

Open Government Essentials: Public Records Law

Wisconsin Department of Justice
Office of Open Government
Statewide Prosecutor and Education Training (SPET)
Newly Elected DA Training
December 8, 2020



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Overview of Presentation

- ▶ Overview of DOJ's Office of Open Government (OOG)
- ▶ Shared Enforcement of Open Government Laws (AG/DA)
- ▶ Overview of Public Records Law (PRL)
 - ▶ Key Definitions and Principles
 - ▶ Why should DA's care? What about *Foust*?
- ▶ What is a "Record"? (And What is Not?)
- ▶ Receiving and Processing Public Records Requests (PRRs)
- ▶ Selected Issues in the Public Records Law
 - ▶ Various Records, Timing, Notice, Costs



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Overview of DOJ's Office of Open Government (OOG)



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Overview of the OOG/What We Do

- ▶ Interpret and apply the Public Records and Open Meetings (PROM) Laws
 - ▶ Develop open government policies
 - ▶ Provide legal counsel to DOJ and client agencies
 - ▶ Provide training, technical assistance, and open government resources
- ▶ Manage DOJ's public records request (PRR) process
- ▶ Operate 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
 - ▶ PROM Help Line: (608) 267-2220

OOG



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What OOG Does—Part 2

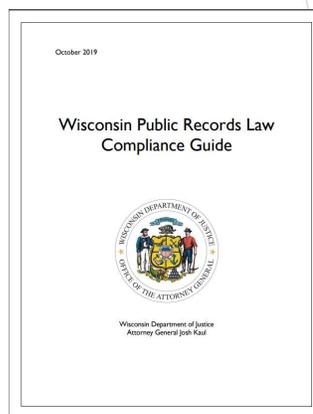
- ▶ Provide legal counsel to DA's on open government matters:
 - ▶ Advise DA's on whether OML/PRL violations may have occurred, and/or whether to prosecute complaints
 - ▶ Advise DA's on how to handle public records requests (PRRs)
- ▶ Provide training, technical assistance:
 - ▶ To DA's
 - ▶ To local LE
 - ▶ To municipalities/counties
 - ▶ To governmental bodies



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Resources on OOG's Website

- ▶ OOG's Website at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ▶ DOJ's Compliance Guides: PRL, OML
- ▶ OOG Advisories:
 - ▶ Fees, Open Meetings During COVID-19
- ▶ Other Resources:
 - ▶ Previous Presentations
 - ▶ AG Opinions Regarding Open Government
 - ▶ Sample Forms/Complaints
 - ▶ DOJ's Public Records Fee Schedule



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What OOG Does NOT Do

- ▶ Cannot provide legal advice outside the scope of the public records law (PRL) and open meetings law (OML)
 - ▶ *E.g.*, Misconduct or ethics violations of government officials
 - ▶ OOG would refer citizen to local LE or local DA
- ▶ Cannot provide litigation defense, if DA is sued
 - ▶ But OOG might refer DA to DOJ's Division of Legal Services (Civil Litigation Unit)



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Shared Enforcement of Open Government Laws



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Shared Enforcement Powers

DA and AG share responsibility for enforcement of PRL and OML

- Wis. Stat. §§ 19.31-19.39 (PRL)
- Wis. Stat. §§ 19.81-19.97 (OML)

Most DA encounters = complaints/formal enforcement

- Wis. Stat. § 19.37 (PRL/mandamus enforcement)
- Wis. Stat. § 19.97 (OML/verified complaint)
 - “**Verified complaint**” submitted to DA = Prerequisite for DA and private relator action

Most AG/OOG encounters = inquiries/informal enforcement

- Any person may request AG’s advice
- Wis. Stat. § 19.39 (PRL)
- Wis. Stat. § 19.98 (OML)

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Independent Enforcement Powers

- ▶ Both DA and AG have independent enforcement powers
 - ▶ Wis. Stat. § 19.37 (PRL/mandamus enforcement)
 - ▶ Wis. Stat. § 19.97 (OML/enforcement complaint)
- ▶ AG’s independent enforcement powers
 - ▶ DOJ/AG does not have to make same decisions as DA
 - ▶ But typically AG would defer to DA’s decision
 - ▶ And typically AG cannot investigate/resolve factual disputes
- ▶ *Bottom Line*: DA in better position than AG to investigate and prosecute local matters
 - ▶ AG will not usually pursue formal enforcement unless matter presents *novel legal issue* pertaining to *matters of statewide concern*



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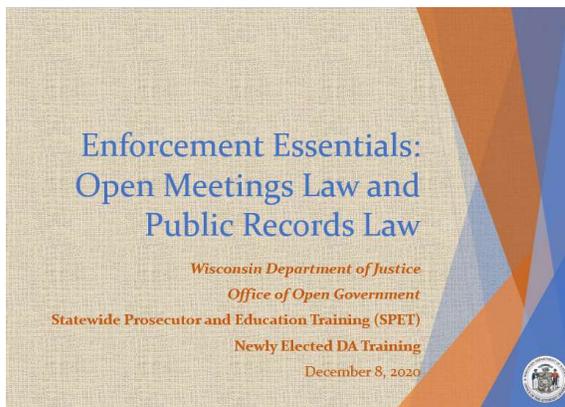
What DOJ (OOG) Does NOT Do— Part 2

- ▶ Prosecute complaints that DA's receive (unless DOJ independently decides to prosecute)
- ▶ Serve as “appellate” review of DA's decision under OML/PRL
 - ▶ OOG will review if citizen has complaint
 - ▶ But OOG will usually defer to DA's decision
- ▶ Enforce PR/OM complaints that:
 - ▶ Require factual investigation/resolution of factual disputes
 - ▶ Do not pertain to statewide matters
 - ▶ DOJ would usually advise complainant to contact local DA and/or local LE



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For More Information About Enforcement

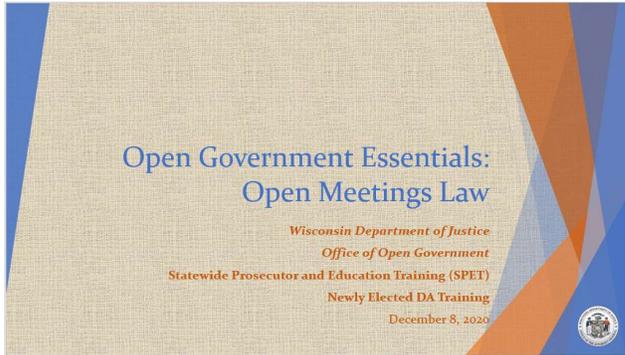


- ▶ See Handout: Enforcement Essentials
 - ▶ Who Enforces
 - ▶ Penalties
 - ▶ Remedies
 - ▶ Defenses
 - ▶ Typical Complaints



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For More Information About Open Meetings Law



- ▶ See Handout:
Open Meetings
Law Essentials
 - ▶ “Governmental
body”
 - ▶ “Meeting”
 - ▶ Notice
 - ▶ Open sessions
 - ▶ Closed sessions

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Overview of Public Records Law

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Government Transparency and the 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
- ▶ Objectives of Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ 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



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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



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Public Record Roles

- ▶ **Authority:** Defined in Wis. Stat. § 19.32(1) – Any of specified entities having custody of a record
 - ▶ Includes “local office” and “elective officials” (e.g., DA)
- ▶ **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
 - ▶ “Elective official” (e.g., DA) is custodian, but can delegate
- ▶ **Requester:** Defined in Wis. Stat. § 19.32(3) – Generally, any person who requests to inspect or copy a record
 - ▶ Incarcerated or committed persons: *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)



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Records Subject to Disclosure v. Disclosing Records

- ▶ Records subject to disclosure
 - ▶ Generally, all records subject to disclosure, except if specifically excluded from definition of record (Wis. Stat. § 19.32(2))
- ▶ Disclosing records
 - ▶ Presumption of access, unless exemption to disclosure or public records law balancing test requires withholding/redaction
- ▶ Exemptions to disclosure
 - ▶ Statutory (e.g., CI) or common law (e.g., *Foust*)
- ▶ Employee's Role: Search for responsive records and give all responsive records to record custodian to review
- ▶ Custodian's Role: Review responsive records and determine if records must be disclosed (4-step evaluation)



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Foust Exemption to Disclosure under PRL

- ▶ Under *Foust*, prosecutor's files are exempt from disclosure
 - ▶ *State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991)
 - ▶ *State ex rel. Nichols v. Bennett*, 199 Wis. 2d 268 (1996)
 - ▶ See also *Democratic Party of WI v. Wisconsin DOJ*, 2016 WI 100
- ▶ Includes LE investigatory reports, witness statements, etc.
 - ▶ "Historical data leading up to the prosecution" (*Foust*, 165 Wis. 2d at 435)
 - ▶ "Documents integral to the criminal investigation and prosecution process" (*Nichols*, 199 Wis. 2d at 275 n.4)
- ▶ Exemption applies to closed prosecution files
 - ▶ *George v. Records Custodian*, 169 Wis. 2d 573 (Ct. App. 1992)



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Why Do DA's Need To Know About PRL?

- ▶ DA's are still "authorities" and "records custodians" and must respond to PRRs filed in DA's office
 - ▶ All other records in DA's office, besides prosecutor's file, are NOT exempt and are subject to disclosure
 - ▶ *E.g.*, personnel records, correspondence/email, calendars, phone records, electronic records (chats, texts, social media)
- ▶ DA's have enforcement power over PRL (Wis. Stat. § 19.37(1))
 - ▶ Can initiate mandamus actions to compel other authorities to disclose records
 - ▶ Can informally advise local authorities on PRL (*e.g.*, LE)



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CAUTION: *Foust* exemption does not apply to LE agencies

- ▶ Same records that are exempt under *Foust* if contained in prosecutor's "file" are NOT exempt under *Foust* in the hands of LE agency
 - ▶ *State ex rel. Nichols v. Bennett*, 199 Wis. 2d 268 (1996)
 - ▶ *Portage Daily Register v. Columbia Cty. Sher. Off.*, 2008 WI App 30
- ▶ LE must engage in PRL balancing test to determine whether to disclose investigatory records
 - ▶ *Linzmeyer v. Forcey*, 2002 WI 84 (considerations for releasing investigatory records)



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DA Perspective (David and Susan)



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What is a “Record”? (And What is Not?)

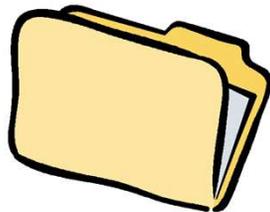


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“Record” = Content, Not Form

“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.”

— Wis. Stat. § 19.32(2)



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Is it a Record?

Yes:

- ▶ Not created by the authority, but in the authority's possession
- ▶ Contractors' records
- ▶ Electronic records, including:
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Audio and video
 - ▶ Social media
 - ▶ Texts and Chats/Virtual workplace platforms (*e.g.* MS Teams)



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Is it a Record?

No:

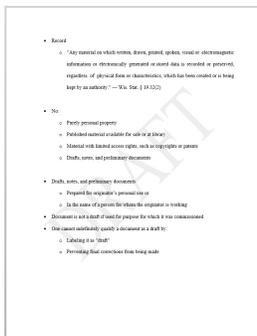
- ▶ Published material available for sale or at library
- ▶ Purely personal property
- ▶ Material with limited access rights
 - ▶ *E.g.*, Copyrights or patents
- ▶ *Drafts, notes, and preliminary documents*



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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
- ▶ *Bottom Line:* Ask the OOG if you have questions about drafts/notes



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Personal vs. Business Email

- ▶ **Personal** email, calls, and documents on an **authority's account**:
 - ▶ Email sent/received on an authority's computer system is a record subject to disclosure
 - ▶ Includes purely personal email sent by officers or employees of the authority, using authority's email system
 - ▶ But disclosure generally not required
- ▶ *Bottom Line:* Employees should give all responsive emails to records custodian, even if personal
 - ▶ Records custodian must still be made aware that such personal emails exist on the authority's account, to make disclosure determination on a case-by-case basis

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Personal vs. Business Email (cont.)

- ▶ **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 (personal and business email)



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Electronic Records = Public Records

- ▶ Social media content posted on social media accounts created or maintained by an authority = Public Record
- ▶ Cell phone content, including content on phones issued by an authority and *possibly content on personal phones used for government business* = Public Record
 - ▶ Phone call records, text messages, app content
- ▶ *Bottom Line:* It is important to check cell phones when gathering records in response to public records requests
- ▶ **Recommendation:** Be aware of what you post on your private accounts/phone!



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Chats and Texts = Public Records

- ▶ Virtual workplace/MS Teams = public records created
 - ▶ Teams Chats (e.g., one-to-one chats, group chats)
 - ▶ Teams Channels (e.g., discussions, chats, files, and other communications)
 - ▶ Also, emojis, GIFs, photos posted
- ▶ Texts = public records created
 - ▶ What's App, iMessage, SMS
- ▶ Employees generally responsible for finding chats/texts that are responsive to PRRs



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Receiving and Processing Public Records Requests (PRR's)



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Who Can Request (and Why)?

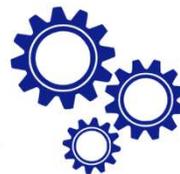
- ▶ Requester generally **need not identify** himself or herself
 - ▶ Anonymous requesters allowed (Wis. Stat. § 19.35(1)(i))
 - ▶ *Exception*: Certain records are restricted (e.g., health care records); custodian allowed to confirm ID of requester
 - ▶ PRR's themselves are records subject to disclosure
- ▶ Requester **need not state the purpose** of the request
 - ▶ Motive 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 balancing test
 - ▶ *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894



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Public Records Request (PRR) Process, Generally

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for any responsive records that are *subject to disclosure*
- ▶ Responsive records are reviewed:
 - ▶ Presumption = Records will be disclosed
 - ▶ But under limited exceptions, not disclosed/redacted
 - ▶ Exempt from disclosure (statutory or common law)
 - ▶ Withheld or redacted under public records balancing test
- ▶ Records are released with letter explaining any redactions



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Receiving a Request, Generally

- ▶ A request may be **verbal** or **in writing**
 - ▶ *Tip*: Summarize verbal request and send written acknowledgement
 - ▶ An authority may not require the use of a form
 - ▶ “Magic words” are not required
 - ▶ Request can be made to *anyone* at agency
- ▶ In order to be a **sufficient** request, it must:
 - ▶ Reasonably describe the information or records requested
 - ▶ Be reasonably specific as to time or subject matter
- ▶ *Bottom Line*: Custodian should not have to guess what records the requester wants



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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
- ▶ *Tip*: Communication with the requester is key in such situations



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Communication with a Requester

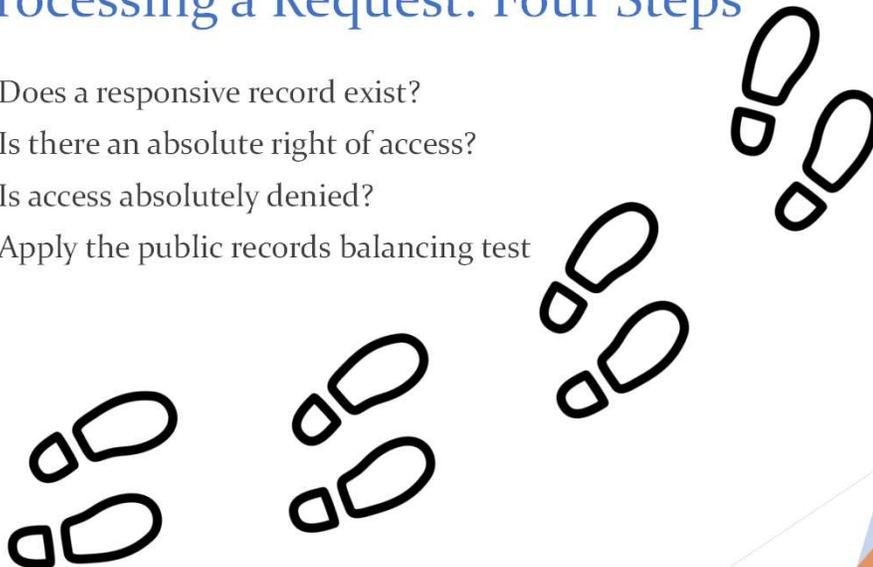
- ▶ Don't understand the request? Contact the requester
 - ▶ Send a written summary of your understanding and request clarification
- ▶ Inform the requester about a large number of responsive records or large estimated costs, and suggest/solicit alternatives
- ▶ Send the requester an acknowledgment and periodic status updates if the response will take some time



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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 public records balancing test



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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 record or inform requester
- ▶ Continuing requests are not contemplated by the public records law
- ▶ If there are no responsive records, inform the records custodian so the requester can be notified



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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



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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



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DA Perspective (David and Susan)



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Selected Issues in the Public Records Law



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Special Privileges or Confidentiality

- ▶ Attorney/client privilege (Wis. Stat. § 905.03) and attorney work product (Wis. Stat. § 804.01(2)(c)(1.))
- ▶ Crime Laboratory Privilege (Wis. Stat. § 165.79)
- ▶ Other statutes requiring confidentiality
 - ▶ Educational records (Wis. Stat. § 118.125)
 - ▶ Health care records (Wis. Stat. § 146.82)
 - ▶ Mental health records (Wis. Stat. § 51.30(4))
- ▶ Statutory exemptions within the PRL (Wis. Stat. § 19.36):
 - ▶ Info about confidential informants (Wis. Stat. § 19.36(8))
 - ▶ Some employee personnel records (Wis. Stat. § 19.36(10))
 - ▶ Info about local public office-holders/DA's (Wis. Stat. § 19.36(11))

CONFIDENTIAL



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Prosecutor, LE, and Juvenile Records

- ▶ Prosecutor's files
 - ▶ 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)
- ▶ Law enforcement records
 - ▶ Balancing test must be applied on a case-by-case basis
 - ▶ *Linzmeyer v. Forcey*, 2002 WI 84 (considerations for releasing investigatory records)
- ▶ LE and court records related to children or juveniles
 - ▶ Wis. Stat. §§ 48.396 and 938.396: Law enforcement records of children and juveniles, respectively, are confidential with some exceptions
 - ▶ Access to other records regarding or mentioning children subject to general public records rules (balancing test)



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Employee Personnel Records

- ▶ Wis. Stat. § 19.36(10): 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 record subjects may be required in limited circumstances (Wis. Stat. § 19.356)



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Notice Before Release

- ▶ 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*—reach out to other LE agencies if you have their records



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Timing of Response

- ▶ Response is required “as soon as practicable and without delay” (Wis. Stat. § 19.35(4))
 - ▶ **No specific time limits**; depends on circumstances
 - ▶ Penalties for arbitrary and capricious delay
- ▶ DOJ policy: 10 business days generally reasonable for a response to simple, narrow requests
- ▶ *Bottom line*: When you are informed of a pending public records request, work to gather responsive records as soon as practicable



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Redaction = Denial

- ▶ 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, redaction is subject to review by mandamus (court action)

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Written Response Required

- ▶ If a written request is denied in whole or in part, it requires a written response, with reasons for denial
 - ▶ Reviewing court usually limited to reasons stated in denial
 - ▶ Availability of same records from other sources generally not a sufficient reason for a denial
 - ▶ 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*



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Costs

- ▶ **Actual, necessary, and direct** costs only—unless otherwise specified by law (Wis. Stat. § 19.35(3))
 - ▶ Copying and reproduction
 - ▶ Location, if costs are \$50.00 or more
 - ▶ Mailing/shipping to requester
 - ▶ See OOG Advisory on Public Records Fees
- ▶ 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 public records requests



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Record Retention

- ▶ Wis. Stat. § 19.35(5) – after receiving a PR 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
- ▶ Wis. Stat. §§ 16.61 and 19.21: Record retention statutes for state and local authorities, respectively
- ▶ Record Retention Schedules
 - ▶ GRS's and RDA's
 - ▶ Generally, 7-yr retention (but may be shorter)
 - ▶ Publicrecordsboard.wi.gov
- ▶ Electronic retention generally permitted



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Related Criminal Actions



- ▶ Wis. Stat. § 946.72 (tampering with public records)
 - ▶ Destruction, damage, removal, or concealment of public records with intent to injure or defraud
 - ▶ Class H felony
- ▶ Wis. Stat. § 943.38 (forgery)
 - ▶ Alteration or falsification of public records
 - ▶ Class H felony



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DA Perspective (David and Susan)



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Questions on PRL/OML? Contact the OOG



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Resources and Contact 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 (main OOG line)
 - ▶ Email Assistant Attorneys General:
 - ▶ Paul Ferguson: fergusonpm@doj.state.wi.us
 - ▶ Sarah Larson: larsonsk@doj.state.wi.us



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