

Wisconsin Department of Justice Office of Open Government



Public Records for Law Enforcement

Wisconsin Department of Justice

Office of Open Government

August 15, 2023

Mount Horeb Public Safety Building

Mount Horeb, Wisconsin



INTRODUCTION



Presentation Overview

- Provide a brief background of DOJ's Office of Open Government
- Outline public records law essentials, including law enforcement issues and considerations:
 - The importance of the public records law
 - What is a record and who can request records
 - The receipt and processing of public records requests
 - The review and redaction of records
 - How to respond to public records requests
- Address records retention
- Offer the opportunity for questions



Office of Open Government (OOG)

- Interpret and apply the Open Meetings Law, Public Records 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
 - Wis. Stat. §§ 19.39 and 19.98
 - 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. 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 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.

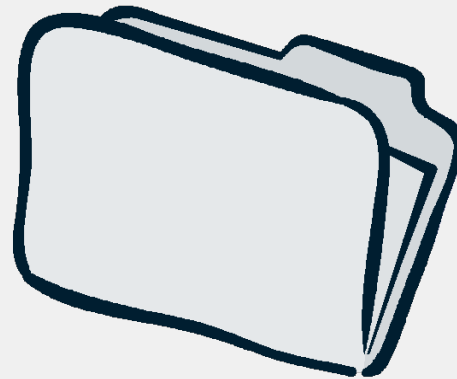


RECORDS



“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.”



Records

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



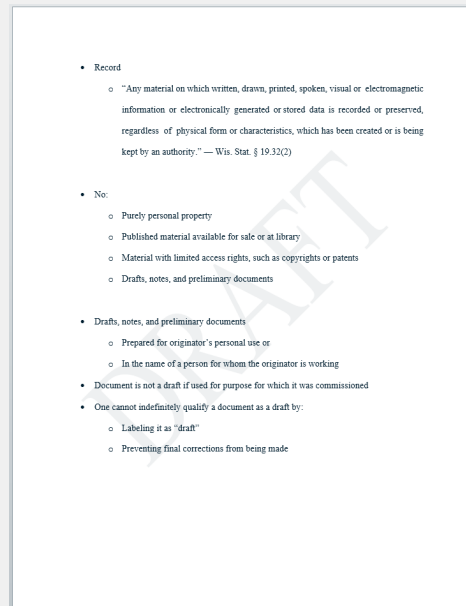
Not Records

- 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



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: Audio and Video Recordings

- **Audio Recordings**

- Voicemails
- Voice memos
- Recorded interviews
- 911 and dispatch audio recordings

- **Video Recordings**

- 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



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 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

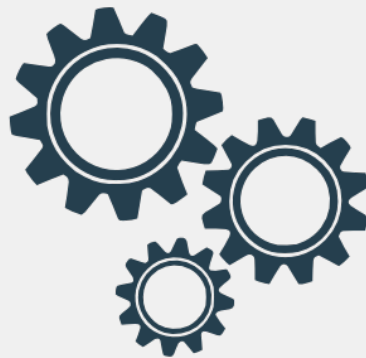


RECEIVING AND PROCESSING A REQUEST



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



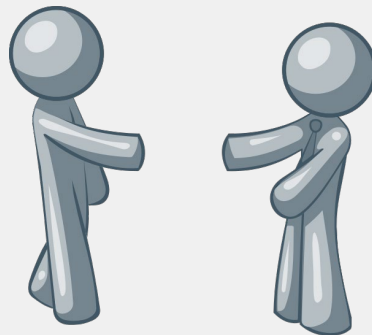
Receiving a Request

- 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:** It is okay to contact the requester to clarify



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



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.



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
 - 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



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** taking into consideration the totality of circumstances
- Identity of requester and purpose of request are generally not part of the balancing test



LAW ENFORCEMENT ISSUES TO NOTE



Prosecutor's Files v. Law Enforcement Records

- A **prosecutor's files** are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433–34, 477 N.W.2d 608, 610 (1991).
- However, for a **law enforcement agency's records**, the regular public records process, including application of the balancing test on a case-by-case basis, must be followed.
 - There is a strong public interest in investigating and prosecuting criminal activity
 - *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
 - **Public oversight of police investigations is important**
 - Police investigation reports can be particularly sensitive
 - Generally, law enforcement records more likely to have an adverse effect on public interests if released



Law Enforcement Records – Key Considerations

- Crime victims’ rights expressed in statutes, constitutional provisions, and case law
 - Includes family of crime victims
 - **Marsy’s Law:** Balancing test considerations
 - Office of Open Government Advisory: Marsy’s Law and Public Records (May 13, 2021): <https://www.doj.state.wi.us/sites/default/files/news-media/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>
- Protection of witnesses
 - Safety and security; “chilling” future cooperation with law enforcement
- Confidential Informants
 - Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise



Law Enforcement Records – Key Considerations, continued

- Children and juveniles
 - **Wis. Stat. ch. 48:** Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 48.396.
 - **Wis. Stat. ch. 938:** Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 938.396.
 - Access to other records regarding or mentioning children subject to general public records rules, including application of the balancing test.
- Officer safety, including the safety of their families and homes
- **Tip:** If an authority has a record that it did not create, it can reach out to the originating authority to see what concerns it may have



Law Enforcement – Questions to Ask

- Would the release endanger the safety of persons involved?
- Are there reputation and privacy interests involved?
 - The public interest is found in the public effects of failing to honor the individual's privacy interests **not** the individual's personal interests
- Do the records contain rumor, hearsay, or potentially false statements?
- Were potentially biased witnesses interviewed?



Law Enforcement – Questions to Ask, continued

- Do the records discuss confidential law enforcement techniques and procedures?
- Is there a possibility of threats, harassment, or reprisals (against victims, witnesses, officers, others, or their families)?
 - Any such possibility is accorded appropriate weight depending on the likelihood
 - Generally, there must be a **reasonable probability**
 - See *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



Ongoing Investigations and Prosecutions

- The public records law does **not** include a prohibition against the release of records regarding an ongoing investigation or prosecution.
 - Exception under § 19.36(10)(b):
 - Unless required by § 103.13
 - **prohibits** the disclosure of information related to the **current** investigation of possible crime or misconduct connected with employment by **employee**.



Ongoing Investigations and Prosecutions

- Ongoing investigation/prosecution is a factor under the balancing test; considerations:
 - Impact on the ability to have a fair trial
 - Influence on jury pool or judge
 - Influence on potential witnesses and impact on the ability to determine veracity
 - Availability of requested records prior to ongoing investigation/prosecution
 - E.g., an individual's personnel file; Acadis records
- **Tip:** A law enforcement agency that receives a public records request related to an ongoing prosecution should **contact the prosecutor** to see if there are concerns related to release.



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



Body Camera Recordings – Retention

- **Wis. Stat. § 165.87(2):**

- Must retain all data from law enforcement body cameras for at least **120 days**
 - Exceptions that require longer retention, including:
 - Encounters that result in death or actual or alleged injury
 - Encounters that result in a custodial arrest
 - A search during an authorized temporary questioning
 - Encounters that include the use of force by a law enforcement officer
 - Other situations in which longer retention may be required
 - Including when body camera data is used in criminal, civil, or administrative proceedings



Body Camera Recordings – Definitions

- **Wis. Stat. § 165.87(3)(a):**
 - “Authority” and “requester” have the same meanings as in the public records law
 - “Record subject” means an individual recorded by a body camera to whom **all** the following apply:
 - Individual is depicted or the individual’s voice is audible
 - Individual’s identity is known to the law enforcement agency
 - Individual is **not** a law enforcement officer acting in an official capacity
 - Unless a crime or other violation of law has been committed or alleged to have been committed against the officer while present at the location that was recorded



Body Camera Recordings – Disclosure

- **Wis. Stat. § 165.87(3)(b):**
 - Generally, data from a body camera are records subject to disclosure
- **Wis. Stat. § 165.87(3)(c):**
 - Outlines public policy **weighing in favor of nondisclosure** of certain content:
 - Privacy of victims of sensitive or violent crimes
 - Privacy of minors
 - Privacy of record subjects in a location where a record subject has a reasonable expectation of privacy
 - Such an individual's face and other identifiers must be redacted
 - **Unless** they do **not** object **or** the public interest is **so great** that it outweighs the public policy weighing in favor of nondisclosure



Body Camera Recordings – Disclosure, continued

- **Wis. Stat. § 165.87(3)(d):**
 - For the purposes of public records requests, the law enforcement agency that created the body camera recording is the legal custodian
 - Other authorities possessing the recording must **deny** requests for it
- **Wis. Stat. § 165.87(3)(e):**
 - Statute does not prohibit release of body camera data under Wis. Stat. § 175.47(5)(b) (release of reports related to reviews of officer-involved deaths)



Driver's Privacy Protection Act (DPPA)

- 18 U.S.C. § 2721 et seq. - federal statute enacted in 1994
- Purpose: limit release of personal info contained in driver's license records
- Concerns about threats from stalkers and criminals and states' practice of selling personal information to businesses
- Law prohibits release of certain types of information (with exceptions):
 - Personal information
 - Individual's photograph, SSN, driver ID number, name, address, telephone number, medical or disability information
 - Highly restricted personal information
 - Individual's photo or image, SSN, medical or disability information



Driver's Privacy Protection Act (DPPA)

- **Accident reports:** permitted to be released unredacted
 - DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
- **Incident reports:** release of DMV info. prohibited unless exception applies
 - Compliance with public records requests is not an exception (not a “function”)
- Information **verified** using DMV records is not protected by DPPA
 - Presents problem of determining how information was obtained
- See *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339



Mental Health Records

- Wis. Stat. § 51.30(4): Generally, **mental health registration and treatment** records are **confidential** and **privileged** to the subject individual.
 - May only release with the subject individual's **informed written consent**, court order, or other certain limited circumstances. See Wis. Stat. § 51.30(4)(b).
 - **Includes** duplicate copies of **statements of emergency detention** in the possession of a law enforcement agency, absent written informed consent or a court order. See *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
 - Supreme Court found that such records were registration records even if in the possession of the law enforcement agency.
 - Treatment records include registration records. See Wis. Stat. § 51.30(1)(b).
- Consult your legal counsel



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 Issues to Note

- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Wis. Stat. § 165.79: Crime Laboratory Privilege
- Other statutes requiring confidentiality



REDACTION



Redaction

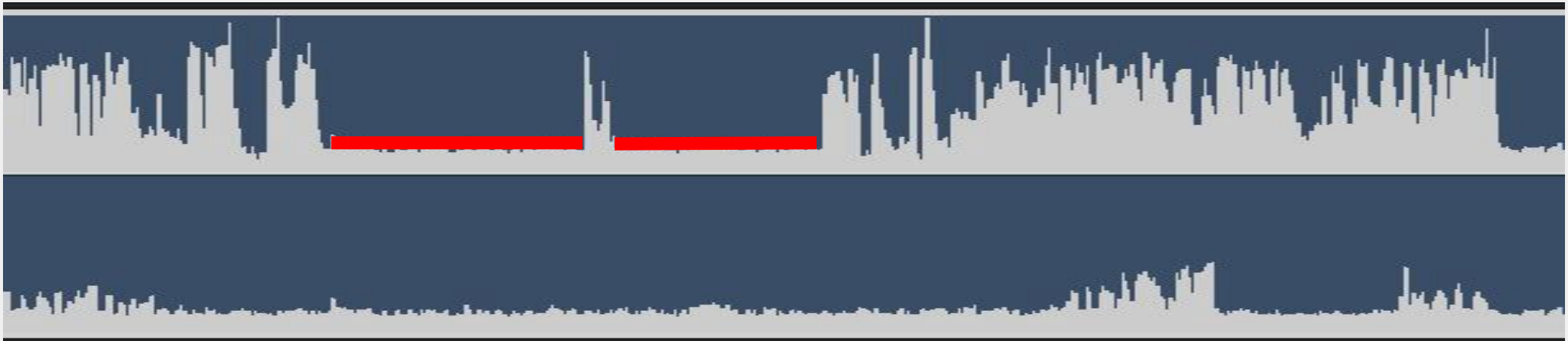
- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information**
 - Therefore, subject to review by mandamus

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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



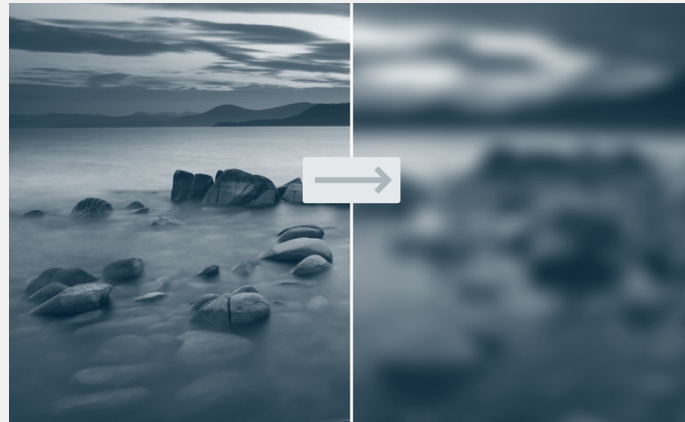
Redaction: Video Recordings

- 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)



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



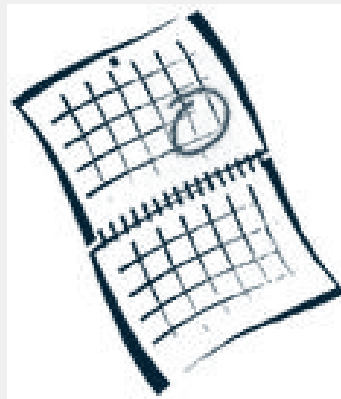
Format of Records

- *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 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
- **Bottom line:** When the OOG informs you of a pending public records request, work to gather responsive records as soon as practicable



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

- Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - **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



Records Retention – Best Practices

- Establish agency policies regarding retention
- Ensure all agency-specific RDAs are up-to-date
 - RDAs sunset after 10 years
- Train agency records officers and staff on records retention and relevant agency policies
- Follow your retention schedules
- Consult your legal counsel
- For additional information, visit the PRB's website: <http://publicrecordsboard.gov>



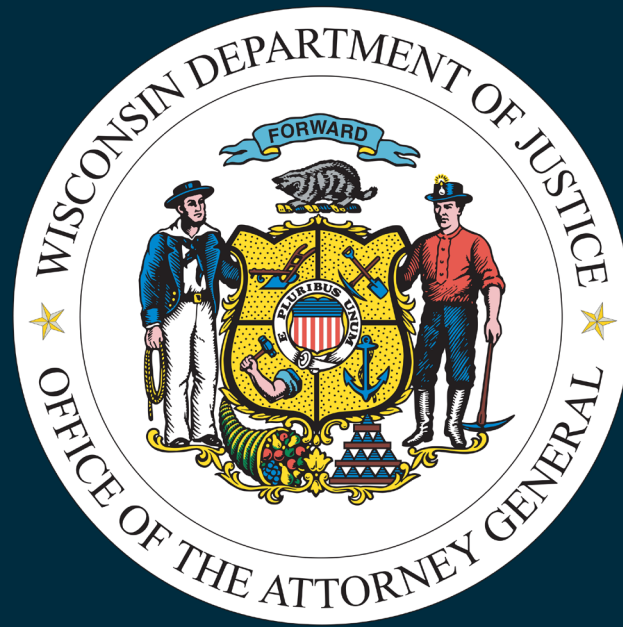
QUESTIONS?



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
fergusonpm@doj.state.wi.us





Thank You!

