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

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
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

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
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)

Shared Enforcement of Open Government Laws
Shared Enforcement Powers

DA and AG share responsibility for enforcement of PRL and OML
- 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)

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
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

For More Information About Enforcement

- See Handout: Enforcement Essentials
  - Who Enforces
  - Penalties
  - Remedies
  - Defenses
  - Typical Complaints
For More Information About Open Meetings Law

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

Overview of Public Records Law
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


- 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

- **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)

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)
**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)
  - *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)

**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)
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
- 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)

DA Perspective (David and Susan)
What is a “Record”? (And What is Not?)

“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)
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)

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
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

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
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)

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!
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
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

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
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

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
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

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
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

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
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

DA Perspective (David and Susan)
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))
Prosecutor, LE, and Juvenile Records

- Prosecutor’s files
  - Not subject to public inspection under the public records law
- 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)

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)
Notice Before Release

- Required by Wis. Stat. § 19.356(2)(a):
  - 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

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
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)

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**
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

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
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

DA Perspective (David and Susan)
Questions on PRL/OML? Contact the OOG

Resources and Contact Information

- Download DOJ Compliance Guides and other resources at [https://www.doj.state.wi.us/office-open-government/office-open-government](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