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. 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 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
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
Records Request Process

Received and forwarded to the authority’s records custodian, the request is reviewed. The authority begins the search for records responsive to the request. For each record or portion of a record, the authority determines whether the record is subject to disclosure. Records subject to disclosure are reviewed:

- They will be disclosed unless:
  - They are exempt from disclosure pursuant to a statute or the common law;
  - Public records balancing test weighs in favor of nondisclosure.

Responsive records are released with a letter explaining any redactions.
Requesting a Request

It may be submitted to anyone working for an authority

A request may be verbal or in writing

Authority may not require the use of a form

Words” are not required

To be a sufficient request, it must:

- Ably describe the information or records requested
- Reasonably specific as to time and subject matter

A should not have to guess what records the requester wants
Only records that exist at the time of the request must be produced. Second, an authority need not create new records. The public records law does not require answering questions. Further, if a request asks a question and an existing record answers the question, no further action is required. If no responsive records are not contemplated by the public records law, inform the requester. See *Journal Times v. Police & Fire* 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.
Balancing Test

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

Sive; “blanket rules” disfavored

Judgment based on case-by-case basis taking into consideration totality of circumstances requester and the purpose of request are generally not part of balancing test
§ 19.36(6): If part of a record is disclosable, must disclose that part and non-disclosable portions

A practical way to redact: electronic redaction, black magic marker, cover up with a marker when photocopying

This constitutes a denial of access to the redacted information and is, subject to review by mandamus.
RESPONDING TO A REQUEST
In response to the request, communicate with the requester for clarification. In addition, work with other offices, chief clerks, etc. in the handling of confidential attorney-client privileged communications.
In the request or copies of requested records were not sufficient, must be in electronic format, where no redactions were applied, **must be** and copies of requested records were not sufficient responses. Of background, context, or additional information.
In Response

A request requires a written response, if the request is denied in whole or in part for denial must be specific and sufficient. The notice is to give adequate notice of reasons for denial and ensure that the decision has exercised judgment. The court usually limited to reasons stated in denial.

Duplicity of the same records from other sources generally not a sufficient reason. Inform the requestor that denial is subject to review in an enforcement action for such under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney.

Send in writing to a verbal request.
of Response

When a request is required, “as soon as practicable and without delay”

Specific time limits, depends on circumstances

Generally: 10 business days generally reasonable for response to simple, requests

For arbitrary and capricious delay
Before Release

Record subjects is only required in limited circumstances defined by Wis. Stat. § 19.356(2)(a)1:
- Records containing information resulting from a closed investigation into a disciplinary 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

A “third subject” can try to prevent disclosure in court defined by Wis. Stat. § 19.356(9):
- Any other or employee of the authority holding state or local public office

A “third subject” may augment the record to be released.
PERMISSIBLE FEES
necessary, and direct costs only—unless otherwise specified by law

and reproduction

n, if costs are $50.00 or more

ot combine location costs with other costs to reach the $50 threshold

' shipping to requester

specified in Wis. Stat. § 19.35(3)

s may not charge for redaction costs

nt may be required if total costs exceed $5.00

may waive all or part of costs
ENFORCEMENT
§ 19.37: Mandamus action to challenge withholding a record or part of a record in granting access

Mandamus action may be filed by:

- the person seeking access
- the person seeking access with or without attorney
- any attorney
- the Attorney General
- any person or entity that may be ordered to release records

§ 946.72: Tampering with public records and notices
RECORDS RETENTION
Retention and Preservation

Ares are exempt from records retention requirements. See Wis. Stat. § 16.61(2)(b)1.

Ares are subject to Wis. Stat. § 19.35(5) records preservation requirement when a records request is submitted

destroy records which are subject to a pending public records request

reserve records for 60 days after denial (90 days if requester is incarcerated);

delay 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!