State Bar of Wisconsin
Public Records, Open Meetings Update 2022

Wisconsin Department of Justice
Office of Open Government
Processing Public Records Requests

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Presentation Overview

- Walk through the processing of public records requests, including:
  - Importance of the public records law
  - Overview of the basic public records request process
  - Receiving public records requests
  - Locating requested records
  - Reviewing and redacting records
  - Responding to public records requests
  - Determining permissible fees
INTRODUCTION
Importance of Public Records Requests

• “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
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 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 PUBLIC RECORDS REQUEST
Who Can Request Records?

- Wis. Stat. § 19.32(3) - generally, a requester is 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

- 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.
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 or subject matter**

- Custodian should not have to guess what records the requester wants
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 if there is a large number of responsive records, or large estimated costs, and suggest or solicit alternatives
  • A requester may not know how many responsive records exist
  • A requester may have no interest in many “technically” responsive records

• Send the requester an acknowledgment and periodic status updates if the response will take some time
LOCATING RECORDS
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**
  - Electronic records, including audio and video
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files
Not Records

• 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
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.
Time Consuming Records Searches

- It can be time consuming to search through filing cabinets and file boxes to locate records, especially older records that are not stored electronically.
- 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, such as emails, can also be time consuming.
Time Consuming Records Searches (cont.)

- Location costs of $50.00 or more are one of the few permissible fees that 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
- “Locating” a record means to find it by searching, examining, or experimenting.
  - 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 individual capable of searching
- Authority staff should keep track of the time spent locating records
- Maintain an open line of communication with the requester
  - Inform the requester of large, estimated location costs
REVIEWING AND REDACTING 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
      • Examples: Wis. Stat. § 19.36; Wis. Stat. § 938.396
    • Common law
      • Examples: attorney work product; prosecutor’s files
  • 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
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 the totality of circumstances

• Identity of requester and the purpose of request are generally not part of the balancing test
REDACTING RECORDS
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
RESPONDING TO A REQUEST
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
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 (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 format fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester
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
- Attorney General 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
    • 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
  • Result of 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
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!