Electronic Public Records and Open Meetings Compliance

Wisconsin Department of Justice
Office of Open Government

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COVID Relief Legislation & Current Issues in Administrative & Local Government Law 2022
Presentation Overview

• **Electronic Public Records**
  • Outline the public records request process
  • Explain what constitutes a record, including audio and video recordings
  • Locating electronic records and determining permissible fees
  • Reviewing and redacting audio and video recordings
  • Retaining electronic records

• **Remote Meetings**
  • Overview of open meetings law essentials
  • Explain reasonable accessibility
  • Discuss Covid’s impact on open meetings
  • Provide best practices for conducting remote meetings
ELECTRONIC PUBLIC RECORDS: CONSIDERATIONS FOR VIDEO, VOICEMAIL, AND OTHER AUDIO RECORDINGS
Importance of 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, 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 for public oversight
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 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
What is a 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.”
Records

- Records **include** the following:
  - Material not created by the authority but in the authority’s possession
  - Audio and video recordings
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files
  - Other electronic records
Electronic Records: Audio and Video Recordings

- **Audio Recordings**
  - Voicemails
  - Voice memos
  - Recorded interviews
    - E.g., criminal investigations; workplace investigations
  - Recordings of meetings
    - E.g., workplace meetings; governmental body meetings, including open and closed sessions
  - 911 and dispatch audio recordings

- **Video Recordings**
  - Recordings of meetings
  - Surveillance video
  - Police dashboard camera recordings
  - Police body camera recordings
    - Wis. Stat. § 165.87 includes provisions regarding retention, defining the custodian of such recordings, and possible exceptions to disclosure
Locating Electronic Records

• The increasing use of electronic records has made locating many records easier and faster.
  • However, this is not always the case.
    • Searching for some electronic records can be time consuming.

• “Locating” a record means to find it by searching, examining, or experimenting.
• Location costs of $50.00 or more are one of the few permissible fees an authority may assess
  • Only the actual, necessary, and direct costs of locating records may be assessed
  • An authority cannot combine location costs with other costs to reach the $50 threshold
  • Review and redaction are separate processes for which a requester may not be charged
• Location costs include time spent by specialists
  • Limit the amount of time spent by specialists
  • Charge the lowest hourly rate of the individual capable of searching
• Authority staff should keep track of the time spent locating records
Review Each Requested Record

- Each requested record must be reviewed to determine the following:
  - Whether all or part of the requested record is prohibited from disclosure pursuant to a statute or the common law
    - Statutes may be found within the public records law itself or elsewhere
    - Common law
  - Whether the public records balancing test weighs in favor of not disclosing all or part of the requested record
    - Presumption that the records will be disclosed
- Records or information exempt from disclosure must be redacted

- This process can be time consuming for audio and video recordings
  - It may be helpful to communicate this to the requester
Special Considerations for Audio and Video

• Audio and video recordings may present issues not found in other types of records, for example:
  • Voices and likenesses of crime victims and confidential informants
  • Purely personal information such as:
    • Home interiors
    • Family photographs
    • Personal documents

• May require attention when determining whether information requires redaction
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, covering when photocopying
- **Redaction constitutes a denial of access to the redacted information**
  - Therefore, any redaction is subject to review by mandamus
Redaction: Audio Recordings

- Computer software is available that provides redaction capabilities.
  - Ability to redact portions of audio while leaving the rest intact
    - Example: redaction of a crime victim’s voice
Redaction: Video Recordings

- Computer software is available that provides redaction capabilities.
  - Ability to redact portions of video while leaving the rest intact
    - E.g., blurring, blacking out portions of video, removing sections of video
Redaction: Audio and Video Recordings

- 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)
Communication with a Requester

- Inform the requester if there is a large number of responsive records or complex electronic records
  - A requester may not know how many or what types of responsive records exist
  - A requester may not be aware of the time or resources required to review and potentially redact records, especially electronic records

- It is important to maintain an open line of communication with a requester
Records Retention under the Public Records Law

  - **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 Records Retention Statutes

- **Wis. Stat. § 16.61**: State authorities
- **Wis. Stat. § 19.21**: Local authorities

**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

- Agency-specific **Records Retention/Disposition Authorizations** (RDAs)
  - Deviate from the GRSs to meet specific agency needs

**Important**: Records retention schedules are based on the content of the record and not its format
- For example, there can be no retention schedule for “all voicemails”
Records Retention Considerations

• Accounting for record storage, archiving, and searching
• Concerns:
  • Costs
  • Equipment
  • Technological knowledge and expertise
  • Maintenance

• For additional information, including guidance and best practices on electronic records management, visit the Public Records Board (PRB) website: http://publicrecordsboard.gov
OPEN MEETINGS COMPLIANCE: CONDUCTING MEETINGS REMOTELY
Public Policy

“In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.”

—Wis. Stat. § 19.81(1)
Open Meetings Law Essentials

• Generally, the open meetings law requires that all meetings of governmental bodies:
  • must be preceded by **public notice**; and
  • must be **publicly held** in a place that is **reasonably accessible** and **open** at all times to all members of the public;
    • except in limited situations in which a **closed session** is specifically authorized
Meeting

• “Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(1).

• The Wisconsin Supreme Court established a two-part test to determine if a meeting occurs. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
  
  • A meeting occurs whenever:
    1. Members convene for the purpose of conducting governmental business (**purpose** requirement)
    2. The number of members present is sufficient to determine the body's course of action (**numbers** requirement)
      • Includes **negative quorums**
Meetings: “Convening” of Members

- Members must convene for there to be a meeting
- Not limited to face-to-face gatherings or physical presence together
  - Examples: telephone calls, emails, virtual meetings, other electronic forms of communication
- Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority
Open Sessions: Reasonably Accessible

- Three aspects to public accessibility:
  - **Physical location** in the community
    - Meetings should be held within the body’s geographic area
    - May not be held on private premises unless open and reasonably accessible to public
  - **Room size** and acoustics
    - Must be reasonably calculated to accommodate all citizens who wish to attend
    - Body members must take reasonable steps to make it possible to be heard
  - **Physical accessibility**
    - In open session, the room should be **unlocked**
    - If doors must be closed due to noise, notice should be posted inviting entry
    - Accessibility for people with disabilities
      - State bodies must meet in facilities people can access w/o assistance. Wis. Stat. § 19.82(3).
      - Statute not applicable to local bodies, but they must provide reasonable access
Reasonably Accessible: Covid’s Impact

• The law requires meetings to be held in places “reasonably accessible” to the members of the public and open to all citizens at all times unless otherwise provided by law. Wis. Stat. § 19.81(2).
  • The type of access that constitutes reasonable access during pandemic circumstances may be different from the types of access required in other circumstances.
    • Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.
• DOJ’s past guidance on remote meetings stated that telephone conference calls and video conferences were acceptable means of conducting meetings.
  • However, past guidance envisioned a physical place where members of the public could go to hear the telephone conference call or view the video conference.
    • The circumstances surrounding the pandemic have made this challenging.
Reasonably Accessible: Covid’s Impact (cont.)

• OOG issued guidance to address inquiries regarding holding meetings during the pandemic.
  • Three advisories:
    • March 16, 2020 – provided key guidance on holding remote meetings
    • March 20, 2020 – offered additional information addressing technological and practical issues
    • March 15, 2021 – encouraged bodies to make open meetings accessible remotely until the pandemic is over and, following the pandemic to continue using practices developed during the pandemic that increase transparency

• Under pandemic circumstances, governmental bodies can typically meet their open meetings law obligations while being mindful of the public health situation by conducting meetings via telephone or video conference calls.
  • However, the public must be provided an effective way to monitor the calls.

• Meeting notices must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.
Remote Meetings: Best Practices

• For certain types of meetings, only providing remote access may not always be permissible.
  • For example:
    • Telephone conferences involving complex plans, drawings, or charts
    • When the demeanor of a witness is significant

• Practical Tips:
  • The body chair should encourage body members to identify themselves before speaking.
  • Body members should refrain from speaking over one another.
  • Body members should avoid texting or email one another during meetings.
  • Bodies should post a recording of a meeting on its website as soon as practicable after a meeting concludes.

• Bodies that meet remotely can and should consider steps to ensure that their meetings remain open and accessible to the public.
Remote Meetings: Best Practices (cont.)

• It is advisable for bodies to keep the public health situation, government guidance, and health concerns of the public in mind when making decisions regarding conducting open meetings.

• Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
  • Bodies should facilitate reasonable access to meetings for such individuals.
    • For example, bodies could hold meetings in person with a remote option.

• If a body meets in person, the public must be afforded the opportunity to also attend in person.

• **Bottom Line:** The more access to meetings, the better. Providing multiple options—even post-pandemic—to the public to attend meetings helps to fulfill the purpose of the open meetings law.
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:
  - Location: AG’s Capitol Office, 114 East
  - Main Tel: (608) 267-2220
  - OOG Email: opengov@widoj.gov
  - Paul Ferguson: (608) 264-9464
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Thank You!