

The Wisconsin Public Records Law

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
League of Wisconsin Municipalities
2017 Clerks, Treasurers & Finance Officers Institute
Stevens Point, WI
June 22, 2017



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
- ▶ Operate 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



Office of Open Government (OOG)

- ▶ OOG Website:
 - ▶ OOG outline and public records request response protocol
 - ▶ Public records notice
 - ▶ Public records request fee schedule
 - ▶ Public records snapshot - shows all pending requests; updated weekly
 - ▶ Other website additions on the way
- ▶ Online resources:
 - ▶ Open Meetings Law and Public Records Law compliance guides
 - ▶ Links to Open Meetings Law and Public Records Law statutes
 - ▶ Past training presentation material
 - ▶ Wisconsin Stat. § 19.77 annual summaries
 - ▶ Ask the OOG
 - ▶ Additional guidance



Introduction



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
- ▶ Objectives:
 - ▶ Shed light on workings of government and acts of public officers and employees
 - ▶ Assist members of the public in becoming an informed electorate
 - ▶ Serve 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



Public Records Request Process

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for records
- ▶ Any responsive records are reviewed:
 - ▶ Is there a statutory or common law exemption from disclosure?
 - ▶ Authority applies public records balancing test
- ▶ Records are released with letter explaining any redactions



Public Record Roles



“Authority”

- ▶ Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- ▶ Very similar to “governmental body” in Open Meetings law
- ▶ Includes quasi-governmental corporation
- ▶ Public records law obligations apply separately to each authority
- ▶ *Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Association*, 2014 WI App 106, 357 Wis. 2d 687, 855 N.W.2d 715 (unincorporated association is not an authority)



“Legal Custodian”

- ▶ Defined in Wis. Stat. § 19.33 - vested by an authority with full legal power to render decisions and carry out public records responsibilities
- ▶ Elective official, chairperson of a committee of elected officials, or designee
 - ▶ A contractor is not the custodian
- ▶ Other authorities to designate one or more positions
- ▶ Defaults are highest ranking officer and chief administrative officer, if any



“Legal Custodian” (continued)

- ▶ All records belong to the authority (e.g., municipality):
- ▶ Custodial services
 - ▶ Other authority staff may participate or assist
 - ▶ Helpful to establish an internal public records procedure



"Requester"

- ▶ Defined at Wis. Stat. § 19.32(3)
 - ▶ Generally, any person who requests to inspect or copy a record
- ▶ More limited rights for persons committed under mental health laws or incarcerated
 - ▶ Must be requesting records containing specific references to themselves or minor children
- ▶ Wis. Stat. § 19.35(1)(am)
 - ▶ A requester has greater rights to inspect personally identifiable information about himself or herself



Who Can Request?

- ▶ Requester need not state the purpose of the request
- ▶ Requester generally need not identify himself or herself
- ▶ 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.



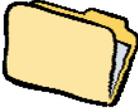
Records



"Record"

"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."

— Wis. Stat. § 19.32(2)




Is it a Record?

No:

- ▶ Published material available for sale or at library
- ▶ Purely personal property
- ▶ Material with limited access rights, such as copyrights or patents
- ▶ Drafts, notes, and preliminary documents




Is it a Record?

Yes:

- ▶ Not created by the authority but in the authority's possession
- ▶ Electronic records, including:
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Audio and video
- ▶ Contractors' records




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"
 - ▶ Preventing final corrections from being made



Is It a Record?

- ▶ A supervisor asks a staffer to draft a letter. The staffer emails the letter to the supervisor. Is the letter subject to disclosure under the public records law?



Is It a Record?

- ▶ A supervisor asks a staffer to draft a letter. The staffer emails the letter to the supervisor. The supervisor does not make any changes to the letter, and forwards it, unsigned, to its recipient. Is the letter subject to disclosure under the public records law?



Is It a Record?

- ▶ An agency develops a new leave policy. A version marked "draft" is circulated internally for edits. The policy is followed, but it is never finalized. Media outlets submitted a public records request for a copy. The only copy in the agency's possession is the copy marked "draft." Is the copy of the policy subject to disclosure?



Is It a Record?

- ▶ An employee has a sticky note on his desk with a "To Do" list on it. Is the sticky note subject to disclosure?



Personal and Business Email, etc.

- ▶ Personal email, 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
 - ▶ Disclosure generally not required
 - ▶ *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177



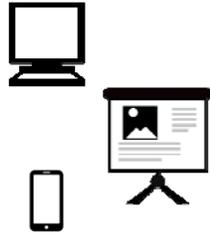
Personal and Business Email, etc., cont.

- ▶ Government business emails, calls, and documents on private accounts:
 - ▶ These materials may be "records"
 - ▶ Content determines whether something is a "record," not the medium, format, or location
 - ▶ Recommendation: Conduct a careful search of all relevant accounts
 - ▶ Personal materials on the same private accounts are not subject to disclosure



Electronic Records

- ▶ Emails
- ▶ Database files
- ▶ PowerPoint presentations
- ▶ Audio and video
- ▶ Web-based documents
- ▶ Social media
- ▶ Cell phones, including texts



Social Media

- ▶ Increased use of social media by authorities
 - ▶ Facebook
 - ▶ Twitter
- ▶ Likely to be a "record" if created or maintained by an authority



Social Media (continued)

- ▶ Considerations:
 - ▶ Be familiar with the site
 - ▶ Are the records archived?
 - ▶ Who may post, manage, or control?
 - ▶ How long is content available?
 - ▶ Will third-party messages or posts be "records"?
 - ▶ Does the authority have a social media policy?



Communications to Public Officials

- ▶ Persons who communicate political views to their elected lawmakers should be prepared to see their names and views made public
- ▶ Depending on the totality of circumstances, it may be appropriate to redact personal financial, health, or other similarly sensitive information as "purely personal"
- ▶ Possibility of threats, harassment, or reprisals is a legitimate consideration; weight to be accorded depends on likelihood of actual occurrence
- ▶ *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



Contractors' Records

- ▶ Records produced or collected under a contract with the authority are "records" for public records law purposes
 - ▶ Records produced or collected "in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of" a contract
 - ▶ Records produced "in the course of" the contracted-for matter
 - ▶ Includes data and other electronic records
- ▶ *Juneau County Star-Times v. Juneau County*, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457



Is It a Record?

- ▶ The bottom line is that content not format determines if something is a record

**CONTENT
NOT
FORMAT**



Receiving a Request



Sufficient Request

- ▶ A request need not be in writing: It may be verbal
- ▶ An authority may not require the use of a form
- ▶ "Magic words" are not required



Sufficient Request, continued

- ▶ Reasonably describes the information or records requested
- ▶ Reasonably specific as to time and subject matter
 - ▶ Important for requests involving electronic records
- ▶ Custodian should not have to guess what records the requester wants



Scope of Request

- ▶ A large number of responsive records—by itself—does not make a request too broad
- ▶ But a request cannot so burden an authority that its normal functioning would be impaired
- ▶ A requester may have no way of knowing how many responsive records exist
- ▶ A requester may have no interest in many “technically” responsive records
- ▶ Keep purpose and objective of public records law in mind



A Good Request

- ▶ Request framed carefully to produce records actually of interest
- ▶ If a particular document is requested, the request identifies it by date, author, and title
- ▶ Request for email records: search terms can be helpful
- ▶ Request is directed to the records custodian or other person identified in the authority’s public records notice (Wis. Stat. § 19.34(1))
- ▶ Indicates when cost is a concern



June 5, 2017

Charlie Chairperson
Cheese Town Board Chairperson
250 Main Street
Cheese Town, WI 53000

Dear Mr. Chairperson,

Please send me copies of all town records related to redevelopment of the old quarry site.

If I do not receive the records by June 15, 2017, I will assume you are denying my open records request and will take all appropriate legal action.

I expect you will not charge me for these records because of the high public interest in this important matter.

Thank you for your prompt attention.

Yours truly,

Ralph Requester
123 Quarry Road
Cheese Town, WI 53000

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June 5, 2017

Carly Clerk
Town Clerk
250 Main Street
Cheese Town, WI 53000

Dear Ms. Clerk:

Pursuant to the Wisconsin Public Records Law, please send me copies of all 2016 Cheese Town Board minutes discussing the Vacation Company's proposed redevelopment of the old Bedrock Quarry site. I only need pages of the minutes on discussing the proposed quarry redevelopment, and I don't need copies of any related documents distributed at the Town Board meetings. Also, please send me copies of all emails between the Town Board members regarding the quarry redevelopment from May 1 through September 15, 2016. I would prefer to receive the responsive records by email, if possible.

If the cost of fulfilling my request will be more than \$25.00, please contact me before proceeding. Also, please contact me if you have any questions about this request.

Thank you,

Rebecca Requester
rebecca@internet.com
555-1234

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Processing a Request



Evaluating a Request

- ▶ Carefully assess to determine what is needed to respond
- ▶ Don't understand the request?
 - ▶ Contact the requester
 - ▶ Send a written summary of your understanding
 - ▶ Request clarification



Evaluating a Request (continued)

- ▶ Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
- ▶ Send the requester an acknowledgment and periodic status updates if the response will take some time



Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the balancing test



Step 1: Does the Record 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



Step 1: Does the Record Exist?, cont.

- ▶ Search for records that might be responsive
- ▶ If there are no responsive records, inform the requester
- ▶ *Journal Times v. City of Racine Board of Police & Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563: It is problematic to deny access to records on substantive grounds, then respond later that there are no responsive records



Step 2: Absolute Right 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



Step 3: Absolute Denial of Access

- ▶ Absolute Denial
 - ▶ Can be located in public records statutes:
 - ▶ 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:
 - ▶ Patient health care records; pupil records



Step 4: The Balancing Test

- ▶ Weigh the public interest in disclosure of the record against the public interest and public policies against disclosure
- ▶ Fact intensive; "blanket rules" disfavored
- ▶ Must conduct on case-by-case basis taking into consideration the totality of circumstances
- ▶ Identity of the requester and the purpose of the request are generally not part of the balancing test



Some Sources of Public Policies

- ▶ Policies expressed in other statutes
 - ▶ E.g., patient health care records, student records
- ▶ Court decisions
- ▶ Exemptions to open meetings requirements in Wis. Stat. § 19.85(1)
 - ▶ Only if there is a specific demonstration of need to deny access at the time of the request
- ▶ Policies expressed in evidentiary privileges
- ▶ Public interest in reputation and privacy of individuals



Special Issues



Special Issues

- ▶ Presumption of complete public access - public's right to know
- ▶ Information provided on the condition of confidentiality
 - ▶ Not binding but a factor in the balancing test
- ▶ Tax and financial information
 - ▶ Wis. Stat. § 19.36(13): Financial identifying information
 - ▶ Other statutes



Special Issues, continued

- ▶ Public policy behind Wis. Stat. §§ 801.19, 801.20, and 801.21: Protection of information in circuit court records
- ▶ Personally identifiable and financially identifiable information:
 - ▶ Federal Employer Identification Numbers (FEIN or EIN)
 - ▶ Social Security Numbers
 - ▶ Dates of birth
 - ▶ Home addresses
 - ▶ Home telephone numbers



Driver's Privacy Protection Act (DPPA)

- ▶ Federal statute enacted in 1994
- ▶ Purpose: limit release of an individual's personal information contained in driver's license record
- ▶ Concerns about threats from stalkers, criminals and states' practice of selling personal information to businesses



DPPA, continued

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



Special Issues, continued

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Generally, access not permitted for 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



Final Candidates—Wis. Stat. § 19.36(7)

- ▶ Each applicant who is seriously considered for appointment or whose name is certified for appointment, and whose name is submitted for final consideration to an authority for appointment, to a state position (except in the classified service) or a local public office
- ▶ Includes all of the following:
 - ▶ When there are at least 5 applicants, each of the 5 applicants considered most qualified
 - ▶ When there are fewer than 5 applicants, each applicant
 - ▶ When an appointment is to be made from a group of more than 5 most qualified applicants, all applicants in the group



Electronic Databases

- ▶ Direct access to electronic databases not required
- ▶ Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- ▶ Wis. Stat. § 19.36(4): a computer program is not subject to examination or copying
 - ▶ However, the following is:
 - ▶ Input: Material used as input for computer program
 - ▶ Output: Material produced as product of computer program
- ▶ Requester, within reasonable limits, may request a data run to obtain requested information

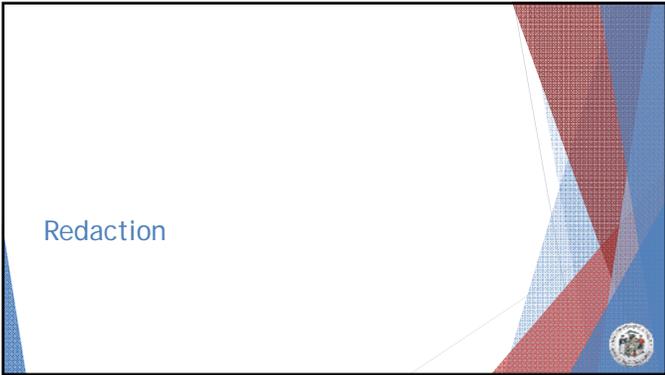


Metadata

- ▶ No controlling Wisconsin precedent
 - ▶ A circuit court held metadata is not a record because it includes drafts, notes, preliminary computations, and editing information
 - ▶ Courts in other jurisdictions have held metadata must be disclosed in response to freedom of information laws
- ▶ Good rule of thumb:
 - ▶ Content determines whether it is a record, not the format

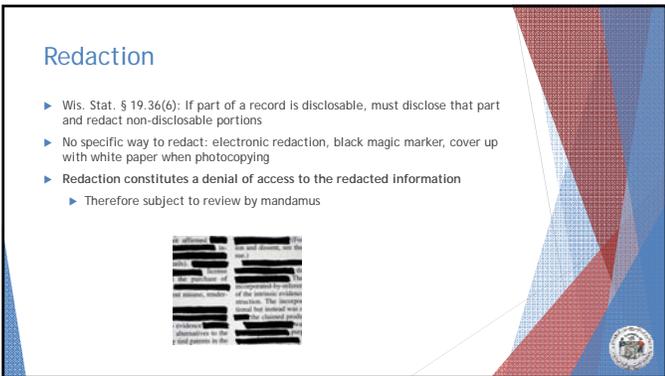
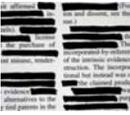


Redaction

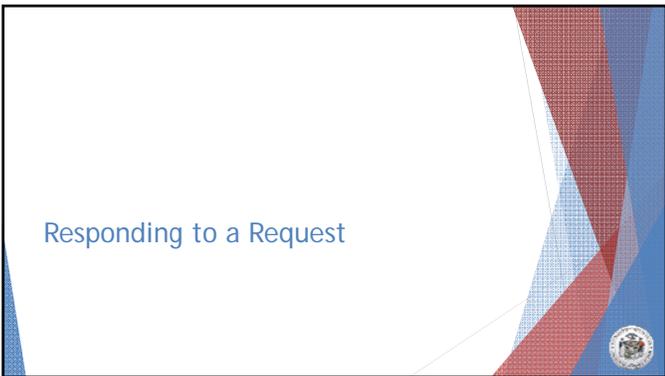


Redaction

- ▶ 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



Format of Records

- ▶ Wis. Stat. § 19.35(1)(b), (c), (d): a copy substantially as readable/audible/good as the original
- ▶ *WIREData, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
 - ▶ Whether records must be produced in requested format not squarely addressed
 - ▶ PDF fulfilled request for "electronic records" despite not having all the characteristics wanted by the requester
 - ▶ Sufficient to provide a copy of relevant data in an appropriate format
- ▶ Right to receive land information from a political subdivision in same format in which record is maintained
- ▶ Possible court case developments - stay tuned



Written Response?

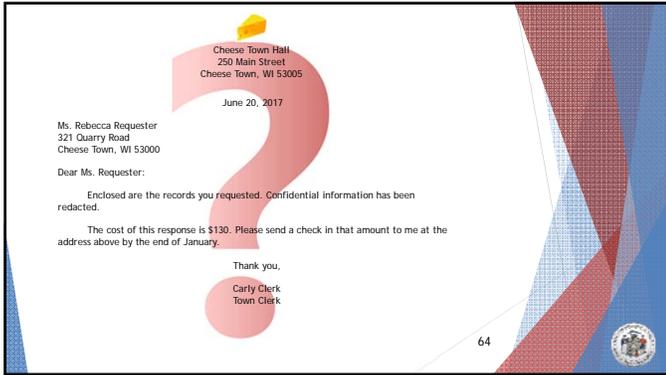
- ▶ A written request requires a written response, if the request is denied in whole or in part
- ▶ May respond in writing to a verbal request
- ▶ A request for clarification, without more, is not a denial
- ▶ Must inform requestor that denial is subject to review in an enforcement action for mandamus under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney General

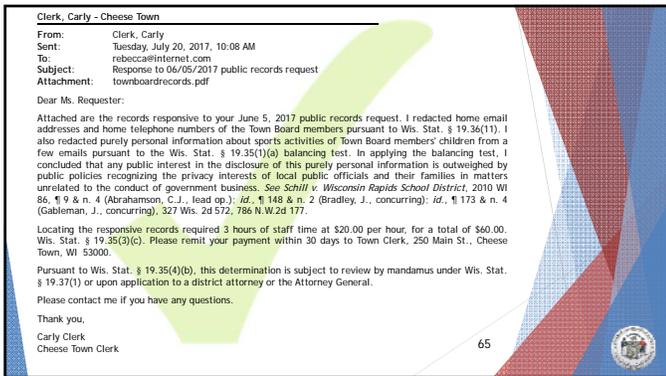


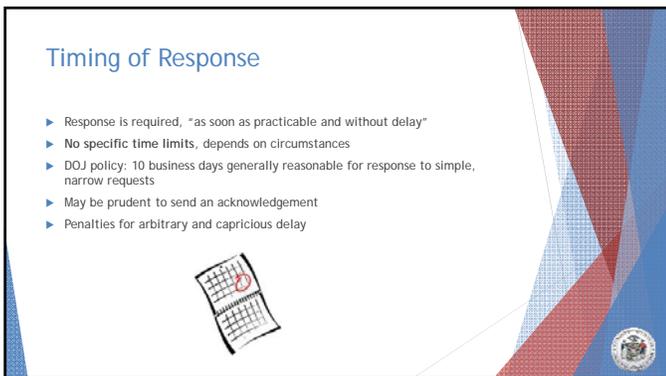
Reasons for Denial

- ▶ Reasons for denial must be specific and sufficient
- ▶ Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
- ▶ Reviewing court usually limited to reasons stated in denial
- ▶ Availability of same records from other sources generally not a sufficient reason









Notice Before Release

- ▶ Required by Wis. Stat. § 19.356(2)(a)1
 - ▶ Records 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 an employer other than the authority about employees of that employer
 - ▶ "Record subject" can try to stop disclosure in court
- ▶ Required by Wis. Stat. § 19.356(9)-officer or employee holding state or local public office
 - ▶ OAG-07-14 (Oct. 15, 2014)
- ▶ Courtesy notice



Costs



Costs

- ▶ Actual, necessary, and direct costs only—unless otherwise specified by law
 - ▶ Copying and reproduction
 - ▶ Paper copies v. electronic copies
 - ▶ Location, if costs are \$50.00 or more
 - ▶ 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



Cost of Response

- ▶ Clarifying or limiting a request may:
 - ▶ Reduce costs to requester
 - ▶ Eliminate records not of interest to requester
 - ▶ Facilitate a quicker response
- ▶ Cost estimates should be reasonable, based on information available before preparing the response or developed during preparation
- ▶ Keep careful records in order to support and calculate requests for payment of costs




Enforcement



Enforcement

- ▶ Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
 - ▶ 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."




Remedies

- ▶ Authority may be ordered to release records
- ▶ Attorney's fees and costs may be awarded if mandamus action was a cause of the release
- ▶ If a denial, delay or charge of excessive fees is found to be arbitrary and capricious:
 - ▶ Court may award punitive damages
 - ▶ Authority may be required to forfeit not more than \$1,000
 - ▶ Forfeitures enforced by action on behalf of state by the attorney general or district attorney



Record Retention



Record Retention: Public Records Law

- ▶ Wis. Stat. § 19.35(5) - after receiving a request:
 - ▶ No destruction until request granted or until at least 60 days after request is denied
 - ▶ 90 days if requester is committed or incarcerated
 - ▶ No destruction during enforcement action



Record Retention: Other Statutes

- ▶ Records retention laws
 - ▶ State authorities: Wis. Stat. § 16.61
 - ▶ Local authorities: Wis. Stat. § 19.21
- ▶ Record Retention Schedules:
 - ▶ General Records Schedules (GRSs)
 - ▶ Agency-Specific Record Retention Schedules (RDAs)
- ▶ Check for existing record retention schedules
- ▶ <http://publicrecordsboard.wi.gov/>
- ▶ Consult legal counsel



Record Retention—Public Records Law

- ▶ Wis. Stat. § 19.35(5) - after receiving a request:
 - ▶ No destruction until request granted or until at least 60 days after request is denied
 - ▶ 90 days if requester is committed or incarcerated
 - ▶ No destruction during enforcement action
- ▶ Wis. Stat. §§ 16.61 and 19.21: record retention statutes for state and local authorities, respectively



Record Retention: Electronic Copies

- ▶ Hard copies v. electronic copies
 - ▶ Copies of records in electronic formats permissible
- ▶ State authorities: Wis. Stat. § 16.61(5)(a)
- ▶ Local authorities: Wis. Stat. § 19.21(4)(c)
 - ▶ Local government unit or agency may provide for retention of records in electronic format
 - ▶ Local government unit or agency shall make for such provision by ordinance or resolution



Record Retention: Considerations

- ▶ Emails and social media
- ▶ Cell phones
 - ▶ Data, texts, other messages, photographs
- ▶ Storage, archiving, searching
 - ▶ Costs, equipment, maintenance



Further Information

- ▶ Consult legal counsel
- ▶ Record retention: Public Records Board (<http://publicrecordsboard.wi.gov/>)
- ▶ Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ▶ Call the Office of Open Government: (608) 267-2220
- ▶ Write to: Office of Open Government
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857



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