

State Bar of Wisconsin Public Records, Open Meetings Update 2022

Wisconsin Department of Justice
Office of Open Government



Processing Public Records Requests

Wisconsin Department of Justice

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State Bar of Wisconsin

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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. Maclver 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.



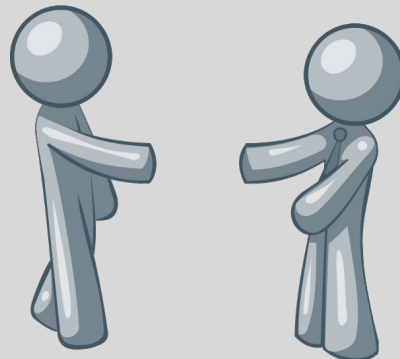
Receiving a Request

- 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

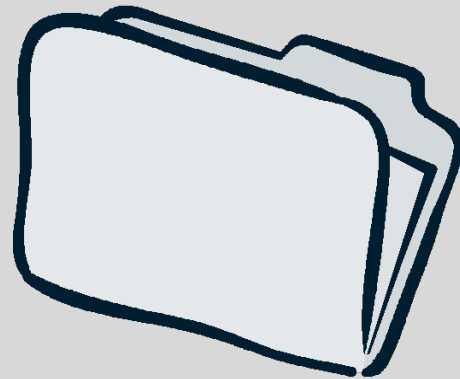


LOCATING RECORDS



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

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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



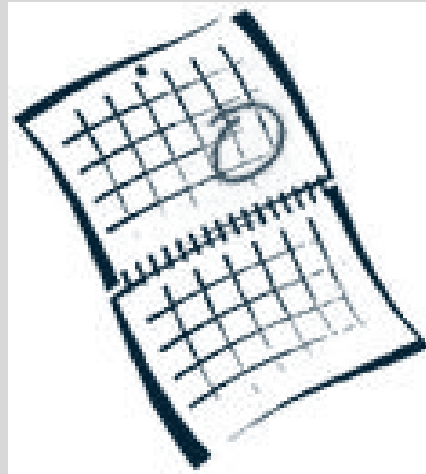
Format of Records

- *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>

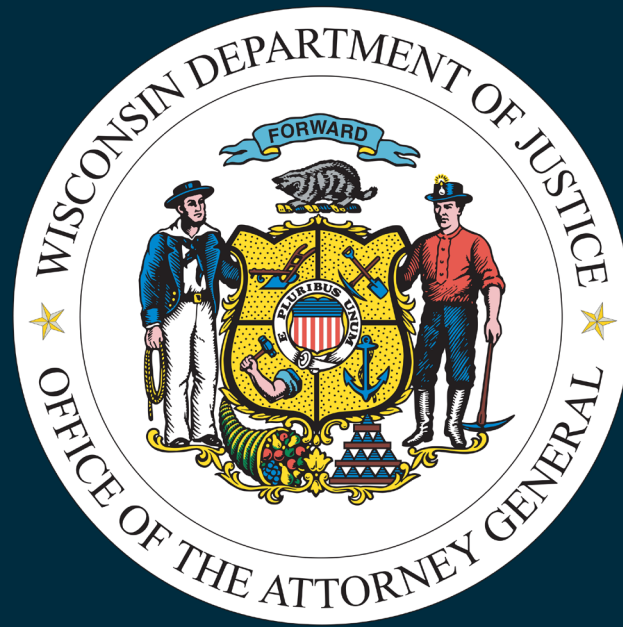


Further Information

- 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
fergusonpm@doj.state.wi.us





Thank You!

