Wisconsin Department of Justice
Office of Open Government
The Public Records Law: Essentials

Wisconsin Department of Justice
Office of Open Government
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League of Wisconsin Municipalities
Food for Thought-Monthly Brown Bag Lunch Series
Remote Training
INTRODUCTION
Presentation Overview

• Provide a brief background on DOJ’s Office of Open Government

• Cover public records law essentials, including:
  • Explain what is a record and who can request records
  • Discuss the receipt and processing of public records requests
  • Outline how to respond to public records requests

• Address records retention

• Offer the opportunity for questions
DOJ’s Office of Open Government (OOG)

- Interpret and apply the Public Records Law, Open Meetings Law, and other open government statutes and rules
- Manage DOJ’s public records request process
- Develop open government policies
- Provide legal counsel to DOJ and clients
- Run the PROM help line and respond to citizen correspondence concerning open government issues
    - Any person may request AG’s advice
- Provide training and open government resources
Government Transparency

• “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 ROLES
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
  - 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

- *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.
RECORDS
“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**: You can contact the requester if you do not understand the request
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.
Absolute Right and Denial of Access

- **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, for example:
    - 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, for example:
    - Patient health care records; pupil records
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** considering the totality of circumstances

- Identity of requester and purpose of request are generally not part of the balancing test
ISSUES TO NOTE
Employee Records

- Wis. Stat. § 19.36(10): Treatment of employee personnel records
  - Unless required by Wis. Stat. § 103.13, prohibits the disclosure of 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 employees is required in certain circumstances. See Wis. Stat. § 19.356.
Other Special Issues

- Law enforcement records: Often require careful review
  - Law enforcement records of children and juveniles who are the subjects of investigations and other proceedings are confidential with some exceptions. See Wis. Stat. §§ 48.396 and 938.396.
  - Access to other records regarding or mentioning children are subject to general public records rules including the balancing test

- Wis. Stat. § 165.87: Law enforcement body cameras; includes provisions regarding:
  - Retention of body camera data
  - Legal custodian of body camera data
  - Possible exceptions to disclosure, including victims of sensitive or violent crimes, minors, and certain locations.

- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Other statutes requiring confidentiality
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, 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
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

• 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
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
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
  - Generally, a **7-year retention period** for most records
  - The Public Records Board (PRB) may set shorter retention periods
- **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
QUESTIONS?
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!