Wisconsin Department of Justice

2022 New Legislator Conference
INTRODUCTION
Presentation Overview

- Describe the importance of the public records law
- Define what is a record and who can request records
- Discuss the receipt and processing of public records requests
- Detail how to respond to public records requests
- Offer the opportunity for questions
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

• Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
  • Sheds light on workings of government and acts of public officers and employees
  • Assists members of the public in becoming an informed electorate
  • Serves 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
Presumption of Openness

• Presume that every document (paper or electronic), email, text, etc., that enters your office is subject to public disclosure

• Public policy favors disclosure

• There are statutes requiring non-disclosure of certain information
Authorities and Custodians

**Authority**: Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- Any of specified entities having custody of a record
  - Includes each legislator and each chief clerk’s office
- Public records law obligations apply separately to each authority
- The authority that receives a request **must** respond

**Legal Custodian**: 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

- 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)

- Requesters may be anonymous, and generally, **need not identify** themselves
  - However, public records requests are records subject to disclosure

- Requesters **need not state the purpose** of their requests
  - Motive generally not relevant, but context appropriately considered
“Record” Defined

• 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
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files

- 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
Electronic Records: Email, Texts, etc.

- **Personal** email, texts, 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, texts, calls, and documents on **personal 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
RECEIVING AND PROCESSING A REQUEST
Public Records Request Process

• PRR is received and forwarded to the authority’s records custodian
• The authority begins the 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 a letter explaining any redactions
Receiving a Request

- A request may be submitted to anyone working for 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

- **Tip:** It is okay to contact the requester to clarify
Records Must 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.
The Balancing Test

- Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
  - Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.

- Fact intensive; “blanket rules” disfavored

- Must conduct on **case-by-case basis** taking into consideration totality of circumstances

- Identity of requester and the purpose of request are generally not part of 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
RESPONDING TO A REQUEST
Response Preparation

- Analyze the request
- Okay to communicate with the requester for clarification
- Have a plan
- Okay to work with other offices, chief clerks, etc.
- Be mindful of confidential attorney-client privileged communications
Response Format

• Restate the request
• Inspection or copies
• Native formats (*Lueders v. Krug* case)
  • Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
    • Printed copies of requested records were not sufficient
• Electronic responses
• Inclusion of background, context, or additional information
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 the custodian has exercised judgment
  - Reviewing court usually limited to reasons stated in denial
  - Availability of the same records from other sources generally not a sufficient reason
    - Must inform the 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
- 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 employer other than the authority about employees of that employer
    • “Record subject” can try to prevent 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
• AG opinions regarding notice: OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
• Courtesy notice
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
    • 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
• OOG Advisory: Charging Fees under the Wisconsin Public Records Law available at https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.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
  - Mandamus action may be filed by:
    - Requester, with or without attorney
    - District attorney
    - Attorney General
  - 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.”
RECORDS RETENTION
Record Retention and Preservation

• Legislators are exempt from records retention requirements. See Wis. Stat. § 16.61(2)(b)1.
• Legislators are subject to Wis. Stat. § 19.35(5) records preservation requirement when a public records request is submitted
  • Cannot destroy records which are subject to a pending public records request
  • Must preserve records for 60 days after denial (90 days if requester is incarcerated); indefinitely if litigation is filed
Resources and Further Information

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

- Contact:
  - Chief clerk
  - Legislative Council’s Open Records Task Force: (608) 266-1304
  - DOJ’s Office of Open Government PROM Help Line: (608) 267-2220
Thank You!