶ Most video software will handle audio redactions, too
- ▶ Cost
 - ▶ Many cost effective options available for audio/video software
 - ▶ May take many working hours to redact audio/video (time decreases with practice)
- ▶ Future technical questions?
 - ▶ Contact your agency’s IT department
 - ▶ Contact DOJ DC Digital Records Analyst J. Spencer Gustafson
 - ▶ Email: gustafsonjs@doj.state.wi.us



Police Body Camera Recordings

- ▶ Body camera recordings are records subject to disclosure
- ▶ Must be retained as required by relevant records retention schedules
- ▶ Proposed legislation would have public records law and records retention implications
 - ▶ Senate Bill 50
 - ▶ Result of Joint Legislative Council Study Committee on the Use of Police Body Cameras



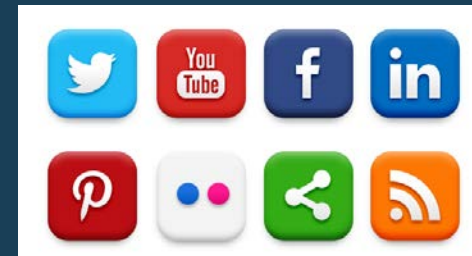
Police Body Camera Recordings, cont.

- ▶ Senate Bill 50
 - ▶ Must retain all data from law enforcement body cameras for at least **120 days**
 - ▶ Exceptions for longer retention
 - ▶ Public policy **weighing in favor of nondisclosure** of content relating to:
 - ▶ Minors
 - ▶ Victims of sensitive or violent crimes
 - ▶ Locations where a record subject has a reasonable expectation of privacy
 - ▶ **Unless** there is **no** objection **or** the public interest is **so great** that it outweighs the public policy weighing in favor of nondisclosure
 - ▶ For the purposes of public records requests, the law enforcement agency that created the body camera recording is the legal custodian
 - ▶ Other authorities possessing the recording must **deny** requests for it
- ▶ Will it become law? **Stay tuned.**



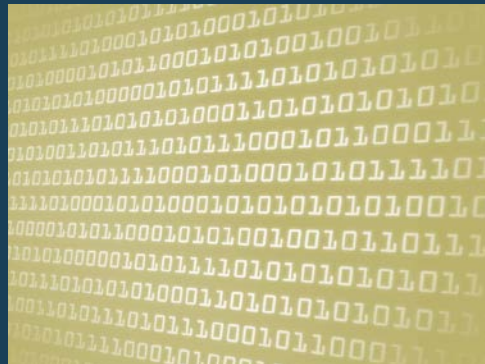
Social Media Records

- ▶ Social media accounts created or maintained by an authority
 - ▶ Increased use of social media by authorities
 - ▶ E.g., Facebook, Twitter
 - ▶ Constitute records if created or maintained by an authority
- ▶ Considerations:
 - ▶ Be familiar with the site
 - ▶ Are the records archived?
 - ▶ Who may post, manage, or control?
 - ▶ How long is content available?
 - ▶ Third-party messages or posts
 - ▶ Does the authority have a social media policy?



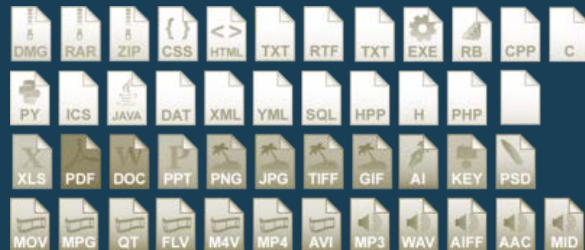
Electronic Databases

- ▶ 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



Format of Records

- ▶ *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898
 - ▶ Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
 - ▶ Printed copies of requested records were not sufficient
 - ▶ Printed copies do not include metadata
 - ▶ Metadata is data about data
 - ▶ Because emails were requested in electronic format, associated metadata was also requested
- ▶ *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
 - ▶ PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester



Permissible Fees



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
 - ▶ 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>



Record Retention



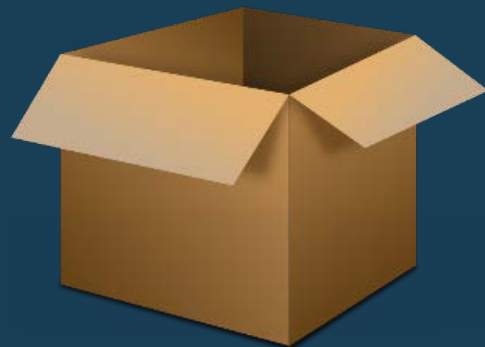
Record Retention under the Public Records Law

- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ **Wis. Stat. § 19.35(5)**: Governs retention **following receipt of a request**:
 - ▶ No destruction until the request is granted or until at least **60 days** after the authority denies the request
 - ▶ **90 days** if requester is committed or incarcerated
 - ▶ No destruction during enforcement action



Other Record Retention Statutes

- ▶ Wis. Stat. § 16.61: State authorities
- ▶ Wis. Stat. § 19.21: Local authorities
 - ▶ Generally, a **seven-year retention period** for most records
 - ▶ The Public Records Board (PRB) may set shorter periods
 - ▶ PRB has oversight and accountability for the state's records program



Types of Record Retention Schedules

- ▶ Agency-specific **Records Retention/Disposition Authorizations (RDAs)**
 - ▶ Deviate from the GRSs to meet specific agency needs
- ▶ **General Records Schedules (GRSs)**
 - ▶ State agencies are bound to follow
 - ▶ Unless they opt out and adopt corresponding RDAs within 12 months
 - ▶ Local government units may opt in



Local Government Retention Schedules

- ▶ **County General Records Schedule**
 - ▶ PRB approved in May 2010
 - ▶ Contains schedules for sheriff's records
- ▶ **Wisconsin Municipal Records Schedule (WMRS)**
 - ▶ PRB approved on August 27, 2018
 - ▶ Does not contain schedules for law enforcement records
- ▶ **Guidance in developing law enforcement records schedules:**
 - ▶ Counties General Records Schedule
 - ▶ Sheriff's records
 - ▶ Agency-specific schedules (RDAs) - examples:
 - ▶ DOJ - Division of Criminal Investigation
 - ▶ DOT - State Patrol
 - ▶ Local government law enforcement agencies



Record Retention - Format

- ▶ Hard copies v. electronic copies
 - ▶ **Retention 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



Retention of Texts, Social Media, etc.

- ▶ Methods of retaining texts, social media, app content, and similar records:
 - ▶ Screen shots
 - ▶ Rely on social media provider or individual phone user
 - ▶ **Caution:** Authorities are responsible for ensuring that records are maintained so this creates a risk
 - ▶ Social media provider may change its terms of use, delete content, or cease to exist
 - ▶ Individual users may not retain content properly or may damage or lose their phones
 - ▶ Archiving services
 - ▶ Agency-created retention tools



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
- ▶ For additional information, visit the Public Records Board's website:
 - ▶ <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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