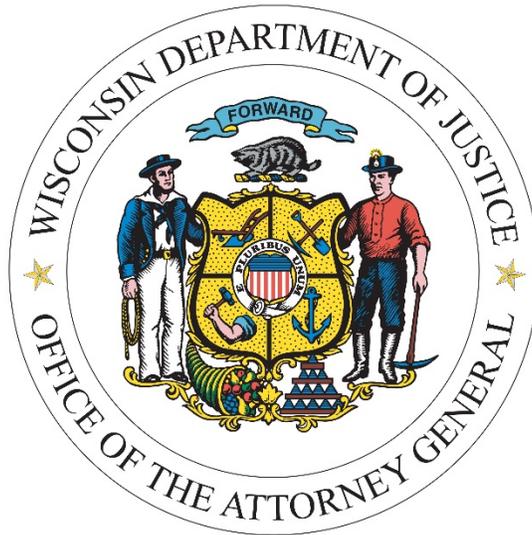


October 2019

# Wisconsin Public Records Law Compliance Guide



Wisconsin Department of Justice  
Attorney General Josh Kaul

# Message from the Office of Open Government

It is imperative that we recognize that transparency is the cornerstone of democracy and that citizens cannot hold elected officials accountable in a representative government unless government is performed in the open.

The Wisconsin Department of Justice (DOJ) plays an important role in ensuring Wisconsin's open government laws are properly and faithfully executed by public officials. The Office of Open Government has worked to reduce DOJ's average public record response times. The office also makes available online a snapshot of all public records requests pending each week, average monthly response times for the office, and responses to public records requests that may be of public interest. DOJ responds to hundreds of inquiries every year concerning issues related to the open meetings law and the public records law, and instructs on open government at dozens of conferences, seminars, and training sessions. In these ways, the Office of Open Government provides resources and services to all state, regional, and local government entities and citizens.

Wisconsin's open government laws promote democracy by ensuring that all state, regional and local governments conduct their business with transparency. Wisconsin citizens have a right to know how their government is spending their tax dollars and exercising the powers granted by the people. This guide is a resource for everyone to understand and exercise their right to access their government.

This compliance guide may be accessed, downloaded or printed free of charge from the DOJ website, by visiting <https://www.doj.state.wi.us/>. Please share this guide with your constituencies and colleagues.

Records custodians and all those who perform public duties are encouraged to contact the Office of Open Government if we can be of assistance.

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# Disclaimer

This guide provides an overview of the law and compiles information provided by DOJ in response to inquiries submitted over the course of several decades. This guide is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

This guide does not provide answers to every question that may arise regarding the public records law. Although this guide is updated periodically, it reflects the current law as of the date of its publication, and it may be superseded or affected by newer versions and/or changes in the law. This guide does not create an attorney-client relationship. You should consult with an attorney for specific information and advice when necessary and appropriate.

# Wisconsin Public Records Law Compliance Guide



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# Table of Contents

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	Page
INTRODUCTION .....	1
PUBLIC POLICY AND PURPOSE .....	1
SOURCES OF WISCONSIN PUBLIC RECORDS LAW .....	2
KEY DEFINITIONS .....	2
Record .....	2
Requester .....	6
Authority .....	7
Legal Custodian.....	8
Record Subject.....	9
Personally Identifiable Information.....	9
Local Public Office.....	10
State Public Office .....	10
BEFORE ANY REQUEST: PROCEDURES FOR AUTHORITIES.....	11
Records Policies .....	11
Hours for Access.....	11
Facilities for Requesters.....	12
Fees for Responding.....	12
Records Retention Policies .....	12
THE REQUEST.....	12
Written or Oral .....	12
Requester Identification.....	12
Purpose .....	13
Reasonable Specificity.....	13
Format .....	14
Ongoing Requests .....	14
Requests Are Records .....	15
THE RESPONSE TO THE REQUEST .....	15
Mandatory .....	15
Timing.....	15
Format.....	16
Content of Denials.....	16
Redaction.....	18
Motive and Context.....	18
Obligation to Preserve Responsive Records.....	19
Responses Are Records.....	19
Access to Information vs. Participation in Electronic Forum.....	19
Certain Shared Law Enforcement Records .....	19

	Page
ANALYZING THE REQUEST .....	20
Access Presumed .....	20
Suggested Four-Step Approach.....	20
<i>Step One: Is There Such a Record?</i> .....	21
<i>Step Two: Is the Requester Entitled to Access the Record</i> Pursuant to Statute or Court Decision? .....	22
<i>Step Three: Is the Requester Prohibited from Accessing</i> the Record Pursuant to Statute or Court Decision? .....	22
<i>Step Four: Does the Balancing Test Weigh in Favor of Prohibiting Access to the Record?</i> .....	31
Special Issues .....	36
Privacy and reputational interests .....	36
Crime victims and their families.....	39
Law enforcement records.....	40
Court records .....	42
Children and juveniles .....	42
Confidentiality agreements .....	43
Personnel records and other employment-related records of public employees.....	44
Records about the requester .....	47
Correspondence with elected officials .....	50
LIMITED DUTY TO NOTIFY PERSONS NAMED IN RECORDS IDENTIFIED FOR RELEASE.....	50
Background .....	50
Notice and Judicial Review Procedures .....	51
Records for Which Notice Is Required and Pre-Release Court Review May Be Sought.....	51
When Is Notice Required and for What Kinds of Records? .....	51
To Whom Must the Notice Be Given? .....	53
Is Notice Required When the Records Have Already Been Made Public? .....	53
What Are the Requirements of the Notice? .....	54
When and How Must the Notice Be Served? .....	54
After the Notification Is Given, When Can the Records Be Released? .....	55
What Is the Procedure for a Pre-Release Judicial Review?.....	56
Records for Which Notice Is Required and Supplementation of the Record is Authorized.....	56
When Is Notice Required and To Whom Must the Notice Be Given? .....	57
Is Notice Required When the Records Have Already Been Made Public? .....	57
What Are the Requirements of the Notice? .....	58
When and How Must the Notice Be Served? .....	58
After the Notification Is Given, When Can the Records Be Released? .....	58
What Is the Procedure for Supplementation of the Record? .....	58
Courtesy Notice .....	58
ELECTRONIC RECORDS .....	59
Introduction .....	59
Record Identification.....	59
Access .....	62
Retention and Storage.....	66

INSPECTION, COPIES, AND FEES.....	67
Inspection .....	67
Copies.....	67
Fees .....	68
RIGHT TO CHALLENGE ACCURACY OF A RECORD .....	70
ENFORCEMENT AND PENALTIES.....	71
Mandamus.....	71
Penalties Available on Mandamus.....	73
Related Criminal Offenses .....	74
Miscellaneous Enforcement Issues.....	74
Interpretation by Attorney General .....	74

## INTRODUCTION

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The Wisconsin public records law authorizes requesters to inspect or obtain copies of “records” maintained by government “authorities.” The identity of the requester or the reason why the requester wants particular records generally do not matter for purposes of the public records law. Records are presumed to be open to inspection and copying, but there are some exceptions. Requirements of the public records law apply to records that exist at the time a public records request is made. The public records law does not require authorities to provide requested information if no responsive record exists, and generally does not require authorities to create new records in order to fulfill public records requests. The public records statutes, Wis. Stat. §§ 19.31–19.39, do not address the general duty to retain records. This outline is intended to provide general information about the public records law.

## PUBLIC POLICY AND PURPOSE

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“[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”<sup>1</sup> This is one of the strongest declarations of policy found in the Wisconsin statutes.<sup>2</sup>

Wisconsin legislative policy favors the broadest practical access to government.<sup>3</sup> Providing citizens with information on the affairs of government is:

[A]n essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.<sup>4</sup>

Courts interpret the public records law in light of this policy declaration to foster transparent government.<sup>5</sup>

The purpose of the Wisconsin public records law is to shed light on the workings of government and the official acts of public officers and employees.<sup>6</sup> Its goal is to provide access to records that assist the public in becoming an informed electorate.<sup>7</sup> The public records law therefore serves a basic tenet of our democratic system by providing opportunity for public oversight of government.<sup>8</sup>

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<sup>1</sup> Wis. Stat. § 19.31.

<sup>2</sup> *Zellner v. Cedarburg Sch. Dist.* (“*Zellner I*”), 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.

<sup>3</sup> *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 22, 284 Wis. 2d 162, 699 N.W.2d 551; *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 15, 305 Wis. 2d 582, 740 N.W.2d 177.

<sup>4</sup> Wis. Stat. § 19.31.

<sup>5</sup> *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 40, 341 Wis. 2d 607, 815 N.W.2d 367 (Abrahamson, C.J., lead opinion).

<sup>6</sup> *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

<sup>7</sup> *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 73, 341 Wis. 2d 607, 815 N.W.2d 367 (Roggensack, J., concurring).

<sup>8</sup> *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 16, 259 Wis. 2d 276, 655 N.W.2d 510; *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996); *Linzmeier v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811; see also *John K. MacIver Inst. for Pub. Policy v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862 (“Transparency and oversight are essential to honest, ethical governance.”).

The presumption favoring disclosure is strong, but not absolute.<sup>9</sup>

The general rule is that “[e]xcept as otherwise provided by law, any requester has a right to inspect any record.”<sup>10</sup> Any record specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of the record containing public information is open to public inspection.<sup>11</sup>

## SOURCES OF WISCONSIN PUBLIC RECORDS LAW

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Wisconsin Stat. §§ 19.31–19.39 (the public records statutes). The public records statutes and related Wisconsin statutes can be accessed on the Wisconsin State Legislature’s website: <http://docs.legis.wisconsin.gov/> and in Appendix B of this guide.

Wisconsin Stat. § 19.85(1) (exemptions to the open meetings law, referred to in the public records law), also accessible at <http://docs.legis.wisconsin.gov/>.

Court decisions.

Attorney General opinions and correspondence. Formal Attorney General opinions from 1912 to the present can be accessed at <https://www.doj.state.wi.us/dls/ag-opinion-archive>. Select opinions and resources are available at <https://www.doj.state.wi.us/office-open-government/office-open-government-resources>.

Other sources described below in this outline.

*Note:* The United States Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not apply to states.<sup>12</sup> Nonetheless, the public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test discussed in *Analyzing the Request, Step Four*, below.<sup>13</sup> Generally, the Wisconsin public records law provides for greater access to state governmental records than FOIA does to federal records.<sup>14</sup>

## KEY DEFINITIONS

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### “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

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<sup>9</sup> *Hempel*, 2005 WI 120, ¶ 28; *Voice of Wis. Rapids, LLC v. Wis. Rapids Pub. Sch. Dist.*, 2015 WI App 53, ¶ 10, 364 Wis. 2d 429, 867 N.W.2d 825.

<sup>10</sup> Wis. Stat. § 19.35(1)(a).

<sup>11</sup> Wis. Stat. § 19.36(1).

<sup>12</sup> *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428 n.6, 538 N.W.2d 608 (Ct. App. 1995) (FOIA applies to certain records created by the federal government and its agencies).

<sup>13</sup> *Linzmeier*, 2002 WI 84, ¶¶ 32–33.

<sup>14</sup> *See, e.g., Wis. Family Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 672–73, 291 N.W.2d 631 (Ct. App. 1980).

characteristics, which has been created or is being kept by an authority.<sup>15</sup>

- Must be created or kept in connection with official purpose or function of the agency.<sup>16</sup> Content determines whether a document is a “record,” not medium, format, or location.<sup>17</sup>
- Not everything a public official or employee creates is a public record.<sup>18</sup>
- “Record” includes:
  - Handwritten, typed, or printed documents.
  - Maps and charts.
  - Photographs, films, and tape recordings.
  - Tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved.
  - Electronic records and communications.
    - Information regarding government business kept or received by an elected official on her website, “Making Salem Better,” more likely than not constitutes a record.<sup>19</sup>
    - Email sent or received on an authority’s computer system is a record. This includes personal email sent by officers or employees of the authority.<sup>20</sup>
    - Email conducting government business sent or received on the personal email account of an authority’s officer or employee also constitutes a record.
- “Record” also includes contractors’ records. Each authority must make available for inspection and copying any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority.<sup>21</sup>
  - Access to contractors’ records does not extend to information produced or collected under a subcontract to which the authority is not a party, *unless* the information is required by or

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<sup>15</sup> Wis. Stat. § 19.32(2).

<sup>16</sup> 72 Op. Att’y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965).

<sup>17</sup> OAG I-06-09, at 2 (Dec. 23, 2009); see *MacIver Inst.*, 2014 WI App 49, ¶ 18 (emails sent to an elected lawmaker for the purpose of influencing the lawmaker’s position on a public policy, maintained on a government email system, are records).

<sup>18</sup> *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 680 N.W.2d 792 (citing *State v. Panknin*, 217 Wis. 2d 200, 209–10, 579 N.W.2d 52 (Ct. App. 1998) (concluding that personal notes of a sentencing judge are not public records)); OAG I-06-09, at 3 n.1. *But see Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, 786 N.W.2d 177 (Bradley, J., concurring), ¶ 173 (Gableman, J., concurring), ¶ 188 (Roggensack, J., dissenting) (personal email sent or received on an authority’s computer system is a record as defined by Wis. Stat. § 19.32(2)).

<sup>19</sup> OAG I-06-09, at 2-3.

<sup>20</sup> *Schill*, 2010 WI 86, ¶ 152 (Bradley, J., concurring), ¶ 173 (Gableman, J., concurring), ¶ 188 (Roggensack, J., dissenting).

<sup>21</sup> Wis. Stat. § 19.36(3).

provided to the authority under the general contract to which the authority is a party.<sup>22</sup>

- Interpreting the scope of contractors' records covered by this provision, the Wisconsin Court of Appeals has held that the term "collect" in the Wis. Stat. § 19.36(3) language requiring disclosure of "any record . . . collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority" means "to bring together in one place." The court determined that the statute was not written so narrowly as to require that the contract be for the purpose of collecting the records, and could refer to a contract between the authority's contractor and a subcontractor.<sup>23</sup>

Affirming the court of appeals holding, the Wisconsin Supreme Court held that law firm invoices in possession of the insurance company—but not the policyholder—are "contractors' records" under section 19.36(3) and are therefore subject to disclosure.<sup>24</sup> *Juneau County Star-Times* involved law firm invoicing records generated when a Juneau County Sheriff's Department employee sued the county. Juneau County contracted with a liability insurer to defend the county in lawsuits, and in turn, the liability insurer contracted with a law firm to provide legal defense for the county. The court held the law firm invoices were contractor records under Wis. Stat. § 19.36(3) because the liability insurance policy created a contractual relationship between the county and the law firm. The supreme court also concluded that records produced or collected "under" a contract for section 19.36(3) purposes means records that are produced or collected "in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of" a contract, or "in the course of" the contracted-for matter.<sup>25</sup> As before, a subcontractor's records produced or collected under a contract with an entity other than an authority are not subject to disclosure under the public records law unless something "bridge[s] the gap" between the authority and the subcontractor.<sup>26</sup> In construing section 19.36(3), the supreme court adopted commonly understood meanings of the terms "produced," "collected," and "under" in the context of the factual setting of this case.<sup>27</sup>

- A governmental entity cannot evade its public records responsibilities by shifting a record's creation or custody to an agent.<sup>28</sup>
- "Record" does not include:
  - Drafts, notes, preliminary documents, and similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working.<sup>29</sup>

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<sup>22</sup> *Bldg. & Constr. Trades Council*, 221 Wis. 2d at 585.

<sup>23</sup> *Juneau Cty. Star-Times v. Juneau Cty.*, 2011 WI App 150, ¶¶ 13–30, 337 Wis. 2d 710, 807 N.W.2d 655, *aff'd*, 2013 WI 4.

<sup>24</sup> *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶¶ 81–83, 345 Wis. 2d 122, 824 N.W.2d 457.

<sup>25</sup> *Id.* ¶¶ 37, 57, 83.

<sup>26</sup> *Id.* ¶¶ 75–78 (citing *Bldg. & Constr. Trades Council*, 221 Wis. 2d 575) (payroll records of subcontractor who had contracted only with general contractor were *not* section 19.36(3) contractors' records on account of general contractor's contract with authority, to which subcontractor was not a party).

<sup>27</sup> *Juneau Cty.*, 2013 WI 4, ¶¶ 13, 57.

<sup>28</sup> *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 453, 521 N.W.2d 165 (Ct. App. 1994); *WIREdata, Inc. v. Vill. of Sussex* ("WIREdata II"), 2008 WI 69, ¶ 89, 310 Wis. 2d 397, 751 N.W.2d 736 (contract assessor records).

<sup>29</sup> Wis. Stat. § 19.32(2); *Panknin*, 217 Wis. 2d at 209–10 (personal notes of sentencing judge are not public records); *Voice of Wis. Rapids*, 2015 WI App 53, ¶ 15 ("notes" is given standard dictionary definition and covers broad range of frequently created informal writings).

- This exception is generally limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority.<sup>30</sup>
  - This exclusion will be narrowly construed; the burden of proof is on the records custodian.<sup>31</sup>
- “Drafts”
  - A document is not a draft if it is used for the purposes for which it was commissioned.<sup>32</sup>
  - Preventing “final” corrections from being made does not indefinitely qualify a document as a draft.<sup>33</sup>
  - Labeling each page of the document “draft” does not indefinitely qualify a document as a draft for public records purposes.<sup>34</sup>
- “Notes”
  - A document is not a “note [ ] . . . prepared for the originator’s personal use” if it is used to establish a formal position or action of an authority.<sup>35</sup>
  - Personal use exception applies when notes are only used for the purpose of refreshing originator’s recollection at a later time, not when notes are used for the purpose of communicating information to any other person, or if notes are retained for the purpose of memorializing agency activity.<sup>36</sup>
- Published material available for sale or at the library is not a record.<sup>37</sup>
- Materials which are purely the personal property of the custodian and have no relation to his or her office.<sup>38</sup>
  - However, personal email sent or received on an authority’s computer system is a record.<sup>39</sup>
  - Consequently, if a purely personal email is sent or received on an authority’s computer system, it is still a “record,” although it need not be disclosed if purely personal. The “purely personal email” exemption to disclosure should be narrowly construed.<sup>40</sup>

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<sup>30</sup> 77 Op. Att’y Gen. 100, 102–03 (1988).

<sup>31</sup> *Fox v. Bock*, 149 Wis. 2d. 403, 411, 417, 438 N.W.2d 589 (1989); *Voice of Wis. Rapids*, 2015 WI App 53, ¶ 10.

<sup>32</sup> *Fox*, 149 Wis. 2d at 414; *Journal/Sentinel*, 186 Wis. 2d at 455–56.

<sup>33</sup> *Fox*, 149 Wis. 2d at 417.

<sup>34</sup> *Id.*

<sup>35</sup> *Voice of Wis. Rapids*, 2015 WI App 53, ¶¶ 21, 25.

<sup>36</sup> *Id.*

<sup>37</sup> Wis. Stat. § 19.32(2).

<sup>38</sup> Wis. Stat. § 19.32(2).

<sup>39</sup> *Schill*, 2010 WI 86, ¶ 152 (Bradley, J., concurring), ¶ 173 (Gableman, J., concurring), ¶ 188 (Roggensack, J., dissenting).

<sup>40</sup> See Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010), <https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf>.

- Material with access limited due to copyright, patent, or bequest.<sup>41</sup>

The copyright exception may not apply when the “fair use” exception to copyright protection can be asserted. Whether use of a particular copyrighted work is a “fair use” depends on: (1) The purpose and character of the use, including whether the use is for commercial or nonprofit educational purposes; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.<sup>42</sup> *Note:* Whether a particular use violates the copyright law is a matter of federal law.

- *Note:* Statutory exceptions are instances in derogation of legislative intent and should be narrowly construed.<sup>43</sup>
- “Record” does not include an identical copy of an otherwise available record.<sup>44</sup> An identical copy, for this purpose, is not meaningfully different from an original for purposes of responding to a specific public records request.<sup>45</sup>
- Public records requests and responses are themselves “records” for purposes of the public records law.<sup>46</sup>

### “Requester”

- Generally, any person who requests inspection or a copy of a record.<sup>47</sup>
- *Exception:* Any of the following persons are defined as “requesters” only to the extent that the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom the person has not been denied physical placement under Wis. Stat. ch. 767:
  - A person committed under the mental health law, sex crimes law, sex predator law, or found not guilty by reasons of mental disease or defect, while that person is placed in an inpatient treatment facility.<sup>48</sup>
  - A person incarcerated in a state prison, county jail, county house of correction or other state, county or municipal correctional detention facility, or who is confined as a condition of probation.<sup>49</sup>

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<sup>41</sup> Wis. Stat. § 19.32(2).

<sup>42</sup> *Zellner I*, 2007 WI 53, ¶ 28.

<sup>43</sup> *Id.* ¶ 31 (citing *Fox*, 149 Wis. 2d at 411).

<sup>44</sup> *Stone v. Bd. of Regents of Univ. of Wis. Sys.*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774.

<sup>45</sup> *Id.* ¶ 18. *Cf.* Wis. Stat. § 16.61(2)(b)5.

<sup>46</sup> *Nichols*, 199 Wis. 2d at 275.

<sup>47</sup> Wis. Stat. § 19.32(3).

<sup>48</sup> Wis. Stat. § 19.32(1b), (1d), (3).

<sup>49</sup> Wis. Stat. § 19.32(1c), (1e), (3).

- *Note:* There is generally a greater right to obtain records containing personally identifiable information about the requester himself or herself, subject to exceptions specified in Wis. Stat. § 19.35(1)(am).<sup>50</sup>

## “Authority”

Defined in Wis. Stat. § 19.32(1) as any of the following having custody of a record, and some others:

- A state or local office.
  - A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the “authority” for purposes of the public records law.<sup>51</sup>
  - Only “authorities” are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests.<sup>52</sup>
- An elective official.
- An agency, board, commission, committee, council, department, or public body corporate and politic created by the constitution or by any law, ordinance, rule or order.
- A governmental or quasi-governmental corporation.
  - A corporation is a quasi-governmental corporation for purposes of the public records law “if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status.”<sup>53</sup>
  - Quasi-governmental corporations are not limited to corporations created by acts of government.<sup>54</sup>
  - Determining whether a corporation is a quasi-governmental corporation requires a case-by-case analysis.<sup>55</sup> No one factor is conclusive. The non-exclusive list of factors considered in *Beaver Dam Area Development Corp.* fall into five basic categories:<sup>56</sup>
    - The extent to which the private corporation is supported by public funds;
    - Whether the private corporation serves a public function and, if so, whether it also has other, private functions;

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<sup>50</sup> See Analyzing the Request, Special Issues, Records About the Requester, below.

<sup>51</sup> *WIREData II*, 2008 WI 69, ¶ 75 (municipality’s independent contractor assessor not an authority for public records purposes).

<sup>52</sup> *WIREData II*, 2008 WI 69, ¶¶ 77–78.

<sup>53</sup> *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 9, 312 Wis. 2d 84, 752 N.W.2d 295.

<sup>54</sup> *Id.* ¶ 44.

<sup>55</sup> *Id.* ¶¶ 8–9.

<sup>56</sup> [OAG I-02-09](#) (Mar. 19, 2009).

- Whether the private corporation appears in its public presentations to be a governmental entity;
  - The extent to which the private corporation is subject to governmental control; and
  - The degree of access that government bodies have to the private corporation's records.
- A special purpose district.
  - Any court of law.
  - The state assembly or senate.
  - A nonprofit corporation that receives more than 50% of its funds from a county or municipality and which provides services related to public health or safety to the county or municipality.
  - A university police department under Wis. Stat. § 175.42.
  - A formally constituted sub-unit of any of the above.<sup>57</sup>

### **“Legal Custodian”**

- The legal custodian is vested by the authority with full legal power to render decisions and carry out the authority's statutory public records responsibilities.<sup>58</sup>
- Identified in Wis. Stat. § 19.33(1)–(5):
  - An elective official is the legal custodian of his or her records and the records of his or her office. An elective official may designate an employee to act as the legal custodian.
  - The chairperson of a committee of elective officials, or the chairperson's designee, is the legal custodian of the records of the committee. Similarly, the co-chairpersons of a joint committee of elective officials, or their designees, are the legal custodians of the records of the committee.
  - For every other authority, the authority must designate one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part to be its legal custodian and fulfill its duties under the public records law. If no designation is made, the default is the authority's highest ranking officer and its chief administrative officer, if there is such a person.
  - There are special provisions in Wis. Stat. § 19.33(5) if the members of an authority are appointed by another authority.

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<sup>57</sup> See *Wis. Prof'l Police Ass'n v. Wis. Ctys. Ass'n*, 2014 WI App 106, ¶ 15, 357 Wis. 2d 687, 855 N.W.2d 715 (unincorporated association is not an “authority”).

<sup>58</sup> Wis. Stat. § 19.33(4).

- No elective official is responsible for the records of any other elective official unless he or she has possession of the records of that other elected official.<sup>59</sup>
- Legal custodian of law enforcement records, for purposes of public records requests:
  - The legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.<sup>60</sup>
  - The legal custodian is *not* the local information technology authority having custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology.<sup>61</sup>
- Denial of misdirected requests. A local information technology authority that receives a request for access to information in a law enforcement record must deny any portion of the request that relates to information in a local law enforcement record.<sup>62</sup>
  - Wis. Stat. § 19.35(7)(a)2 defines “law enforcement record” as a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.
  - “Law enforcement agency” means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority.<sup>63</sup>
  - “Local information technology authority” means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.<sup>64</sup>

### **“Record Subject”**

An individual about whom personally identifiable information is contained in a record.<sup>65</sup>

### **“Personally Identifiable Information”**

Information that can be associated with a particular individual through one or more identifiers or other information or circumstances.<sup>66</sup>

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<sup>59</sup> Wis. Stat. § 19.35(6).

<sup>60</sup> Wis. Stat. § 19.35(7)(b).

<sup>61</sup> Wis. Stat. § 19.35(7)(b).

<sup>62</sup> Wis. Stat. § 16.35(7)(c).

<sup>63</sup> Wis. Stat. § 19.35(7)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).

<sup>64</sup> Wis. Stat. § 19.35(7)(a)3.

<sup>65</sup> Wis. Stat. § 19.32(2g).

<sup>66</sup> Wis. Stat. §§ 19.32(1r), 19.62(5).

### **“Local Public Office”**

Defined in Wis. Stat. §§ 19.32(1dm) and 19.42(7w). Includes, among others, the following (excluding any office that is a state public office):

- An elective office of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)).
- A county administrator or administrative coordinator, or a city or village manager.
- An appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.
- An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.
- Any appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee (as defined in Wis. Stat. § 111.70(1)(i)).
- The statutory definition of “local public office” does not include any position filled by an independent contractor.<sup>67</sup>

### **“State Public Office”**

Defined in Wis. Stat. §§ 19.32(4) and 19.42(13). Includes, among others, the following:

- State constitutional officers and other elected state officials identified in Wis. Stat. § 20.923(2).
- Most positions to which individuals are regularly appointed by the Governor.
- State agency positions identified in Wis. Stat. § 20.923(4).
- State agency deputies and executive assistants, and Office of Governor staff identified in Wis. Stat. § 20.923(8)-(10).
- Division administrators of offices created under Wis. Stat. ch. 14, or departments or independent agencies created under Wis. Stat. ch. 15.
- Legislative staff identified in Wis. Stat. § 20.923(6)(h).

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<sup>67</sup> *WIREdata II*, 2008 WI 69, ¶ 75 (contract assessors).

- Specified technical college district executives and Wisconsin Technical College System senior executive positions identified in Wis. Stat. § 20.923(7).
- Municipal judges.

## BEFORE ANY REQUEST: PROCEDURES FOR AUTHORITIES

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### Records Policies

An authority (except members of the legislature and members of any local governmental body) must adopt, display, and make available for inspection and copying at its offices a notice about its public records policies.<sup>68</sup> The authority's notice must include:

- A description of the organization.
- The established times and places at which the public may obtain information and access to records in the organization's custody, or make requests for records, or obtain copies of records.
- The costs for obtaining records.
- The identity of the legal custodian(s).
- The methods for accessing or obtaining copies of records.
- For authorities that do not have regular office hours, any advance notice of intent requirement to inspect or copy records.
- The identification of each position that constitutes a local public office or a state public office.

### Hours for Access

There are specific statutory requirements regarding hours of access.<sup>69</sup>

- If the authority maintains regular office hours at the location where the records are kept, public access to the records is permitted during those office hours unless otherwise specifically authorized by law.
- If there are no regular office hours at the location where the records are kept, the authority must:
  - Provide access upon at least 48 hours' written or oral notice of intent to inspect or copy a record, or

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<sup>68</sup> Wis. Stat. § 19.34(1).

<sup>69</sup> Wis. Stat. § 19.34(2).

- Establish a period of at least 2 consecutive hours per week during which access to records of the authority is permitted. The authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

## Facilities for Requesters

An authority must provide facilities comparable to those used by its employees to inspect, copy, and abstract records. The authority is not required to purchase or lease photocopying or other equipment or provide a separate room.<sup>70</sup>

## Fees for Responding<sup>71</sup>

For detailed information about permissible fees, see Inspection, Copies, and Fees below.

## Records Retention Policies

Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law.<sup>72</sup> **Caution:** Under the public records law, an authority may not destroy a record after receipt of a request for that record until at least sixty days after denial or until related litigation is completed.<sup>73</sup> The sixty-day time period excludes Saturdays, Sundays, and legal holidays.<sup>74</sup>

- The records retention provisions of Wis. Stat. § 19.21 are not part of the public records law.<sup>75</sup>
- An authority's alleged failure to keep records required to be kept under other law may not be attacked under the public records law.<sup>76</sup>

## THE REQUEST

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### Written or Oral

Requests do not have to be in writing.<sup>77</sup>

### Requester Identification

The requester generally does not have to identify himself or herself.<sup>78</sup>

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<sup>70</sup> Wis. Stat. § 19.35(2).

<sup>71</sup> Wis. Stat. § 19.35(3).

<sup>72</sup> See Wis. Stat. §§ 16.61 (retention requirements applicable to state authorities), 19.21 (retention requirements applicable to local authorities).

<sup>73</sup> Wis. Stat. § 19.35(5).

<sup>74</sup> See Wis. Stat. § 19.345.

<sup>75</sup> *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, 742 N.W.2d 530 (the fact that an authority has violated its own retention policy is irrelevant to whether the record must be disclosed under public records law).

<sup>76</sup> *Id.*

<sup>77</sup> Wis. Stat. § 19.35(1)(h).

<sup>78</sup> Wis. Stat. § 19.35(1)(i).

**Caution:** Certain substantive statutes, such as those concerning student records and health records, may restrict record access to specified persons. When records of that nature are the subject of a public records request, the records custodian should confirm before releasing the records that the requester is someone statutorily authorized to obtain the requested records.<sup>79</sup>

**Caution:** The requester's identity may become relevant in the determination of whether there is a safety concern that outweighs the presumption of disclosure.<sup>80</sup>

## Purpose

The requester does not need to state the purpose of the request.<sup>81</sup>

- The Wisconsin Supreme Court, however, has found that the purpose of the request can be relevant in the balancing test. For example, the identity of the requestor and the political nature of the request weighed against disclosure when the requestor was the Democratic Party of Wisconsin and the request was submitted during a contested election.<sup>82</sup>

## Reasonable Specificity

The request must be reasonably specific as to the subject matter and length of time involved.<sup>83</sup>

- The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request.<sup>84</sup>
- The public records law will not be interpreted to impose such a burden upon a records custodian that normal functioning of the office would be severely impaired.<sup>85</sup>
- A records custodian should not have to guess at what records a requester desires.<sup>86</sup>
- A records custodian may not deny a request solely because the records custodian believes that the request could be narrowed.<sup>87</sup>
- The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited.<sup>88</sup>

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<sup>79</sup> See Wis. Stat. § 19.35(1)(i) for other limited circumstances in which a requester may be required to show identification.

<sup>80</sup> *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, ¶¶ 16–17, 354 Wis. 2d 471, 849 N.W.2d 894 (requester's identity as person with history of violence towards subject of request was relevant to inquiry into disclosure).

<sup>81</sup> Wis. Stat. § 19.35(1)(h), (i).

<sup>82</sup> *Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584 (petition for mandamus suggested a partisan purpose underlying the request).

<sup>83</sup> Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212–13, 565 N.W.2d 187 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific).

<sup>84</sup> *Schopper*, 210 Wis. 2d at 213; *Gehl*, 2007 WI App 238, ¶ 17.

<sup>85</sup> *Schopper*, 210 Wis. 2d at 213.

<sup>86</sup> *Seifert*, 2007 WI App 207, ¶ 42.

<sup>87</sup> *Gehl*, 2007 WI App 238, ¶ 20.

<sup>88</sup> *Id.* ¶ 23.

- At some point, an overly broad request becomes sufficiently excessive to warrant rejection pursuant to Wis. Stat. § 19.35(1)(h).<sup>89</sup>
- The public records law does not impose unlimited burdens on authorities and records custodians.<sup>90</sup>
- A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request. These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed. Records custodians making these courtesy contacts should take care not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the public records law.

## Format

- "Magic words" are not required. A request which reasonably describes the information or record requested is sufficient.<sup>91</sup>
- A request, reasonably construed, triggers the statutory requirement to respond. For example, a request made under the "Freedom of Information Act" should be interpreted as being made under the Wisconsin public records law.<sup>92</sup>
- A request is sufficient if it is directed at an authority and reasonably describes the records or information requested.<sup>93</sup>
- No specific form is permitted to be required by the public records law.

## Ongoing Requests

"Continuing" requests are not contemplated by the public records law. The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made.<sup>94</sup> The Attorney General has long interpreted this status as not requiring a record custodian to honor prospective continuing requests for records.<sup>95</sup>

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<sup>89</sup> *Gehl*, 2007 WI App 238, ¶ 24.

<sup>90</sup> *Id.* ¶ 23 (request too burdensome when it would have required production of voluminous records relating to virtually all county zoning matters over a two-year period, without regard to the parties involved or whether the matters implicated requester's interests in any way).

<sup>91</sup> Wis. Stat. § 19.35(1)(h).

<sup>92</sup> See *ECO, Inc.*, 2002 WI App 302, ¶ 23.

<sup>93</sup> *Seifert*, 2007 WI App 207, ¶ 39 (request for records created during investigation or relate to disposition of investigation not construed to include billing records of attorneys involved in investigation).

<sup>94</sup> 73 *Op. Att'y Gen.* 37, 44 (1984).

<sup>95</sup> *Id.*

## Requests Are Records

Public records requests received by an authority are themselves “records” for purposes of the public records law.<sup>96</sup>

## THE RESPONSE TO THE REQUEST

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### Mandatory

The records custodian must respond to a public records request.<sup>97</sup>

### Timing

Response must be provided “as soon as practicable and without delay.”<sup>98</sup>

- The public records law does not require a response within any specific date and time, such as “two weeks” or “48 hours.”<sup>99</sup>
- DOJ policy is that 10 working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location, review, or redaction of many documents, a reasonable time for responding may be longer.
- An authority is not obligated to respond within a timeframe unilaterally identified by a requester, such as: “I will consider my request denied if no response is received by Friday and will seek all available legal relief.” To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.
- What constitutes a reasonable time for a response to any specific request depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and related considerations. Whether an authority is acting with reasonable diligence in responding to a particular request will depend on the totality of circumstances surrounding that request.<sup>100</sup>
- Requests for public records should be given high priority.
- Compliance at some unspecified future time is not authorized by the public records law. The records custodian has two choices: comply or deny.<sup>101</sup>

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<sup>96</sup> *Nichols*, 199 Wis. 2d at 275.

<sup>97</sup> *ECO, Inc.*, 2002 WI App 302, ¶ 24.

<sup>98</sup> Wis. Stat. § 19.35(4)(a).

<sup>99</sup> See *Journal Times v. City of Racine Bd. of Police & Fire Comm’rs*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563.

<sup>100</sup> *WIREdata II*, 2008 WI 69, ¶ 56.

<sup>101</sup> *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457–58, 555 N.W.2d 140 (Ct. App. 1996).

- An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request.<sup>102</sup>
- An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a \$1,000.00 forfeiture.<sup>103</sup> See Enforcement and Penalties, below.

## Format

If the request is in writing, a denial or partial denial of access also must be in writing.<sup>104</sup>

## Content of Denials

Reasons for denial must be *specific* and *sufficient*.<sup>105</sup>

- A records custodian need not provide facts supporting the reasons it identifies for denying a public records request, but must provide specific reasons for the denial.<sup>106</sup>
- Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
  - If confidentiality of requested records is guaranteed by statute, citation to that statute is sufficient.
  - If further discussion is needed, a records custodian's denial of access to a public record must be accompanied by a statement of the specific public policy reasons for refusal.<sup>107</sup>
    - The records custodian must give a public policy reason why the record warrants confidentiality, but need not provide a detailed analysis of the record and why public policy directs that it be withheld.<sup>108</sup>
    - The specificity requirement is not met by mere citation to the open meetings exemption statute, or bald assertion that release is not in the public interest.<sup>109</sup> For further information about how public policies underlying open meetings law exemptions may be considered in the public records balancing test, see Analyzing the Request, *Step Four*, below.

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<sup>102</sup> *WIREData II*, 2008 WI 69, ¶ 56.

<sup>103</sup> Wis. Stat. § 19.37.

<sup>104</sup> Wis. Stat. § 19.35(4)(b).

<sup>105</sup> *Cf. Hempel*, 2005 WI 120, ¶¶ 25–26.

<sup>106</sup> *Id.* ¶ 79.

<sup>107</sup> *Chvala v. Bubolz*, 204 Wis. 2d 82, 86–87, 552 N.W.2d 892 (Ct. App. 1996).

<sup>108</sup> *Portage Daily Register v. Columbia Cty. Sheriff's Dep't*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, 746 N.W.2d 525.

<sup>109</sup> *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772 (Ct. App. 1988). *But see State ex rel. Blum v. Bd. of Educ. of Johnson Creek*, 209 Wis. 2d 377, 386–88, 565 N.W.2d 140 (Ct. App. 1997) (failure to cite statutory section that warrants withholding requested records does not mandate that court order access).

- Need to restrict access still must exist at the time the request is made for the record. Reason to close a meeting under Wis. Stat. § 19.85 is not sufficient reason alone to subsequently deny access to a record of the meeting.<sup>110</sup>
- The purpose of the specificity requirement is to give adequate notice of the basis for denial, and to ensure that the records custodian has exercised judgment.<sup>111</sup>
- The specificity requirement provides a means of preventing records custodians from arbitrarily denying access to public records without weighing the relative harm of non-disclosure against the public interest in disclosure.<sup>112</sup>
- The sufficiency requirement provides the requester with sufficient notice of the reasons for denial to enable him or her to prepare a challenge, and provides a basis for review in the event of a court action.<sup>113</sup>
- An offer of compliance, but conditioned on unauthorized costs and terms, constitutes a denial.<sup>114</sup>
- If no responsive records exist, the authority should say so in its response. An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test. Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as “social security numbers” or “purely personal e-mails sent or received by employees that evince no violation of law or policy.”
- Denial of a written request must inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General.<sup>115</sup>
- The adequacy of a custodian’s asserted reasons for withholding requested records, or redacting portions of the records before release, may be challenged by filing a court action called a petition for writ of mandamus. For more information about filing a mandamus action see Enforcement and Penalties, Mandamus, below.
- If denial of a public records request is challenged in a mandamus proceeding, the court will examine the sufficiency of the reasons stated for denying the request. On mandamus review, custodians who are lawmakers are not entitled to a heightened level of deference to their application of the balancing test.<sup>116</sup>
  - On review, it is not the court’s role to hypothesize or consider reasons not asserted by the records custodian’s response. If the custodian fails to state sufficient reasons for denying

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<sup>110</sup> Wis. Stat. § 19.35(1)(a).

<sup>111</sup> *Journal/Sentinel*, 145 Wis. 2d at 824.

<sup>112</sup> *Portage Daily Register*, 2008 WI App 30, ¶ 14.

<sup>113</sup> *Id.*

<sup>114</sup> *WIREData, Inc. v. Vill. of Sussex (“WIREData I”)*, 2007 WI App 22, ¶ 57, 298 Wis. 2d 743, 729 N.W.2d 757.

<sup>115</sup> Wis. Stat. § 19.35(4)(b).

<sup>116</sup> *MacIver Inst.*, 2014 WI App 49, ¶ 15.

the request, the court will issue a writ of mandamus compelling disclosure of the requested records.<sup>117</sup>

- The reviewing court is free to evaluate the strength of the records custodian’s reasoning, in the absence of facts. But factual support for the records custodian’s reasoning in the statement of denial likely will strengthen the custodian’s case before the reviewing court.<sup>118</sup> A reviewing court may examine requested records *in camera* on mandamus, but is not required to do so. *In camera* review is not necessary when a custodian identifies policy reasons of sufficient specificity for nondisclosure, and those reasons override the presumption in favor of disclosure. In *Ardell*, for example, the authority identified a domestic abuse injunction against the requester and his subsequent conviction for violating that injunction as reasons for denying a request for records about an employee who had obtained the injunction against the requester. The facts were undisputed, eliminating any need to speculate as to how the requester would use the requested information to harm the employee. The requester’s violent history clearly indicated harmful intent inconsistent with the purpose of the public records law.<sup>119</sup>

## Redaction

If part of the record is disclosable, that part must be disclosed.<sup>120</sup>

- An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome.<sup>121</sup>
- However, an authority does not have to extract information from existing records and compile it in a new format.<sup>122</sup>

## Motive and Context

A requester need not state or provide a reason for his or her request.<sup>123</sup> When performing the balancing test described below in Analyzing the Request, *Step Four*, however, a record custodian “almost inevitably must evaluate context to some degree.”<sup>124</sup>

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<sup>117</sup> *Osborn v. Bd. of Regents of Univ. Wis. Sys.*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158; accord *Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967) (court may order mandamus even if sound, but unstated, reasons exist or can be conceived of by the court); *Kroeplin v. Wis. Dep’t of Nat. Res.*, 2006 WI App 227, ¶ 45, 297 Wis. 2d 254, 725 N.W.2d 286; cf. *Blum*, 209 Wis. 2d at 388–91 (an authority’s failure to cite specific statutory exemption justifying nondisclosure does not preclude the court from considering statutory exemption).

<sup>118</sup> *Hempel*, 2005 WI 120, ¶ 80; see *Ardell*, 2014 WI App 66, ¶¶ 18–19.

<sup>119</sup> Compare *MacIver Inst.*, 2014 WI App 49, ¶ 26 (“While Erpenbach correctly asserts that the *possibility* of threats, harassment or reprisals alone is a legitimate consideration for a custodian, the public interest weight given to such a consideration increases or decreases depending on the likelihood of threats, harassment or reprisals actually occurring.”). See also *Lakeland Times v. Lakeland Union High Sch.*, No. 2014AP95, 2014 WL 4548127, ¶¶ 42–43 (Wis. Ct. App. Sept. 16, 2014) (unpublished) (*in camera* review not necessary when a requested record falls within a statutory or common law exception to the public records law).

<sup>120</sup> Wis. Stat. § 19.36(6).

<sup>121</sup> *Osborn*, 2002 WI 83, ¶ 46.

<sup>122</sup> Wis. Stat. § 19.35(1)(L); *WIREData I*, 2007 WI App 22, ¶ 36.

<sup>123</sup> Wis. Stat. § 19.35(1)(i).

<sup>124</sup> *Hempel*, 2005 WI 120, ¶ 66; see also *Ardell*, 2014 WI App 66, ¶ 17 (requester with history of violence toward subject of request cannot use open records law to continue his course of intimidation and harassment toward subject).

## Obligation to Preserve Responsive Records

When a public records request is made, the authority is obligated to preserve responsive records for certain periods of time.

- After receiving a request for inspection or copying of a record, the authority may not destroy the record until after the request is granted or until at least sixty days after the request is denied (ninety days if the requester is a committed or incarcerated person).<sup>125</sup> These time periods exclude Saturdays, Sundays, and legal holidays.<sup>126</sup>
- If the authority receives written notice that a mandamus action relating to a record has been commenced under Wis. Stat. § 19.37 (an action to enforce the public records law), the record may not be destroyed until after the order of the court relating to that record is issued and the deadline for appealing that order has passed.<sup>127</sup>
- If the court order in a mandamus action is appealed, the record may not be destroyed until the court order resolving the appeal is issued.<sup>128</sup>
- If the court orders production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying has been granted.<sup>129</sup>
- An authority or custodian does not violate Wis. Stat. § 19.35(5) by destroying an identical copy of an otherwise available record.<sup>130</sup>

## Responses Are Records

Responses to public records requests are themselves “records” for purposes of the public records law.<sup>131</sup>

## Access to Information vs. Participation in Electronic Forum

The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself.<sup>132</sup>

## Certain Shared Law Enforcement Records

See Key Definitions, Legal Custodian, above, for special rules governing response to requests for certain shared law enforcement records.

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<sup>125</sup> Wis. Stat. § 19.35(5).

<sup>126</sup> See Wis. Stat. § 19.345.

<sup>127</sup> Wis. Stat. § 19.35(5).

<sup>128</sup> Wis. Stat. § 19.35(5).

<sup>129</sup> Wis. Stat. § 19.35(5).

<sup>130</sup> *Stone*, 2007 WI App 223, ¶ 20.

<sup>131</sup> *Nichols*, 199 Wis. 2d at 275.

<sup>132</sup> OAG I-06-09, at 3–4.

## ANALYZING THE REQUEST

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### Access Presumed

The public records law presumes complete public access to public records, but there are some restrictions and exceptions.<sup>133</sup>

- Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by balancing test.<sup>134</sup>
- If neither a statute nor case law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This “balancing test,” described more fully in *Analyzing the Request, Step Four*, below, determines whether the presumption of openness is overcome by another public policy concern.<sup>135</sup>
- Unless a statutory or court-created exception makes a record confidential, each public records request requires a fact-specific analysis. “The custodian, mindful of the strong presumption of openness, must perform the [public] records analysis on a case-by-case basis.”<sup>136</sup>
- The legislature has entrusted records custodians with substantial discretion.<sup>137</sup>
- However, an authority or a records custodian cannot unilaterally implement a policy creating a “blanket exemption” from the public records law.<sup>138</sup>

**Caution:** Wisconsin Stat. § 19.35(1)(am) gives a person greater rights of access than the general public to records containing personally identifiable information about that person.<sup>139</sup>

**Caution:** An agreement to keep certain records confidential will not necessarily override disclosure requirements of the public records law.<sup>140</sup>

### Suggested Four-Step Approach

Additional information about each step is explained below.

- *Step One:* Is there such a record?
  - If yes, proceed to Step Two.
  - If no, analysis stops—no record access.

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<sup>133</sup> Wis. Stat. § 19.31; *Youmans*, 28 Wis. 2d at 683.

<sup>134</sup> *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

<sup>135</sup> *Hempel*, 2005 WI 120, ¶ 4.

<sup>136</sup> *Id.* ¶ 62.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* ¶ 69.

<sup>139</sup> See *Analyzing the Request, Special Issues*, below.

<sup>140</sup> See *Analyzing the Request, Special Issues*, below.

- *Step Two*: Is the requester entitled to access the record pursuant to statute or court decision?
  - If yes, record access is permitted.
  - If no, proceed to Step Three.
- *Step Three*: Is the requester prohibited from accessing the record pursuant to statute or court decision?
  - If yes, analysis stops—no record access.
  - If no, proceed to Step Four.
- *Step Four*: Does the balancing test weigh in favor of prohibiting access to the record?
  - If yes, analysis stops—no record access.
  - If no, record access is permitted.

### ***Step One: Is There Such a Record?***

- The public records law provides access to existing records maintained by authorities.
- “[T]he public records law does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.”<sup>141</sup>
- An authority is not required to create a new record by extracting and compiling information from existing records in a new format.<sup>142</sup>
- Whether a record should have existed under state open meetings law at the time of the request is a question for open meetings law, not public records law.<sup>143</sup>
- An authority is not required to tell a requester that a record does not exist even if “it might be a better course to inform a requester that no record exists.”<sup>144</sup>

However, if no responsive record exists, the records custodian should inform the requester.<sup>145</sup>

- The purpose of the public records law is to provide access to recorded information in records. Granting access to just one of two or more identical records fulfills this purpose.<sup>146</sup>

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<sup>141</sup> *Journal Times*, 2015 WI 56, ¶ 55 (citation omitted); see also *State ex rel. Zimgrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988).

<sup>142</sup> See Wis. Stat. § 19.35(1)(L); see also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

<sup>143</sup> *Journal Times*, 2015 WI 56, ¶¶ 7–8.

<sup>144</sup> *Id.* ¶ 102.

<sup>145</sup> Cf. *State ex rel. Zimgrabe*, 146 Wis. 2d 629.

<sup>146</sup> *Stone*, 2007 WI App 223, ¶ 20.

## Step Two: Is the Requester Entitled to Access the Record Pursuant to Statute or Court Decision?

- By statute expressly requiring access.<sup>147</sup> For example:
  - Uniform traffic accident reports.<sup>148</sup>
  - Books and papers that are “required to be kept” by the sheriff, clerk of circuit court, register of deeds, county treasurer, register of probate, county clerk, and county surveyor.<sup>149</sup>
    - The burden is on the requester to show that the requested record is one that is “required to be kept.”<sup>150</sup>
    - **Caution:** Even statutory rights to access that appear absolute can be limited if another statute allows the records to be sealed, if disclosure infringes on a constitutional right, or if the administration of justice requires limiting access to judicial records.<sup>151</sup>
- By court decision expressly requiring access. For example:
  - Daily arrest logs or police “blotters” at police departments.<sup>152</sup>
  - In these cases, the courts concluded that case-by-case determination of public access would impose excessive and unwarranted administrative burdens.

## Step Three: Is the Requester Prohibited from Accessing the Record Pursuant to Statute or Court Decision?

- Wisconsin Stat. § 19.36(2)–(11), (13) lists records specifically exempt from disclosure pursuant to the public records statute itself. Other state and federal statutes, and court decisions, also require that certain types of records remain confidential.
  - “Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure [under the public records law].”<sup>153</sup>
  - Many of these exceptions are discussed elsewhere in this outline, but some key examples are set forth below.

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<sup>147</sup> *Youmans*, 28 Wis. 2d at 685.

<sup>148</sup> Wis. Stat. § 346.70(4)(f); see also *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 290–91, 477 N.W.2d 340 (Ct. App. 1991).

<sup>149</sup> Wis. Stat. § 59.20(3)(a).

<sup>150</sup> See *State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 110, 483 N.W.2d 238 (Ct. App. 1992) (discusses when records are “required to be kept” under predecessor statute, Wis. Stat. § 59.14); see also *State ex rel. Journal Co. v. Cty. Court for Racine Cty.*, 43 Wis. 2d 297, 307, 168 N.W.2d 836 (1969) (statute compels court clerk to disclose memorandum decision impounded by judge because it is a paper “required to be kept in his office”).

<sup>151</sup> See *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 554–56, 334 N.W.2d 252 (1983); *Schultz*, 168 Wis. 2d at 108; *In re John Doe Proceeding*, 2003 WI 30, ¶¶ 59–72, 260 Wis. 2d 653, 660 N.W.2d 260; *State v. Stanley*, 2012 WI App 42, ¶¶ 60–64, 340 Wis. 2d 663, 814 N.W.2d 867; *C.L. v. Edson*, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

<sup>152</sup> *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179 (1979).

<sup>153</sup> Wis. Stat. § 19.36(1); *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 3, 373 Wis. 2d 348, 891 N.W.2d 803 (any record specifically exempt from disclosure under federal law is also exempt under Wisconsin law; the public interest balancing test does not apply to such records).

- An agency cannot create an exception to Wis. Stat. §§ 19.31 and 19.35 by adopting an administrative rule inconsistent with the public records law.<sup>154</sup>
- Even statutory exemptions not asserted by custodian prior to litigation may be considered by a court during a mandamus action.<sup>155</sup>
- Legislative ratification of a collective bargaining agreement, without enacting companion legislation expressly amending the public records law, does not create an exception to the public records law.<sup>156</sup> The public's rights under the public records law may not be contracted away through the collective bargaining process.<sup>157</sup>
- **Caution:** Statutory exemptions are narrowly construed.<sup>158</sup>
- Exempt from disclosure by the public records statutes. For example:
  - Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an employee.<sup>159</sup>
  - Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an individual who holds a local public office or a state public office.

*Exception:* The home address of an individual holding an elective public office or the home address of an individual who, as a condition of employment, is required to live in a specific location may be disclosed.<sup>160</sup>

- Information related to a current investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation.<sup>161</sup>
  - **Caution:** This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.<sup>162</sup>
  - An “investigation” reaches its final “disposition” when the public employer has completed the investigation, and acts to impose discipline. A post-investigation grievance filed pursuant to a collective bargaining agreement does not extend the “investigation” for purposes of the statute.<sup>163</sup>

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<sup>154</sup> *Chvala*, 204 Wis. 2d at 91.

<sup>155</sup> *Journal Times*, 2015 WI 56, ¶ 69.

<sup>156</sup> *Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 3, 319 Wis. 2d 439, 768 N.W.2d 700.

<sup>157</sup> *Id.* ¶ 53.

<sup>158</sup> *Chvala*, 204 Wis. 2d at 88; *Hathaway*, 116 Wis. 2d at 397.

<sup>159</sup> Wis. Stat. § 19.36(10)(a).

<sup>160</sup> Wis. Stat. § 19.36(11).

<sup>161</sup> Wis. Stat. § 19.36(10)(b).

<sup>162</sup> See Wis. Stat. § 19.32(1bg).

<sup>163</sup> See *Local 2489, AFSCME, AFL-CIO v. Rock Cty.*, 2004 WI App 210, ¶¶ 12, 15, 277 Wis. 2d 208, 689 N.W.2d 644; *Zellner I*, 2007 WI 53, ¶¶ 33–38.

- This exception codifies common law standards and continues the tradition of keeping records related to misconduct investigations closed while those investigations are ongoing, but providing public oversight over the investigations after they have concluded.<sup>164</sup>
- Information pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited.<sup>165</sup>
  - **Caution:** This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.<sup>166</sup>
  - See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are or may be closed to the public).
- Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.<sup>167</sup>
  - **Caution:** This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.<sup>168</sup>
  - Wisconsin Stat. § 19.36(10)(d) does not apply to records of investigations into alleged employee misconduct, and does not create a blanket exemption for disciplinary and misconduct investigation records.<sup>169</sup>
  - See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are closed to the public).
- Investigative information obtained for law enforcement purposes, when required by federal law or regulation to be kept confidential, or when confidentiality is required as a condition to receipt of state aids.<sup>170</sup>
- Computer programs (but the material input and the material produced as the product of a computer program is subject to the right of inspection and copying).<sup>171</sup>

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<sup>164</sup> *Kroepin*, 2006 WI App 227, ¶ 31; see also *Hagen v. Bd. of Regents of Univ. of Wis. Sys.*, 2018 WI App 43, ¶¶ 6–9, 383 Wis. 2d 567, 916 N.W.2d 198.

<sup>165</sup> Wis. Stat. § 19.36(10)(c).

<sup>166</sup> See Wis. Stat. § 19.32(1bg).

<sup>167</sup> Wis. Stat. § 19.36(10)(d); see also *Lakeland Times*, No. 2014AP95, ¶¶ 22–37 (report of comments about job applicant obtained from former employer is a record used for staff management planning because it “relate[d] to” job performance and reputation of an employee; thus, it was exempt from disclosure pursuant to Wis. Stat. § 19.36(10)(d)).

<sup>168</sup> See Wis. Stat. § 19.32(1bg).

<sup>169</sup> *Kroepin*, 2006 WI App 227, ¶¶ 20, 32.

<sup>170</sup> Wis. Stat. § 19.36(2).

<sup>171</sup> Wis. Stat. § 19.36(4).

- Trade secrets.<sup>172</sup>
- Identities of certain applicants for public positions.<sup>173</sup>
- Identities of law enforcement informants.<sup>174</sup>
- Plans or specifications for state buildings.<sup>175</sup>
- An individual's account or customer numbers with a financial institution.<sup>176</sup>
- Exempt from disclosure by other state statutes (unless authorized by an exception or other provision in the statutes themselves). For example:
  - Pupil records.<sup>177</sup>
  - Patient health care records.<sup>178</sup>
    - "Patient health care records" means, with certain statutory exceptions, all records related to the health of a patient prepared by or under the supervision of a health care provider; and records made by ambulance service providers, EMTs, or first responders in administering emergency care, handling, and transporting sick, disabled, or injured individuals.<sup>179</sup>
    - Various statutory provisions allow disclosure to specified persons with or without the patient's consent.<sup>180</sup>
    - Wisconsin Stat. § 256.15(12)(b) provides a limited disclosure exception for ambulance service providers who also are "authorities" under the public records law: information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call, dispatch and response times; reason for the dispatch; location to which the ambulance was dispatched; destination of any transport by the ambulance; and name, age, and gender of the patient. Disclosure of this information is subject to the usual case-by-case, totality of circumstances public records balancing test.<sup>181</sup>

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<sup>172</sup> Wis. Stat. § 19.36(5); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 83.

<sup>173</sup> See Wis. Stat. § 19.36(7) for further information.

<sup>174</sup> See Wis. Stat. § 19.36(8) and *Analyzing the Record, Special Issues*, below, for further information.

<sup>175</sup> Wis. Stat. § 19.36(9).

<sup>176</sup> Wis. Stat. § 19.36(13).

<sup>177</sup> Wis. Stat. § 118.125(1)(d).

<sup>178</sup> Wis. Stat. § 146.82.

<sup>179</sup> Wis. Stat. §§ 146.81(4), 256.15(2)(a).

<sup>180</sup> See Wis. Stat. § 146.82.

<sup>181</sup> 78 Op. Att'y Gen. 71, 76 (1989); OAG I-03-07, at 6-8 (Sept. 27, 2007).

- Mental health registration and treatment records.<sup>182</sup> These include duplicate copies of statements of emergency detention in the possession of a police department, absent written informed consent or a court order for disclosure.<sup>183</sup>
- Law enforcement, court, and agency records involving children and juveniles.
  - Law enforcement officers' records of children and juveniles.<sup>184</sup>
    - ◇ Exceptions include news reporters who wish to obtain information for the purpose of reporting news without revealing the identity of the child or juvenile.<sup>185</sup>
    - ◇ Certain exceptions also apply to motor vehicle operation records and operating privilege records.<sup>186</sup>
    - ◇ See Wis. Stat. §§ 48.396(1)–(1d), (5), and (6), and 938.396(1)–(1j) and (10) for other exceptions.
  - Records of courts exercising jurisdiction over children and juveniles pursuant to Wis. Stat. chs. 48 and 938.<sup>187</sup>
    - ◇ Exception for review of chapter 48 court records by a court of criminal jurisdiction for purpose of conducting or preparing for a proceeding in that court, and for review by a district attorney for the purpose of performing official duties in a court of criminal jurisdiction.<sup>188</sup>
    - ◇ Exception for information contained in the electronic records of a chapter 48 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; or the Wisconsin Department of Children and Families.<sup>189</sup> Exception excludes information relating to the physical or mental health of an individual or that deals with any other sensitive personal matter of an individual.<sup>190</sup>

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<sup>182</sup> Wis. Stat. § 51.30(1)(am), (1)(b), (4).

<sup>183</sup> *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.

<sup>184</sup> Wis. Stat. §§ 48.396(1)–(1d), (5)–(6), 938.396(1), (1j), (10); *see also* Analyzing the Record, Special Issues, below.

<sup>185</sup> Wis. Stat. §§ 48.396(1), 938.396(1)(b)1.

<sup>186</sup> Wis. Stat. § 938.396(3)–(4).

<sup>187</sup> Wis. Stat. §§ 48.396(2), (6), 938.396(2), (2g), (2m), (10).

<sup>188</sup> Wis. Stat. § 48.396(2)(e).

<sup>189</sup> Wis. Stat. § 48.396(3)(b)1.

<sup>190</sup> Wis. Stat. § 48.396(3)(b)2.

- ◇ Exception for review of chapter 938 court records by law enforcement agency for the purpose of investigating a crime or alleged criminal activity that may result in a court exercising certain jurisdiction under certain provisions of chapter 938.<sup>191</sup>
- ◇ Exception for review of chapter 938 court records upon request of a court of criminal jurisdiction to review court records for the purpose of conducting or preparing for a proceeding in that court, upon request of a district attorney to review court records for the purpose of performing official duties in a court of criminal jurisdiction, or upon request of a court of civil jurisdiction or the attorney for a party to a proceeding in that court for the purpose of impeaching a witness.<sup>192</sup>
- ◇ Exception for information contained in the electronic records of a chapter 938 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; a law enforcement agency; the Wisconsin Department of Children and Families; or the Wisconsin Department of Corrections.<sup>193</sup> Exception excludes information relating to the physical or mental health of an individual or that deals with any other sensitive personal matter of an individual.<sup>194</sup>
- ◇ Certain exceptions apply to motor vehicle operation records and operating privilege records.<sup>195</sup>
- ◇ See Wis. Stat. §§ 48.396(2) and 938.396(2g)–(2m) for other exceptions.
- Agency records regarding children in the agency’s care or legal custody pursuant to Wis. Stat. ch. 48, the Children’s Code.<sup>196</sup> Agency records regarding a juvenile who is or was in the agency’s care or legal custody pursuant to Wis. Stat. ch. 938, the Juvenile Justice Code.<sup>197</sup> See Analyzing the Request, Special Issues, Children and Juveniles, below. For other exceptions see Wis. Stat. §§ 48.78(2) and 938.78(2) and (3).
- Addresses of persons participating in an address confidentiality program such as “Safe At Home” under Wis. Stat. § 165.68(4)(d), may not be disclosed except by DOJ pursuant to court order.

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<sup>191</sup> Wis. Stat. § 938.396(2g)(c).

<sup>192</sup> Wis. Stat. § 938.396(2g)(d).

<sup>193</sup> Wis. Stat. § 938.396(2m)(b)1.

<sup>194</sup> Wis. Stat. § 938.396(2m)(b)2.

<sup>195</sup> Wis. Stat. § 938.396(3)–(4).

<sup>196</sup> Wis. Stat. § 48.78.

<sup>197</sup> Wis. Stat. § 938.78.

- Dozens of additional exemptions are embedded in substantive provisions of the Wisconsin Statutes. A comprehensive list of those exemptions is beyond the scope of this outline, but some examples include:
  - Plans and specifications of state-owned or state-leased buildings.<sup>198</sup>
  - Information which likely would result in the disturbance of an archaeological site.<sup>199</sup>
  - Estate tax returns and related documents.<sup>200</sup>
  - Information concerning livestock infected with paratuberculosis.<sup>201</sup>
  - Records of a publicly supported library or library system indicating the identity of any individual who borrows or uses the library's documents, materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in administration of the library or library system, persons authorized by the individual to inspect the records, custodial parents or guardians of children under the age of 16, specified other libraries, or to law enforcement officers under limited circumstances pursuant to Wis. Stat. § 43.30(1m)–(5).
- Records custodians, officers, and employees of public records authorities should learn the exemption statutes applicable to their own agencies.
- Additional exemptions can be located by reviewing the index to the Wisconsin Statutes under both “public records” and the specific subject.
- Exempt from disclosure by federal statutes (unless authorized by an exception or other provision in the statutes themselves). For example:
  - Social security numbers obtained or maintained by an authority pursuant to a provision of law enacted after October 1, 1990.<sup>202</sup>
  - Personally identifiable information contained in student records (applicable to school districts receiving federal funds, with certain exceptions).<sup>203</sup>

*But note:* Students and parents (unless parental rights have been legally revoked) are allowed access to the student's own records and may allow access to third parties by written consent.<sup>204</sup>

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<sup>198</sup> Wis. Stat. § 16.851.

<sup>199</sup> Wis. Stat. § 44.02(23).

<sup>200</sup> Wis. Stat. § 72.06.

<sup>201</sup> Wis. Stat. § 95.232.

<sup>202</sup> See 42 U.S.C. § 405(c)(2)(C)(viii)(I).

<sup>203</sup> See the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

<sup>204</sup> *Osborn*, 2002 WI 83, ¶ 27.

- Many patient health care records, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).<sup>205</sup>
- The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, provides that “No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section.”<sup>206</sup> Further, the Act provides that “information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply . . . .”<sup>207</sup>
- Information pertaining to individuals detained in a state or local facility.<sup>208</sup>
- Personal information in state motor vehicle (“DMV”) records.<sup>209</sup>
  - Under the federal Driver’s Privacy Protection Act (DPPA), “personal information” or “highly restricted personal information” obtained from DMV records may not be disclosed, except when permissible by state law (the “state law exception”), or when permissible “[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions” (the “agency functions” exception), among other DPPA exceptions.<sup>210</sup>
  - In *New Richmond News v. City of New Richmond*, the Wisconsin Court of Appeals ruled that the “state law exception” permits authorities to release traffic *accident* reports unredacted, because Wisconsin law specifically mandates that authorities provide the public with access to accident reports.<sup>211</sup> In contrast, the court ruled that responding to public records requests was not an “agency function” for purposes of the DPPA, such that authorities may not release unredacted *incident* reports containing personal information unless a different DPPA exception applies.<sup>212</sup> Finally, the court ruled that information obtained from another source, but verified using DMV records, is not subject to the DPPA.<sup>213</sup> Depending on the totality of circumstances related to a particular public records request, non-DPPA statutory, common law, or balancing test considerations may also warrant redaction of certain personal information pursuant to the usual public records law analysis.
- Exempt from disclosure by state court decisions. “Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.”<sup>214</sup> For example:

<sup>205</sup> See 42 U.S.C. § 1320d-2, 45 C.F.R. pts. 160 and 164.

<sup>206</sup> 50 U.S.C. § 1861(d)(1).

<sup>207</sup> 6 U.S.C. § 482.

<sup>208</sup> *Voces de la Frontera*, 2017 WI 16, ¶ 3 (immigration retainer forms, I-247, contain only such information and are precluded from being released under Wisconsin public records law).

<sup>209</sup> See the Driver’s Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721–25.

<sup>210</sup> 18 U.S.C. § 2721(b)(14) (the “state law” exception); 18 U.S.C. § 2721(b)(1) (the “agency functions” exception).

<sup>211</sup> *New Richmond News v. City of New Richmond*, 2016 WI App 43, ¶¶ 34–36, 370 Wis. 2d 75, 881 N.W.2d 339 (citing Wis. Stat. § 346.70(4)(f)).

<sup>212</sup> *Id.* ¶¶ 43–49.

<sup>213</sup> *Id.* ¶ 51.

<sup>214</sup> Wis. Stat. § 19.35(1)(a).

- District attorney prosecution files.<sup>215</sup>
  - **Caution:** When a requester asked to inspect all public records requests received by the district attorney’s office since a certain date, the Wisconsin Supreme Court held that *Foust* did not apply. It is the nature of the documents and not their location that determines their status under the public records statute.<sup>216</sup>
  - When a public records request is directed to a law enforcement agency, rather than a district attorney, the *Foust* exception does not apply. The law enforcement agency and the district attorney are separate authorities for purposes of the public records law. If the law enforcement agency has forwarded a copy of its investigative report to the district attorney, the district attorney may deny access to the report in its possession if the district attorney receives a public records request for the report. If the law enforcement agency receives a public records request for a copy of the same report and the report remains in the law enforcement agency’s possession, the law enforcement agency may not rely on *Foust* to deny access to the report. The law enforcement agency instead must perform the usual public records analysis.<sup>217</sup> For further information about requests to law enforcement agencies see Analyzing the Request, Special Issues, Law Enforcement Records, below.
  - Videos of training presentations are exempt from disclosure under *Foust* prosecution file exemption, when the presentations are the “oral equivalent” of a prosecutor’s case file.<sup>218</sup>
  - The public interest in protecting prosecution strategies for online child exploitation cases was sufficient reason for a custodian to deny a request.<sup>219</sup>
- Executive privilege.<sup>220</sup>
- Records rendered confidential by the attorney-client privilege.<sup>221</sup>
- Records consisting of attorney work product, including the material, information, mental impressions, and strategies an attorney compiles in preparation for litigation.<sup>222</sup>
- Purely personal emails sent or received by employees or officers on an authority’s computer system that evince no violation of law or policy.<sup>223</sup>

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<sup>215</sup> See *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991) (“[C]ommon law limitation does exist against access to prosecutor’s files under the public records law.”).

<sup>216</sup> *Nichols*, 199 Wis. 2d at 274.

<sup>217</sup> *Portage Daily Register*, 2008 WI App 30, ¶¶ 15–22.

<sup>218</sup> *Democratic Party of Wis.*, 2016 WI 100, ¶ 27.

<sup>219</sup> *Id.* ¶¶ 16–19, 24.

<sup>220</sup> 63 Op. Att’y Gen. 400, 410-14 (1974) (origins and scope discussed).

<sup>221</sup> See *George*, 169 Wis. 2d at 582; *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782–83, 546 N.W.2d 143 (1996); see also Analyzing the Request, *Step Four*, below.

<sup>222</sup> *Seifert*, 2007 WI App 207, ¶ 28.

<sup>223</sup> *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring).

- The authority—not the employee or officer who sent or received a particular email—is responsible for determining whether an email on its computer system is purely personal, and applying the regular public records analysis to those that are not.
  - The authority’s records custodian therefore should identify and screen all emails claimed to be purely personal, and that evince no violation of law or policy.
  - Whether an email is “purely personal” should be narrowly construed. Any content related to official duties, the affairs of government, and the official acts of the authority’s officers and employees is not purely personal.
  - Some emails may contain some content that is purely personal, such as family news, and other content that relates to official functions and responsibilities. The purely personal content should be redacted; the remaining content should be subject to regular public records analysis.<sup>224</sup>
  - For additional information, see Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010).<sup>225</sup>
- *Note:* There is no blanket exemption for all personnel records of public employees.<sup>226</sup> As discussed above, certain types of personnel records may be exempt from disclosure by specific statutory provisions. The balancing test, in certain circumstances, also may weigh against disclosure of other personnel records.<sup>227</sup>

#### **Step Four: Does the Balancing Test Weigh in Favor of Prohibiting Access to the Record?**

- The balancing test explained.
  - The records custodian must balance the strong *public interest in disclosure of the record against the public interest favoring nondisclosure*.<sup>228</sup>
    - The custodian must identify potential reasons for denial, based on public policy considerations indicating that denying access is or may be appropriate.
    - Those factors must be weighed against public interest in disclosure.
    - Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given.<sup>229</sup>

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<sup>224</sup> See *MacIver Inst.*, 2014 WI App 49, ¶ 19 & n.4 (observing that “[p]ersonal finance or health information” may be subject to redaction as “purely personal” in an email that otherwise is subject to disclosure).

<sup>225</sup> Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010), <https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf>.

<sup>226</sup> *Wis. Newspress*, 199 Wis. 2d at 775–82.

<sup>227</sup> See Analyzing the Request, Special Issues, below.

<sup>228</sup> *Journal Co.*, 43 Wis. 2d at 305.

<sup>229</sup> *Law Offices of Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824–25, 472 N.W.2d 579 (Ct. App. 1991).

- Generally, there are no blanket exemptions from release, and the balancing test must be applied with respect to each individual record.<sup>230</sup>
  - The records custodian must consider all relevant factors to determine whether permitting record access would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing access.<sup>231</sup>
  - The balancing test is a fact-intensive inquiry that must be performed on a case-by-case basis.<sup>232</sup>
  - A records custodian is not expected to examine a public records request “in a vacuum.”<sup>233</sup> The public records law contemplates examination of all relevant factors considered in the context of the particular circumstances.<sup>234</sup>
- In other words, the records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness.<sup>235</sup>

An “exceptional case” exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding the strong presumption favoring disclosure*.<sup>236</sup>
  - The identity of the requester and the purpose of the request are generally *not* part of the balancing test.<sup>237</sup>
  - The *private interest* of a person mentioned or identified in the record is not a proper element of the balancing test, except indirectly.
    - If there is a *public interest* in protecting an individual’s privacy or reputational interest as a general matter (for example, to ensure that citizens will be willing to take jobs as police, fire, or correctional officers), there is a *public interest* favoring the protection of the individual’s privacy interest.<sup>238</sup>
    - Without more, potential for embarrassment is not a sufficient basis for withholding a record.<sup>239</sup>

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<sup>230</sup> *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 56.

<sup>231</sup> Wis. Stat. § 19.35(1)(a).

<sup>232</sup> *Kroepin*, 2006 WI App 227, ¶ 37.

<sup>233</sup> *Seifert*, 2007 WI App 207, ¶ 31.

<sup>234</sup> *Id.*

<sup>235</sup> *Hempel*, 2005 WI 120, ¶ 63.

<sup>236</sup> *Id.*

<sup>237</sup> See *Kraemer Bros., Inc. v. Dane Cty.*, 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999). *But see* *Ardell*, 2014 WI App 66, ¶¶ 16–17 (a requester with documented history of violence towards specific public employee forfeited his right to disclosure of that employee’s employment records by demonstrating intent to hurt her, “and it would be contrary to common sense and public policy to permit him to use the open records law to continue his course of intimidation and harassment.”).

<sup>238</sup> See *Linzmeier*, 2002 WI 84, ¶ 31.

<sup>239</sup> *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 62; see also *MacIver Inst.*, 2014 WI App 49, ¶ 36 (Brown, C.J., concurring) (“[W]hen [citizens] communicate their political views to their legislators, they should be prepared to see those communications with their names attached to them publicized . . .”).

- Existing public availability of the information contained in a record weakens any argument for withholding the same information pursuant to the balancing test.<sup>240</sup>
- Public policies that may be weighed in the balancing test can be identified through their expression in other areas of the law. Relevant public policies also may be practical or common sense reasons applicable in the totality of circumstances presented by a particular public records request. For example:
  - Policies expressed through recognized evidentiary privileges.
    - Wisconsin Stat. ch. 905 enumerates a dozen different evidentiary privileges, such as lawyer-client, health care provider-patient, husband-wife, clergy-penitent, and others.
    - Evidentiary privileges do not by themselves provide sufficient justification for denying access.<sup>241</sup> However, they may be considered to reflect public policies in favor of protecting the confidentiality of certain kinds of information.
    - The balancing test weight accorded to public policies expressed in evidentiary privileges should be greater where other expressions of the same public policy also support denial of access. For example, weight of the physician-patient privilege is reinforced by Wis. Stat. § 146.82 (Wisconsin patient health care records confidentiality statute), HIPAA, and Wis. Admin. Code § Med 10.03 (“unprofessional conduct” includes divulging patient confidences).
    - **Caution:** Unlike the other privileges, the attorney-client privilege (Wis. Stat. § 905.03) does provide sufficient grounds to deny access without resorting to the balancing test.<sup>242</sup>

This is because the attorney-client privilege “is no mere evidentiary rule. It restricts professional conduct.”<sup>243</sup>
  - Wisconsin law does not recognize a deliberative process privilege.<sup>244</sup>
- Policies expressed through exemptions to the open meetings law (Wis. Stat. § 19.85).<sup>245</sup>

<sup>240</sup> *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 61 (union member names sought to be withheld were already publicly available in a staff directory).

<sup>241</sup> See, e.g., 1974 Judicial Council note to Wis. Stat. § 905.09.

<sup>242</sup> *George*, 169 Wis. 2d at 582; *Wis. Newspress*, 199 Wis. 2d at 782–83; see *Analyzing the Request, Step Three*, above.

<sup>243</sup> *Armada Broad., Inc. v. Stirn*, 177 Wis. 2d 272, 279 n.3, 501 N.W.2d 889 (Ct. App. 1993), *rev'd on other grounds*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994); see also SCR 20:1.6(a).

<sup>244</sup> *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶ 60-70, 312 Wis. 2d 1, 754 N.W.2d 439.

<sup>245</sup> *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82; see *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2014 WI App 67, ¶ 9, 354 Wis. 2d 591, 849 N.W.2d 888 (records of a closed meeting, such as motions and votes, may be withheld from disclosure in response to a public records request only if the authority makes a specific demonstration of need to restrict access at the time of the request), *rev'd on other grounds*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563.

- Exemptions to the open meetings law that allow an authority to meet in closed session, “are indicative of public policy” and can be considered as balancing factors favoring non-disclosure.<sup>246</sup>
- **Caution:** If a records custodian relies upon the public policy expressed in an open meetings exception to withhold a record, the custodian must make “a specific demonstration that there was a need to restrict public access *at the time that the request* to inspect or copy the record *was made.*”<sup>247</sup>
  - ◇ A records custodian denying access to records on the basis of public policy expressed by one of the Wis. Stat. § 19.85(1) open meetings exceptions must do more than identify the exception under *which the meeting was closed* and assert that the reasons for *closing* the meeting still exist and therefore justify denying access to the requested records.<sup>248</sup>
  - ◇ The records custodian instead must state specific public policy reasons for the denial, as evidenced by existence of the related open meetings exception.<sup>249</sup>
- Examples of exemptions from the open meetings law:
  - ◇ Quasi-judicial deliberations.<sup>250</sup>
  - ◇ Personnel matters.<sup>251</sup>

In the employment context, reliance on public policies expressed in various Wis. Stat. § 19.85 exceptions has been examined in many cases.<sup>252</sup>
  - ◇ Considering specific applications of probation, extended supervision or parole, or considering strategies for crime detection or prevention.<sup>253</sup>
  - ◇ Public business involving investments, competitive factors, or negotiations.<sup>254</sup>
  - ◇ Consideration or investigation into sensitive or private matters, “which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to.”<sup>255</sup>
  - ◇ Legal advice as to pending or probable litigation.<sup>256</sup>

<sup>246</sup> Wis. Stat. § 19.35(1)(a); 73 Op. Att’y Gen. 20, 22 (1984).

<sup>247</sup> Wis. Stat. § 19.35(1)(a) (emphasis added).

<sup>248</sup> *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459 (Ct. App. 1985).

<sup>249</sup> *Id.*

<sup>250</sup> Wis. Stat. § 19.85(1)(a).

<sup>251</sup> Wis. Stat. § 19.85(1)(b), (c), (f).

<sup>252</sup> See, e.g., *Wis. Newspress*, 199 Wis. 2d at 784-88 (balancing test weighed in favor of disclosure of completed disciplinary investigation); *Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 40-42, 465 N.W.2d 266 (Ct. App. 1990) (same).

<sup>253</sup> Wis. Stat. § 19.85(1)(d).

<sup>254</sup> Wis. Stat. § 19.85(1)(e); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 81 n.18.

<sup>255</sup> See Wis. Stat. § 19.85(1)(f).

<sup>256</sup> Wis. Stat. § 19.85(1)(g).

- ◇ Proper closing of a meeting under one of the Wis. Stat. § 19.85(1) exemptions is not in and of itself sufficient reason to deny access to records considered or distributed during the closed session, or to minutes of the closed session.<sup>257</sup>
- Policies reflected in exceptions to disclosure under the federal Freedom of Information Act, 5 U.S.C. § 552.<sup>258</sup>
- Various other policies that, depending on the circumstances of an individual request, would be relevant in performing the balancing test. For example,
  - Evidence of official cover-up is a potent reason for disclosing records. Citizens have a very strong public interest in being informed about public officials who have been derelict in their duties.<sup>259</sup>
  - Potential loss of morale if public employees' personnel files are readily disclosed weighs against public access.<sup>260</sup>
  - However, there is a public interest in disciplinary actions taken against public officials and employees—especially those employed in law enforcement.<sup>261</sup> The courts repeatedly have recognized the great importance of disclosing disciplinary records of public officials and employees when their conduct violates the law or significant work rules.<sup>262</sup>
  - Potential difficulty attracting quality candidates for public employment if there is a perception that public personnel files are regularly open for review is a public interest in non-disclosure.<sup>263</sup>
  - Potential chilling of candid employee assessment in personnel records also weighs against disclosure.<sup>264</sup>
  - Broadly sweeping, generalized assertions that records must be withheld to protect the safety of public employees are not sufficient. “Nearly all public officials, due to their profiles as agents of the State, have the potential to incur the wrath of disgruntled members of the public, and may be expected to face heightened public scrutiny; that is simply the nature of public employment.”<sup>265</sup> Safety concerns should be particularized when offered to justify withholding or redaction of records. Whether there exists a safety concern sufficient to outweigh the presumption of disclosure is a fact-intensive inquiry to be decided on a case-by-case basis.<sup>266</sup> Statutory provisions such as Wis. Stat. § 19.35(1)(am)2.a. (disclosure of records containing personally

<sup>257</sup> See *Oshkosh Ntw. Co.*, 125 Wis. 2d at 485.

<sup>258</sup> See *Linzmeier*, 2002 WI 84, ¶ 32.

<sup>259</sup> *Hempel*, 2005 WI 120, ¶ 68.

<sup>260</sup> *Id.* ¶ 74.

<sup>261</sup> *Kroepelin*, 2006 WI App 227, ¶ 22.

<sup>262</sup> *Id.* ¶ 28.

<sup>263</sup> *Hempel*, 2005 WI 120, ¶ 75.

<sup>264</sup> *Id.* ¶ 77.

<sup>265</sup> *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 63.

<sup>266</sup> *Ardell*, 2014 WI App 66, ¶ 17.

identifiable information pertaining to requester would endanger an individual's life or safety) and Wis. Stat. § 19.35(1)(am)2.c. (disclosure of records containing personally identifiable information pertaining to requester would endanger safety of correctional officers) may be considered as indicative of public policy recognizing safety concerns properly considered in the balancing test.<sup>267</sup>

- Policies expressed in the Wis. Stat. § 19.35(1)(am) exemptions to disclosure of records containing personally identifiable information.<sup>268</sup>

## Special Issues

- Privacy and reputational interests.
  - Numerous statutes and court decisions recognize the importance of an individual's interest in his or her privacy and reputation as a matter of public policy. For example:
    - Wis. Stat. § 995.50 (recognizing "right of privacy").
    - Wis. Stat. § 19.85(1)(f) (open meetings law exemption, see *Analyzing the Request, Step Four*, above).
    - Wis. Stat. § 230.13 (certain state employee personnel records).
    - *Woznicki v. Erickson*.<sup>269</sup>
  - The privacy statute provides that "[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record."<sup>270</sup>
  - Moreover, the public interest in protecting the privacy and reputational interest of an individual is not equivalent to the individual's personal interest in protecting his or her own character and reputation.<sup>271</sup>
    - The concern is not personal embarrassment and damage to reputation, but whether disclosure would affect any public interest.<sup>272</sup>
    - After an individual has died, the relevant privacy interests are not those of the deceased individual but instead those of the individual's survivors.<sup>273</sup>

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<sup>267</sup> *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 65 n.19; see *MacIver Inst.*, 2014 WI App 49, ¶¶ 23, 26 (taking into consideration whether there was evidence supporting a reasonable probability of threats, harassment or reprisals).

<sup>268</sup> *Seifert*, 2007 WI App 207, ¶¶ 23, 32-34.

<sup>269</sup> *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d 699 (1996), *superseded by statute*, Wis. Stat. §§ 19.356 and 19.36(10)-(11).

<sup>270</sup> Wis. Stat. § 995.50(2)(c).

<sup>271</sup> *Zellner I*, 2007 WI 53, ¶ 50.

<sup>272</sup> *Zellner I*, 2007 WI 53, ¶ 52.

<sup>273</sup> *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (family had privacy interest in preventing disclosure of death scene photographs of deceased family member).

- Privacy-related concerns may outweigh the public interest in disclosure if disclosure would threaten both personal privacy and safety, or if other privacy protections have been established by law (for example, attorney-client privilege).<sup>274</sup>
- The public interest in protecting an individual's reputation is significantly diminished when damaging information about the individual already has been made public.<sup>275</sup>
- In many cases, public interests in confidentiality, privacy, and reputation have been found to outweigh the public interest in disclosure. For example:
  - In *Village of Butler*, the court held that the balance weighed in favor of the public's interest in keeping police personnel records private: "disclosure of the requested records likely would inhibit a reviewer from making candid assessments of their employees in the future . . . [And] opening these records likely would have the effect of inhibiting an officer's desire or ability to testify in court because he or she would face cross-examination as to embarrassing personal matters. A foreseeable result is that fewer qualified people would accept employment in a position where they could expect that their right to privacy regularly would be abridged."<sup>276</sup>
  - In *Kraemer Brothers*, the court held that the privacy interests of employees of private companies contracting with a public entity outweighed the public interest in disclosure.<sup>277</sup>
  - In *Hempel*, the court held that it was appropriate to consider the confidentiality concerns of witnesses and complainants, and the possible chilling effects on potential future witnesses and complainants, when performing the balancing test.<sup>278</sup>
- In many other cases, however, the public interest in disclosure has been found to outweigh any public interest in privacy and reputation. For example:
  - In *Local 2489*, the court held that the balancing test tipped in favor of public access to a completed investigation of public employee wrongdoing.<sup>279</sup>
  - In *Jensen v. School District of Rhinelander*, the court held that the public interest in disclosure of a school superintendent's performance evaluation outweighed his reputational interest because a public official has a lower expectation of employment privacy and because prior media reports had already compromised the superintendent's reputational interest.<sup>280</sup>

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<sup>274</sup> *Kroepin*, 2006 WI App 227, ¶ 46.

<sup>275</sup> *Id.* ¶ 47.

<sup>276</sup> *Vill. of Butler*, 163 Wis. 2d at 831.

<sup>277</sup> *Kraemer Bros.*, 229 Wis. 2d at 92-104.

<sup>278</sup> *Hempel*, 2005 WI 120, ¶¶ 71-73.

<sup>279</sup> *Local 2489*, 2004 WI App 210, ¶¶ 21, 26.

<sup>280</sup> *Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, ¶¶ 22-24, 251 Wis. 2d 676, 642 N.W.2d 638.

- In *State ex rel. Journal/Sentinel, Inc. v. Arreola*, the court held that police officers have a lower expectation of privacy.<sup>281</sup> The public interest in being informed of alleged misconduct by law enforcement officers and the extent to which those allegations were properly investigated is particularly compelling.<sup>282</sup>
  - In *Zellner I*, the court held that the public has a significant interest in knowing about allegations of public schoolteacher misconduct and how they are handled because teachers are entrusted with the significant responsibility of teaching children.<sup>283</sup>
  - In *Breier*, the court held that public interest in disclosure of arrest records outweighed any public interest in the privacy and reputational interests of arrestees.<sup>284</sup>
  - In *Atlas Transit, Inc. v. Korte*, the court held that the public interest in disclosure of the names and commercial license numbers of school bus drivers outweighed a slight privacy intrusion.<sup>285</sup>
- Privacy interests may be given greater weight where personal safety is also at issue.<sup>286</sup> The public policy interest in ensuring the safety and welfare of a public employee may, under certain circumstances, overcome the presumption of access to otherwise available records about that employee. In *Ardell*, the authority had documented well-founded safety concerns for its employee. The employee obtained a domestic abuse injunction against the requester, who pled guilty to two counts of violating that injunction. The court of appeals reasoned that it was plain from the requester’s history that his purpose in requesting employment records about the employee was not a legitimate one—to obtain records providing oversight of government operations—instead the requester’s intent was to continue to harass and intimidate the employee. By committing acts of violence against the employee and ignoring the domestic abuse injunction, the court reasoned, the requester forfeited his right to the requested records. Consequently, *Ardell* presented exceptional circumstances in which the public policies favoring non-disclosure outweighed those favoring disclosure.

Under the balancing test, “the possibility of threats, harassment or reprisals alone is a legitimate consideration for a custodian,” but “the public interest weight given to such a consideration increases or decreases depending upon the *likelihood* of threats, harassment or reprisals actually occurring.”<sup>287</sup>

- Access to FBI rap sheets has been held to be an unwarranted invasion of privacy, categorically.<sup>288</sup>

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<sup>281</sup> *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996).

<sup>282</sup> *Kroepelin*, 2006 WI App 227, ¶ 46.

<sup>283</sup> *Zellner I*, 2007 WI 53, ¶ 53.

<sup>284</sup> *Breier*, 89 Wis. 2d at 440.

<sup>285</sup> *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 9–26, 249 Wis. 2d 242, 638 N.W.2d 625; see *Dumas v. Koebel*, 2013 WI App 152, ¶¶ 20–24, 352 Wis. 2d 13, 841 N.W.2d 319.

<sup>286</sup> See *Klein v. Wis. Res. Ctr.*, 218 Wis. 2d 487, 496–97, 582 N.W.2d 44 (Ct. App. 1998); *State ex rel. Morke v. Record Custodian*, 159 Wis. 2d 722, 726, 465 N.W.2d 235 (Ct. App. 1990); *Ardell*, 2014 WI App 66, ¶¶ 9–14.

<sup>287</sup> *MacIver Inst.*, 2014 WI App 49, ¶ 29 (emphasis added).

<sup>288</sup> *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762–71 (1989).

- Prominent public officials must have a lower expectation of personal privacy than regular public employees; greater scrutiny of public employees than their private sector counterparts comes with the territory of public employment.<sup>289</sup> There is a particularly strong public interest in being informed about public officials who have been derelict in their duties.<sup>290</sup>
- The federal Driver’s Privacy Protection Act (DPPA)<sup>291</sup> provides a federal cause of action for knowingly obtaining, disclosing, or using “personal information” or “highly restricted personal information” obtained from a state department of motor vehicles (DMV) for any purpose other than a permissible use as provided by the statute.
  - For more information on how the Wisconsin courts have construed the DPPA’s restrictions on disclosing personal information from DMV records, see Step Three above, Exempt from disclosure by federal statute.
  - “Personal information” protected by DPPA is not limited to the items listed in the statute and can include other identifying information such as height, weight, hair color, and birth date.<sup>292</sup>
- Crime victims and their families.
  - State and federal law recognizes rights of privacy and dignity for crime victims and their families.
  - The Wisconsin Constitution, art. I, § 9m, states that crime victims should be treated with “fairness, dignity, and respect for their privacy.” Wisconsin Stat. § 950.04(1v)(ag), (1v)(dr), and (2w)(dm) further emphasize the importance of the privacy rights of victims and witnesses.
  - The Wisconsin Statutes recognize that this state constitutional right must be honored vigorously by law enforcement agencies. The statutes further recognize that crime victims include both persons against whom crimes have been committed and a deceased victim’s family members.<sup>293</sup>
  - The Wisconsin Supreme Court, speaking of both Wis. Const. art. I, § 9, and related statutes concerning the rights of crime victims, has instructed that “justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims.”<sup>294</sup>
  - The Wisconsin Supreme Court in *Democratic Party of Wisconsin v. Wisconsin Department of Justice* found that the constitutional right to privacy of juvenile crime victims mentioned in recordings of prosecutor training presentations weighed against disclosure where the

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<sup>289</sup> *Hempel*, 2005 WI 120, ¶ 75; *Kroepelin*, 2006 WI App 227, ¶ 49.

<sup>290</sup> *Kroepelin*, 2006 WI App 227, ¶ 52.

<sup>291</sup> 18 U.S.C. §§ 2721–25.

<sup>292</sup> *Dahlstrom v. Sun-Times Media*, 777 F.3d 937, 942–45 (7th Cir. 2015).

<sup>293</sup> Wis. Stat. §§ 950.01, 950.02(4)(a).

<sup>294</sup> *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623.

victims could be identified from the videos and would likely be re-traumatized by disclosure.<sup>295</sup>

- Federal courts, including the United States Supreme Court, have also recognized that family members of a deceased person have personal rights of privacy—in addition to those of the deceased—under both traditional common law and federal statutory law. “Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”<sup>296</sup>
- 2011 Wisconsin Act 283 created three statutory provisions, Wis. Stat. § 950.04(1v)(ag), (1v)(dr), and (2w)(dm), related to disclosure of personally identifying information of victims and witnesses by public officials, employees, or agencies, which were intended to protect victims and witnesses from inappropriate and unauthorized use of their personal information. These statutes are not intended to and do not prohibit law enforcement agencies or other public entities from disclosing the personal identities of crime victims and witnesses in response to public records requests, although those public records duties should continue to be performed with due regard for the privacy, confidentiality, and safety of crime victims and witnesses.<sup>297</sup>
- Law enforcement records.
  - Public policies favor public safety and effective law enforcement.<sup>298</sup>
  - Police reports of closed investigations.
    - No blanket rule—balancing test must be done on a case-by-case basis.<sup>299</sup>
    - Policy interests against disclosure: interference with police business, privacy and reputation, uncertain reliability of “raw investigative data,” revelation of law enforcement techniques, danger to persons named in report.
    - Policy interests favoring disclosure: public oversight of police and prosecutorial actions, reliability of corroborated evidence, degree to which sensitive information already has been made public.
  - Police reports of ongoing investigations.

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<sup>295</sup> *Democratic Party of Wis.*, 2016 WI 100, ¶¶ 28–32.

<sup>296</sup> *Favish*, 541 U.S. at 168; see also *Marsh v. Cty. of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (finding that parent had constitutionally protected right to privacy over child’s autopsy photos).

<sup>297</sup> See Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (Apr. 27, 2012), <https://www.doj.state.wi.us/sites/default/files/dls/act-283-advisory.pdf>.

<sup>298</sup> See *Linzmeier*, 2002 WI 84, ¶ 30.

<sup>299</sup> *Linzmeier*, 2002 WI 84, ¶ 42.

- Subject to the balancing test, but policy interests against disclosure most likely will outweigh interests in favor of release.<sup>300</sup>
  - Access to an autopsy report was properly denied when a murder investigation was still open.<sup>301</sup>
  - Fact that a police investigation is open and has been referred to the district attorney's office is not a public policy reason sufficient for the police department to deny access to its investigative report. One or more public policy reasons applicable to the circumstances of the case must be identified in order to deny access, such as protection of crime detection strategy or prevention of prejudice to the ongoing investigation.<sup>302</sup>
- Confidential informants.
- In a reverse of the usual analysis, records custodians must withhold access to records involving confidential informants unless the balancing test requires otherwise.<sup>303</sup>
  - "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied."<sup>304</sup>
  - If a record is opened for inspection, the records custodian must delete any information that would identify the informant.<sup>305</sup>
  - Confidential informants outside the law enforcement context: If an authority must promise confidentiality to an informant in order to investigate a civil law violation, the resulting record *may* be protected from disclosure under the balancing test.<sup>306</sup>
    - ◇ The test for establishing a valid pledge of confidentiality is demanding.<sup>307</sup>
    - ◇ For this kind of confidentiality agreement to override the public records law, the agreement must meet a four-factor test adopted in *Mayfair Chrysler-Plymouth*:<sup>308</sup>
      - ▶ There must have been a clear pledge of confidentiality;
      - ▶ The pledge must have been made in order to obtain the information;
      - ▶ The pledge must have been necessary to obtain the information; and

<sup>300</sup> See *id.* ¶¶ 15–18.

<sup>301</sup> *Journal/Sentinel*, 145 Wis. 2d at 824–27; see also *Favish*, 541 U.S. at 167.

<sup>302</sup> *Portage Daily Register*, 2008 WI App 30, ¶¶ 23–26.

<sup>303</sup> Wis. Stat. § 19.36(8)(b).

<sup>304</sup> Wis. Stat. § 19.36(8)(a)1.

<sup>305</sup> Wis. Stat. § 19.36(8)(b).

<sup>306</sup> See *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164–68, 469 N.W.2d 638 (1991) (tax investigation).

<sup>307</sup> See 74 Op. Att'y Gen. 14 (1985); 60 Op. Att'y Gen. 284 (1971).

<sup>308</sup> *Mayfair Chrysler-Plymouth*, 162 Wis. 2d at 168.

- ▶ Even if the first three factors are met, the records custodian must determine that the harm to the public interest in permitting inspection outweighs the great public interest in full inspection of public records.
  - Special custodial and disclosure rules govern public records requests for certain shared law enforcement records.<sup>309</sup>
- Court records.

Effective July 1, 2016, Wis. Stat. § 801.19 requires the redaction of social security numbers, employer or tax ID numbers, financial account numbers, driver license numbers, and passport numbers from records filed with Wisconsin’s circuit courts.<sup>310</sup>

**Caution:** Even though requesters generally have an “absolute right of inspection” for court records under Wis. Stat. § 59.20(3), that right can be denied pursuant to a court order sealing the record.<sup>311</sup>

- Children and juveniles.

Many, but not all, records related to children or juveniles have special statutory confidentiality protections.

- Law enforcement records.
  - Except as provided in Wis. Stat. § 48.396(1)–(1d), (5), and (6), law enforcement officers’ records of children who are the subjects of investigations or other proceedings pursuant to Wis. Stat. ch. 48 are confidential. Subjects covered by chapter 48 include children in need of protection and services (“CHIPS”), foster care, and other child welfare services.<sup>312</sup>
  - Except as provided in Wis. Stat. § 938.396(1), (1j), and (10), law enforcement officers’ records of juveniles who are the subjects of proceedings under the juvenile justice provisions of Wis. Stat. ch. 938, including matters which would be prosecuted as crimes if committed by an adult.<sup>313</sup>
  - Other law enforcement records regarding or mentioning children are not subject to the confidentiality provisions of Wis. Stat. §§ 48.396 or 938.396. These records might involve children who witness crimes, are the victims of crimes that do not lead to chapters 48 or 938 proceedings, or are mentioned in law enforcement reports for other reasons: for example, a child who happens to witness a bank robbery or be the victim of a hit and run automobile accident.

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<sup>309</sup> See Key Definitions, above.

<sup>310</sup> See also Analyzing the Request, Special Issues, above.

<sup>311</sup> *Bilder*, 112 Wis. 2d at 554–56 (court records can be sealed if disclosure infringes on a constitutional right, if the administration of justice requires the limitation of public access, or if there is a statute authorizing the sealing of otherwise public records).

<sup>312</sup> See also Analyzing the Request, *Step Three*, above.

<sup>313</sup> See also Analyzing the Request, *Step Three*, above.

- ◇ Access to these records should be resolved by application of general public records rules.
- ◇ Balancing test consideration may be given to public policy concerns arising from the ages of the children mentioned, such as whether release of unredacted records would likely subject a child mentioned to bullying at school, further victimization, or some neighborhood retaliation. In such cases, redaction of identifying information about children mentioned may be warranted under the balancing test.
- Court records. Records of courts exercising jurisdiction over children pursuant to chapter 48 or juveniles pursuant to chapter 938 are subject to the respective confidentiality restrictions of Wis. Stat. §§ 48.396(2) and (6), and 938.396(2), (2g), (2m), and (10). Certain exceptions apply to motor vehicle operation records and operating privilege records pursuant to Wis. Stat. § 938.396(3)–(4), and for certain uses described in *Analyzing the Request, Step Three*, above. See Wis. Stat. §§ 48.396(2), (3), (5), and (6), and 938.396(2g), (2m), and (10) for other exceptions.

Effective July 1, 2016, under Wis. Stat. § 48.396(2)(ad), the provisions of Wis. Stat. §§ 801.19 to 801.21 will be applicable to court proceedings under chapter 48.<sup>314</sup>

- Child protective services and similar agency records.
  - Except as provided in Wis. Stat. § 48.78, the Wisconsin Department of Children and Families, a county department of social services, a county department of human services, a licensed child welfare agency, or a licensed day care center may not make available for inspection or disclose the contents of any record kept or information received about a child in its care or legal custody.
  - Except as provided in Wis. Stat. § 48.981(7), all reports of child abuse or neglect made pursuant to Wis. Stat. § 48.981 are confidential and not subject to public records requests.
  - Except as provided in Wis. Stat. § 938.78, the Wisconsin Department of Children and Families, the Wisconsin Department of Corrections, a county department of social services, a county department of human services, or a licensed child welfare agency may not make available for inspection or disclose the contents of any record kept or information received about a juvenile who is or was in its care or legal custody.
- Student records. Pupil records of elementary, middle, and high school students are subject to the confidentiality provisions of Wis. Stat. § 118.125. The Wisconsin Department of Public Instruction provides comprehensive guidance about confidentiality and student records at [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/srconfid\\_11-16-18.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/srconfid_11-16-18.pdf).
- Confidentiality agreements. Lawsuit settlement agreements providing that the terms and conditions of the settlement will remain confidential are public records subject to the balancing test.

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<sup>314</sup> See also *Analyzing the Request, Special Issues*, above.

- This applies to settlements formally approved by a court.<sup>315</sup>
- This also applies to settlements not filed with or submitted to a court.<sup>316</sup>
- Settlement of litigation is in the public interest, and certain parties are more likely to settle their claims if they are guaranteed confidentiality—so there is some public interest in keeping settlement agreements confidential. When applying the balancing test, however, Wisconsin courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential.<sup>317</sup>
- “[A] generalized interest in encouraging settlement of litigation does not override the public’s interest in access to the records of its courts.”<sup>318</sup>
- If an authority enters into a confidentiality agreement, it may later find itself in “a no-win” situation where it must choose between violating the agreement or violating the public records law.<sup>319</sup>
- A distinction should be drawn between settlement *agreements* and settlement *negotiations*. There is a strong public interest in maintaining the confidentiality of settlement negotiations that weighs in favoring of nondisclosure under the balancing test. Settlements are cost-effective and benefit judicial efficiency, and parties negotiating freely in confidence allows for more effective negotiations.<sup>320</sup>
- Personnel records and other employment-related records of public employees.
  - General concepts applicable to personnel records and the balancing test.
    - The records custodian almost invariably must evaluate context to some degree.<sup>321</sup>
    - The public interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling and would not, by itself, override the strong public interest in obtaining information regarding their activities while on duty.<sup>322</sup>
    - Public employees who serve in a position of trust, such as law enforcement, should expect closer public scrutiny.<sup>323</sup>

<sup>315</sup> See *In re Estates of Zimmer*, 151 Wis. 2d 122, 131–37, 442 N.W.2d 578 (Ct. App. 1989).

<sup>316</sup> See *Journal/Sentinel*, 186 Wis. 2d at 451–55; *74 Op. Att’y Gen. 14* (1985).

<sup>317</sup> See *Journal/Sentinel*, 186 Wis. 2d at 458–59; *Zimmer*, 151 Wis. 2d at 133–35; *C.L. v. Edson*, 140 Wis. 2d 168, 184–86, 409 N.W.2d 417 (Ct. App. 1987).

<sup>318</sup> *Zimmer*, 151 Wis. 2d at 135.

<sup>319</sup> *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993).

<sup>320</sup> See Wis. Stat. § 904.085 (“to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled,” communications in mediation are generally not admissible in evidence or subject to discovery or compulsory process and therefore not a public record); see also *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979–81 (6th Cir. 2003) (concluding a settlement privilege concerning confidential negotiations should exist).

<sup>321</sup> *Hempel*, 2005 WI 120, ¶ 66.

<sup>322</sup> *Local 2489*, 2004 WI App 210, ¶ 27.

<sup>323</sup> *Kroepelin*, 2006 WI App 227, ¶ 44; *Local 2489*, 2004 WI App 210, ¶ 26.

- Public employees have no expectation of privacy in records demonstrating potentially illegal conduct even if disclosure would dilute their effectiveness at their jobs.<sup>324</sup>
  - Persons of public prominence have little expectation of privacy regarding professional conduct, even if allegations against them were disproven.<sup>325</sup>
  - Embarrassing computer use records do not change character as public records under the balancing test even if presented to an employee at a closed and confidential meeting.<sup>326</sup>
- Factors weighing in favor of disclosure of personnel records.
    - Records contain or dispel evidence of an official cover-up.<sup>327</sup>
    - Records contain evidence/information regarding a school teacher’s inappropriate comments toward students,<sup>328</sup> or viewing pornography on a school computer.<sup>329</sup>
    - The information that would pose the most potential reputational harm already is available in the public domain.<sup>330</sup>
    - Employee has other available avenues of recourse, such as the ability to file a response to an inaccurate or misleading fact disclosure.<sup>331</sup>
  - Factors weighing against disclosure of personnel records.
    - The increased level of embarrassment would have a chilling effect on future witnesses or victims coming forward—especially in sexual harassment case.<sup>332</sup>
    - Loss of morale if employees believed their personnel files were readily available to the public. However, the court called this argument only “plausible” and did not “fully endorse” it.<sup>333</sup>

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<sup>324</sup> *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995).

<sup>325</sup> *Wis. State Journal*, 160 Wis. 2d at 41–42.

<sup>326</sup> *Zellner I*, 2007 WI 53, ¶ 54.

<sup>327</sup> *Hempel*, 2005 WI 120, ¶ 68.

<sup>328</sup> *Linzmeier*, 2002 WI 84, ¶¶ 4, 25.

<sup>329</sup> *Zellner I*, 2007 WI 53, ¶ 53; see also *Woznicki v. Moberg*, No. 2015AP1883, 2016 WL 5727062, ¶¶ 15–16 (Wis. Ct. App. Oct. 4, 2016) (unpublished) (public school teachers are in a significant position of responsibility and visibility; public has strong interest in knowing how the government handles disciplinary actions of public school teachers).

<sup>330</sup> *Kroepelin*, 2006 WI App 227, ¶ 47; *Kailin v. Rainwater*, 226 Wis. 2d 134, 148, 593 N.W.2d 865 (Ct. App. 1999) (concluding that courts “cannot un-ring the bell”).

<sup>331</sup> *Zellner I*, 2007 WI 53, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16); see Right to Challenge Accuracy of a Record, below.

<sup>332</sup> *Hempel*, 2005 WI 120, ¶ 73; *Local 2489*, 2004 WI App 210, ¶ 9.

<sup>333</sup> *Hempel*, 2005 WI 120, ¶ 74.

- The scrutiny of rank-and-file employees in the records extends so far such that it may discourage qualified candidates from entering the workforce. However, the court found this factor to weigh only “slightly” in favor of non-disclosure.<sup>334</sup>
  - Information gleaned from the investigation could be factually inaccurate and cause unfair damage to the employee’s reputation.<sup>335</sup> However, the employee should provide facts establishing that the record contains inaccurate, misleading, and unauthenticated data.<sup>336</sup>
  - Disclosure could inhibit future candid assessments of employees in personnel records.<sup>337</sup>
  - Release would jeopardize *both* the personal privacy and safety of an employee.<sup>338</sup>
- Personal emails.
- Purely personal emails sent or received by employees or officers on an authority’s computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request.<sup>339</sup>
  - Personal emails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the emails and a government function, such as a personnel investigation.<sup>340</sup>
  - *Schill* does not prevent requesters interested in how an authority’s employees and officers are using email accounts on the authority’s computer system from obtaining access to records other than purely personal emails. A requester seeking this kind of information could request records showing the number of emails sent or received by a particular employee or officer during a specified time period, for example, and the times and dates of those emails.
  - Like other reasons asserted by a records custodian for withholding or redacting requested records, a response asserting that responsive records consist of purely personal emails that will not be disclosed may be challenged by filing a petition for writ of mandamus.<sup>341</sup>

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<sup>334</sup> *Id.* ¶ 75.

<sup>335</sup> *Id.* ¶ 76.

<sup>336</sup> *Zellner I*, 2007 WI 53, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16).

<sup>337</sup> *Hempel*, 2005 WI 120, ¶ 77 (citing *Vill. of Butler*, 163 Wis. at 828 n.3).

<sup>338</sup> *Local 2489*, 2004 WI App 210, ¶ 28 (citing *Ledford*, 195 Wis. 2d at 250-51).

<sup>339</sup> *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring).

<sup>340</sup> *Id.* ¶ 23 (Abrahamson, C.J., lead opinion), ¶ 166 (Bradley, J., concurring), ¶ 180 (Gableman, J., concurring).

<sup>341</sup> See Enforcement and Penalties, Mandamus, below, for more information about mandamus actions.

- Despite the lead opinion in *Schill*, DOJ’s position is that purely personal emails sent or received on government email accounts are records under the public records law and therefore, subject to disclosure.

In *Schill*, the court held 5–2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not “records.” The remaining four justices concluded the emails were “records” (but two agreed they did not need to be disclosed under the balancing test). As a result, it is likely that should the question of whether personal emails sent or received on government email accounts are records come before the court in the future, a majority will find such emails are records and thus, subject to disclosure.

- For additional information, see Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010).<sup>342</sup>
- Other personnel records cross-references in this guide.
  - Analyzing the Request, *Step Three*: Exempt from disclosure by public records statutes.
  - Analyzing the Request, *Step Three*: Information relating to staff management planning.
  - Analyzing the Request, *Step Three*: No blanket exemption for all personnel records of public employees.
  - Analyzing the Request, *Step Four*: Open meetings law exemptions.
  - Analyzing the Request, Special Issues: Privacy-related concerns may outweigh the public interest in disclosure.
  - Analyzing the Request, Special Issues: Personnel investigation prepared by an attorney may be withheld if performed after threat of litigation.

- Records about the requester.

- The fact that a particular record is about the requester generally does not determine who is entitled to access that record.<sup>343</sup>
- A requester has a greater right of access than the general public to “any personally identifiable information pertaining to the individual in a record containing *personally identifiable information* that is maintained by an authority.”<sup>344</sup>
  - This is because an individual requester asking to inspect or copy records pertaining to himself or herself is considered to be substantially different from a requester, “be it a

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<sup>342</sup> Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010), <https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf>.

<sup>343</sup> See Wis. Stat. § 19.35(1)(a) (emphasis added) (“[A]ny requester has the right to inspect any record.”).

<sup>344</sup> Wis. Stat. § 19.35(1)(am) (emphasis added).

private citizen or a news reporter,” who seeks access to records about government activities or other people.<sup>345</sup>

- The purpose of giving an individual greater access to records under Wis. Stat. § 19.35(1)(am) is so that the individual can determine what information is being maintained, and whether that information is accurate.<sup>346</sup>
- When it applies, the Wis. Stat. § 19.35(1)(am) right of access to records containing individually identifiable information about the requester is more potent than the general Wis. Stat. § 19.35(1)(a) right of access. The Wis. Stat. § 19.35(1)(am) right is more unqualified.<sup>347</sup>
- When a person or the person’s authorized representative makes a public records request under Wis. Stat. § 19.35(1)(a) or (am) and states that the purpose of the request is to inspect or copy records containing personally identifiable information about the person, the following procedure is required by Wis. Stat. § 19.35(4)(c)1. and 3.<sup>348</sup> A general public records request, not indicating that the purpose of the request is to inspect or copy records containing personally identifiable information pertaining to the requester, does not trigger the following procedure.<sup>349</sup>
  - The records custodian determines if the requester has a right to inspect or copy the records under Wis. Stat. § 19.35(1)(a), the statute creating general public access rights.
  - If the records custodian determines that the requester does not have a right to inspect or copy the record under Wis. Stat. § 19.35(1)(a), the records custodian then must determine if the requester has a right to inspect or copy the record under Wis. Stat. § 19.35(1)(am).
  - Under Wis. Stat. § 19.35(1)(am), the person is entitled to inspect or receive copies of the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to Wis. Stat. § 19.35(1)(am).
  - These requests are not subject to the balancing test, because the legislature already has done the necessary balancing by enacting exceptions to the Wis. Stat. § 19.35(1)(am) disclosure requirements.<sup>350</sup>
  - The Wis. Stat. § 19.35(1)(am) exceptions mainly protect the integrity of ongoing investigations, the safety of individuals (especially informants), institutional security, and the rehabilitation of incarcerated persons.
  - These Wis. Stat. § 19.35(1)(am) exceptions are not to be narrowly construed.<sup>351</sup>

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<sup>345</sup> *Hempel*, 2005 WI 120, ¶ 34.

<sup>346</sup> *Id.* ¶ 55.

<sup>347</sup> *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 10, 287 Wis. 2d 795, 706 N.W.2d 161.

<sup>348</sup> *Hempel*, 2005 WI 120, ¶ 29.

<sup>349</sup> *Seifert*, 2007 WI App 207, ¶ 21.

<sup>350</sup> *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56.

<sup>351</sup> *Id.* ¶ 56.

- Wisconsin Stat. § 19.35(1)(am) exceptions include the following:
  - ◊ Any record containing personally identifiable information collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.<sup>352</sup>
    - ▶ Wisconsin Stat. § 19.35(1)(am) contains no requirement that the investigation be current.<sup>353</sup>
    - ▶ This section allows a custodian to deny access to a requester who is, in effect, a potential adversary in litigation or another proceeding unless required to do so under the rules of discovery in actual litigation.<sup>354</sup>
  - ◊ Any record containing personally identifiable information that would do any of the following if disclosed:
    - ▶ Endanger an individual’s life or safety.<sup>355</sup>
    - ▶ Identify a confidential informant.<sup>356</sup>
    - ▶ Endanger the security—including security of population or staff—of any state prison, jail, secured correctional facility, secured child caring institution, secured group home, mental health institute, center for the developmentally disabled, or facility for the institutional care of sexually violent persons.<sup>357</sup>
    - ▶ Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in Wis. Stat. § 19.35(1)(am)2.c. and d.
  - ◊ Any record that is part of a record series, as defined in Wis. Stat. § 19.62(7), that is not indexed, arranged, or automated in a way that the record can be retrieved by the authority maintaining the record series by use of an individual’s name, address, or other identifier.<sup>358</sup>
- Student and pupil records. Although these are generally exempt from disclosure, they are open to students and their parents (except for those legally denied parental rights).<sup>359</sup>

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<sup>352</sup> Wis. Stat. § 19.35(1)(am)1.

<sup>353</sup> *Seifert*, 2007 WI App 207, ¶ 36.

<sup>354</sup> *Id.* ¶ 32 (personnel investigation prepared by an attorney may be withheld if performed after threat of litigation).

<sup>355</sup> Wis. Stat. § 19.35(1)(am)2.a.

<sup>356</sup> Wis. Stat. § 19.35(1)(am)2.b.

<sup>357</sup> Wis. Stat. § 19.35(1)(am)2.c.

<sup>358</sup> Wis. Stat. § 19.35(1)(am)3.

<sup>359</sup> *See* FERPA, 20 U.S.C. § 1232g(a)(1); Wis. Stat. § 118.125(2).

- A patient’s access to his or her own mental health treatment records may be restricted by the director of the treatment facility during the course of treatment.<sup>360</sup> However, after discharge, such records are available to the patient.<sup>361</sup>
  - After sentencing, an unrepresented criminal defendant generally is not entitled to access his or her presentence investigation without a court order.<sup>362</sup> A criminal defendant not represented by counsel, or a no-merit defendant, may view his or her presentence investigation report, but may not keep a copy.<sup>363</sup>
  - Other statutes may impose other restrictions on a requester’s ability to obtain particular kinds of records about himself or herself.
  - Wisconsin Stat. § 19.70(1) provides a procedure for an individual or a person authorized by the individual to challenge the accuracy of a record containing personally identifying information about that individual.<sup>364</sup>
- Correspondence with elected officials.
    - Names and email addresses of citizens cannot be redacted from correspondence sent to public officials expressing their opinions regarding public policy.<sup>365</sup>
    - There is a strong public interest in knowing “who” is emailing elected officials to attempt to influence public policy and from “where” such individuals are communicating.<sup>366</sup>
    - Citizens have no expectation of privacy regarding the emails they send to elected officials in an attempt to influence public policy.<sup>367</sup>

## LIMITED DUTY TO NOTIFY PERSONS NAMED IN RECORDS IDENTIFIED FOR RELEASE

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### Background

Beginning with *Woznicki*, the Wisconsin Supreme Court recognized that, when a records custodian’s decision to release records implicates the reputational or privacy interests of an individual, the records custodian must notify the subject of the intent to release, and allow a reasonable time for the subject of the

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<sup>360</sup> Wis. Stat. § 51.30(4)(d)1.

<sup>361</sup> Wis. Stat. § 51.30(4)(d)2.–3.; *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 840–44, 586 N.W.2d 36 (Ct. App. 1998).

<sup>362</sup> Wis. Stat. § 972.15(4).

<sup>363</sup> Wis. Stat. § 972.15(4m); *see also State v. Parent*, 2006 WI 132, ¶¶ 34–35, 298 Wis. 2d 63, 725 N.W.2d 915 (no-merit defendant is in the same position as unrepresented defendant for purposes of viewing copy of presentence investigation report).

<sup>364</sup> *See* Right to Challenge Accuracy of a Record, below.

<sup>365</sup> *MacIver Inst.*, 2014 WI App 49, ¶ 31 (“If a citizen has a genuine concern about his or her views becoming public, he or she need not express such views through means which create a public record.”).

<sup>366</sup> *Id.* ¶¶ 19–21.

<sup>367</sup> *MacIver Inst.*, 2014 WI App 49, ¶ 29.

record to appeal the records custodian's decision to circuit court. Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees.<sup>368</sup>

## Notice and Judicial Review Procedures

Wisconsin Stat. § 19.356 now codifies and clarifies pre-release notice requirements for specific kinds of records, and also codifies judicial review procedures, as described below.<sup>369</sup> By enacting Wis. Stat. § 19.356, the legislature sought to limit the extent to which notice was required while recognizing an interest in the privacy and reputation of certain record subjects.

Wisconsin Stat. § 19.356(1) establishes the general rule that an authority need not provide notice to a record subject prior to releasing a record in response to a public records request. Wisconsin Stat. § 19.356(2) and Wis. Stat. § 19.356(9), however, provide exceptions to this general rule.

The language of Wis. Stat. § 19.356 shows that the legislature intended to create two separate notice procedures. As described in the next two sections,<sup>370</sup> each notice provision fulfills a separate purpose. Among other provisions, section 19.356(2)(a) applies to an authority's employees, whereas section 19.356(9) applies to local and state public office holders who are officers or employees of an authority.

*Note:* Wisconsin Stat. § 19.356 establishes short time periods, specified in days, during which certain actions must occur. All time periods established in Wis. Stat. §§ 19.31–19.39 exclude Saturdays, Sundays, and legal holidays.<sup>371</sup> A time period of a certain number of days specified in Wis. Stat. § 19.356, therefore, means that number of business days, not calendar days.

## Records for Which Notice Is Required and Pre-Release Court Review May Be Sought

First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.<sup>372</sup>

Next, if the authority concludes that the records should be released, then the authority may use the information below to determine the next course of action. The authority must first determine if notice is required under Wis. Stat. § 19.356(2)(a)1., 2., and 3., and if so, to whom notice must be given. If notice is required, the authority must follow the procedures set forth in Wis. Stat. § 19.356(2)(a) to draft and serve the notice. Before releasing the records, the authority must wait the requisite number of days under Wis. Stat. § 19.356(5) to allow for potential judicial review.

*When Is Notice Required and for What Kinds of Records?*

The notice required by Wis. Stat. § 19.356(2)(a)<sup>373</sup> is limited to only three categories of records:

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<sup>368</sup> *Klein*, 218 Wis. 2d 487; *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

<sup>369</sup> See also 2003 Wis. Act 47, which contains extensive explanatory notes about the passage of Wis. Stat. § 19.356.

<sup>370</sup> See "Records for Which Notice is Required and Pre-Release Court Review May Be Sought" and "Records for Which Notice is Required and Supplementation of the Record is Authorized."

<sup>371</sup> See Wis. Stat. § 19.345.

<sup>372</sup> Wis. Stat. § 19.356(2)(a); see also *Zellner v. Herrick* ("Zellner II"), 2009 WI 80, ¶ 38, 319 Wis. 2d 532, 770 N.W.2d 305 (record subject may commence action under Wis. Stat. § 19.356(4) to enjoin release of records if custodian grants access).

<sup>373</sup> For the notice required by Wis. Stat. § 19.356(9)(a) to public office holders who are officers or employees of an authority, see "Records for Which Notice is Required and Supplementation of the Record is Authorized."

- Records containing information relating to an “employee” created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the “employee” or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer.<sup>374</sup>
  - The public records law’s definition of “employee” does not contain direct references to “current employee” or “former employee.” However, the Attorney General’s longstanding interpretation is that Wis. Stat. § 19.356(2)(a)1. applies if the record contains information related to a record subject who is a current *or* former employee.<sup>375</sup>
    - For example, the public records statute defines “employee” as “any individual *who is* employed by an authority, other than an individual holding local public office or a state public office, or any individual *who is* employed by an employer other than an authority.”<sup>376</sup>
    - Similarly, the notification statute is also written in the present tense, stating that notice is required for “[a] record containing information relating to an employee that *is created* or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee . . . .”<sup>377</sup>
  - Therefore, if the record subject “is” an employee at the time the record “is created,” he or she is entitled to notice even if the employee is no longer employed by the authority at the time the authority receives the request.<sup>378</sup>
  - *Note:* “Employees” covered under Wis. Stat. § 19.356(2) do not include individuals holding local or state public office who are officers or employees of an authority. Those individuals are covered by a different provision of the notice statute.<sup>379</sup>
- Records obtained by the authority through a subpoena or search warrant.<sup>380</sup>
- Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access.<sup>381</sup>

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<sup>374</sup> Wis. Stat. § 19.356(2)(a)1.

<sup>375</sup> [OAG-02-18](#) (Feb. 23, 2018).

<sup>376</sup> See Wis. Stat. § 19.32(1bg) (emphasis added).

<sup>377</sup> See Wis. Stat. § 19.356(2)(a)1. (emphasis added).

<sup>378</sup> See [Local 2489](#), 2004 WI App 210, ¶¶ 5–6, 25–28 (post-Wis. Stat. § 19.356 case involving notice provided to a group of current and former employees in which the court did not distinguish notice to current employees from that of former employees); see also [OAG-02-18](#) (Feb. 23, 2018).

<sup>379</sup> See Wis. Stat. § 19.356(9)(a); [Moustakis v. Wis. Dep’t of Justice](#), 2015 WI App 63, ¶¶ 1, 24, 364 Wis. 2d 740, 869 N.W.2d 788, *aff’d*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142; see also “Records for Which Notice is Required and Supplementation of the Record is Authorized,” below.

<sup>380</sup> Wis. Stat. § 19.356(2)(a)2.

<sup>381</sup> Wis. Stat. § 19.356(2)(a)3; [OAG-1-06](#), at 4–5 (Aug. 3, 2006).

### *To Whom Must the Notice Be Given?*

- If notice is required, notice must be provided to “any record subject to whom the record pertains.”<sup>382</sup>
  - For the definitions of “record subject” and “personally identifiable information” see Key Definitions, above.<sup>383</sup>
  - This does not mean that every person mentioned in a record must receive notice. Instead, the record subject must—in some direct way—be a focus or target of the requested record.<sup>384</sup>
- Limited exceptions to the notice requirement apply to access by the affected employee, for purposes of collective bargaining, for investigation of discrimination complaints, or when a record is transferred from the administrator of an educational agency to the state superintendent of public instruction.<sup>385</sup> In those limited instances, notice would not be required.

### *Is Notice Required When the Records Have Already Been Made Public?*

The answer to this question depends on why, or how, the records have already been made public. The Attorney General has opined that there are two primary ways in which records might have already been made public: 1) a previous release of the same records under the public records law; and 2) records that are made public at a public hearing or proceeding, or are otherwise already publicly available.<sup>386</sup>

- If the records were previously released pursuant to Wis. Stat. § 19.35, no additional notice to record subjects is required for future requests for the same record.<sup>387</sup>
  - With the exception of certain personally identifiable information released pursuant to Wis. Stat. § 19.35(1)(am), records released pursuant to the public records law are public records. Permitting access by one requester to records is equivalent to permitting access by the entire public to the records.<sup>388</sup>
  - Therefore, once an authority, having complied with any necessary notice requirements, fulfils a requester’s public records request, the authority has permitted access to the record for the purposes of Wis. Stat. § 19.356.<sup>389</sup>
  - *Note:* If, in response to future public records requests, an authority releases a record that a record subject has augmented with written comments and documentation pursuant to

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<sup>382</sup> Wis. Stat. § 19.356(2)(a).

<sup>383</sup> See also Wis. Stat. § 19.32(2g) (“record subject”); Wis. Stat. §§ 19.32(1r), 19.62(5) (“personally identifiable information”).

<sup>384</sup> OAG-1-06, at 2–3.

<sup>385</sup> Wis. Stat. § 19.356(2)(b)–(d).

<sup>386</sup> OAG-02-18 (Feb. 23, 2018).

<sup>387</sup> OAG-02-18 (Feb. 23, 2018).

<sup>388</sup> See *Democratic Party of Wis.*, 2016 WI 100, ¶ 19 (“[R]eleasing the [record] to one effectively renders it public to all . . . .”); see also OAG-02-18 (Feb. 23, 2018).

<sup>389</sup> OAG-02-18 (Feb. 23, 2018).

Wis. Stat. § 19.356(9), the authority should also release the written comments and documentation.<sup>390</sup>

- If the records are otherwise publicly available, such as those records made public at a public hearing or proceeding, the notice provisions under Wis. Stat. § 19.356 are presumed to apply. Therefore, the authority should provide notice, because the legislature did not expressly provide an exception to the notice requirements for those records.<sup>391</sup>
  - *Note:* The definition of “record” excludes “published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.”<sup>392</sup> Consequently, statutory notice under Wis. Stat. § 19.356 is not required for published materials, because “published materials” are not “record[s]” under the public records law.

#### *What Are the Requirements of the Notice?*

- Written notice is required.<sup>393</sup>
- The notice must briefly describe the requested record and include a description of the record subject’s rights under Wis. Stat. § 19.356(3) and (4) to seek a court order restraining access of the record.<sup>394</sup> It may be helpful to include copies of the records identified for release and a copy of Wis. Stat. § 19.356.
- Explaining in the notice what, if any, information the authority intends to redact before permitting access may prevent efforts to obtain a court order restraining release. Enclosing copies of the records as redacted for intended release serves the same purpose.
- A notice may include information beyond what the statute requires in order to assist the recipient in understanding why the notice is being provided.

#### *When and How Must the Notice Be Served?*

- Notice must be served before permitting access to the record and within three business days after making the decision to permit access.<sup>395</sup>
- Notice must be served personally or by certified mail.<sup>396</sup>
- Wisconsin Stat. § 19.356 is silent on what an authority must do should service via certified mail and personal service fail. The Attorney General, however, has opined that best practices include following other service of process laws that are consistent with the public records law’s purpose.<sup>397</sup>

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<sup>390</sup> OAG-02-18 (Feb. 23, 2018).

<sup>391</sup> OAG-02-18 (Feb. 23, 2018).

<sup>392</sup> See Wis. Stat. § 19.32(2).

<sup>393</sup> Wis. Stat. § 19.32(2).

<sup>394</sup> Wis. Stat. § 19.356(2)(a).

<sup>395</sup> Wis. Stat. §§ 19.345, 19.356(2)(a).

<sup>396</sup> Wis. Stat. § 19.356(2)(a).

<sup>397</sup> OAG-02-18 (Feb. 23, 2018).

- For example, under Wis. Stat. § 801.11(1), the statute governing service of process for individuals, personal service is required. But if personal service under Wis. Stat. § 801.11(1) cannot be made with reasonable diligence, then service can be accomplished by leaving a copy of the summons at the individual's usual place of abode.<sup>398</sup> Similarly, under Wis. Stat. § 801.11(4), the statute governing service of process for corporations and corporate officers, service can be accomplished by leaving a copy of the summons at the usual place of business.<sup>399</sup>
- The Attorney General has opined that these two alternatives to personal service, occurring elsewhere in the statutes, appear reasonable and consistent with the public records law's purposes and mandates requiring an authority to fill or deny a records request as soon as possible and without delay.<sup>400</sup>
- An authority should exercise reasonable diligence to locate and effectuate service to those entitled to notice. In light of the guidance offered by the general service statute, and the language and purpose of the public records law, it is reasonable that should service fail in the manner specifically required by the public records law after reasonable diligence, an authority may choose to use two of the alternative methods of service available in the general service statute, although these alternative methods are not required and are not exclusive:
  - First, an authority may leave a copy of the notice at the record subject's usual place of abode in a manner substantially similar to Wis. Stat. § 801.11(1)(b).
  - Second, if the record subject's usual place of abode cannot be located after reasonable diligence, an authority may leave a copy of the notice at the record subject's usual place of business in a matter substantially similar to Wis. Stat. § 801.11(4)(b).<sup>401</sup>
- If, after reasonable diligence, the authority is unable to effectuate service according to the public records law's provisions and other alternatives to personal service that are consistent with the public records law's purpose, the authority may release the records. The authority should accomplish these steps as soon as practicable and without delay.<sup>402</sup>

*After the Notification Is Given, When Can the Records Be Released?*

- The authority may not provide access to a requested record within 12 business days of sending the notice.<sup>403</sup>
- If a judicial review action is commenced, access may not be provided during the pendency of that

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<sup>398</sup> Wis. Stat. § 801.11(1)(b); see also *Loppnow v. Bielik*, 2010 WI App 66, ¶ 10, 324 Wis. 2d 803, 783 N.W.2d 450 (under Wis. Stat. § 801.11(1)(b), "reasonable diligence" is defined as "diligence to be pursued and shown . . . which is reasonable under the circumstances and not all possible diligence which may be conceived").

<sup>399</sup> Wis. Stat. § 801.11(4)(b).

<sup>400</sup> OAG-02-18 (Feb. 23, 2018).

<sup>401</sup> OAG-02-18 (Feb. 23, 2018).

<sup>402</sup> OAG-02-18 (Feb. 23, 2018).

<sup>403</sup> Wis. Stat. §§ 19.345, 19.356(5).

action, until that review action concludes.<sup>404</sup> However, a protective order under Wis. Stat. § 19.356(5) does not preclude the court from providing limited access to the requested records “on an attorney’s eyes-only basis.”<sup>405</sup>

- After a review action concludes, access may not be provided until all relevant appeal and petition for review periods expire, or until the authority receives written notice from the record subject that no further appeal or petition for review will be taken, whichever comes first.<sup>406</sup>

#### *What Is the Procedure for a Pre-Release Judicial Review?*

After receiving notice that the authority intends to release records, a record subject may seek court review using an expedited procedure set forth in Wis. Stat. § 19.356(3)–(8). Strict timelines apply to the notice and judicial review requirements, and courts must give priority to these judicial reviews.<sup>407</sup>

- *Note:* A record subject is not required to formally challenge a proposed records release by filing a lawsuit under Wis. Stat. § 19.356(4). A record subject may instead seek to prevent a records release by informally communicating with an authority, and an authority may change its mind about releasing proposed records upon receipt of additional information from the record subject.<sup>408</sup>
- Appeal of a circuit court order on judicial review pursuant to Wis. Stat. § 19.356(4)–(7) must be filed within 20 business days of entry of the circuit court order.<sup>409</sup> The court of appeals must grant precedence to the appeal over all other matters not accorded similar precedence by law.<sup>410</sup>

### **Records for Which Notice Is Required and Supplementation of the Record Is Authorized**

Under Wis. Stat. § 19.356(9)(a), a different kind of notice is required if an authority decides to permit access to a record containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office.<sup>411</sup>

First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.<sup>412</sup>

Next, if the authority concludes that the records should be released, then the authority should use the information below to determine the next course of action. The authority must first determine if notice is required under Wis. Stat. § 19.356(9)(a), and if so, to whom notice must be given. If notice is required, the authority must follow the procedures set forth in Wis. Stat. § 19.356(9)(a) to draft and serve the notice. Before releasing the records, the authority must wait the requisite number of days under Wis. Stat. § 19.356(9)(b) to allow an opportunity for the record subject to augment the record.

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<sup>404</sup> Wis. Stat. § 19.356(5).

<sup>405</sup> *Hagen*, 2018 WI App 43, ¶¶ 10-11.

<sup>406</sup> Wis. Stat. § 19.356(5).

<sup>407</sup> See Wis. Stat. § 19.356(3)–(8). See generally *Local 2489*, 2004 WI App 210, ¶¶ 13–14 (the language in Wis. Stat. § 19.356 evinces a legislative intent that public records be promptly disclosed to a requester, even if their release is challenged by a record subject).

<sup>408</sup> *Ardell*, 2014 WI App 66, ¶ 22 (“The plain language of the statute in no way discourages the subject of a records request from engaging in less litigious means to prevent disclosure nor does it prevent a records custodian from changing its mind.”).

<sup>409</sup> Wis. Stat. § 19.356(8); *Zellner II*, 2009 WI 80, ¶ 27 (citing Wis. Stat. § 808.04(1m)).

<sup>410</sup> Wis. Stat. § 19.356(8).

<sup>411</sup> Wis. Stat. § 19.356(9)(a).

<sup>412</sup> Wis. Stat. § 19.356(9)(a).

### *When Is Notice Required and To Whom Must the Notice Be Given?*

The notice required by Wis. Stat. § 19.356(9)(a)<sup>413</sup> is limited to only records “containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office.”<sup>414</sup>

- For the definitions of “record subject, “state public office” and “local public office” see Key Definitions, above.
- The Attorney General has opined that Wis. Stat. § 19.356(9)(b) does *not* apply to a record that only mentions a person holding state or local public office.<sup>415</sup>
  - More is required than a mere passing reference or mention of the record subject’s name. Instead, the record must pertain to the record subject in a more substantial way; the record subject must be the focus or subject of the record.
  - Notification obligations under Wis. Stat. § 19.356(9), however, are not limited to the three circumstances identified in Wis. Stat. § 19.356(2)(a).
- The Attorney General has also opined that the notification provisions in Wis. Stat. § 19.356(9)(b) do *not* apply to records containing information relating to a record subject who is an officer or employee of an authority who *formerly* held a local or state public office. The provision only applies when an officer or employee of the authority *currently* holds a local or state public office.<sup>416</sup>
  - The notice statute for public office holders refers to records “containing information relating to a record subject who *is* an officer or employee of the authority holding a local public office or a state public office.”<sup>417</sup>
  - Therefore, the notification provisions in Wis. Stat. § 19.356(9)(b) only apply when an officer or employee of the authority *currently* holds a local or state public office. This interpretation is consistent with the purpose of Wis. Stat. § 19.356(9) in that it permits a current local or state public office holder to explain himself or herself to the public while the official continues to serve the public.

### *Is Notice Required When the Records Have Already Been Made Public?*

For a discussion of this question, see “Records for Which Notice is Required and Pre-Release Court Review May Be Sought,” above.

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<sup>413</sup> For the notice required by Wis. Stat. § 19.356(2)(a) to an authority’s employees, see “Records for Which Notice is Required and Pre-Release Court Review May Be Sought.”

<sup>414</sup> Wis. Stat. § 19.356(9)(a); [OAG-07-14](#) (Oct. 15, 2014) (notice only required if record subject is an officer or employee of an authority).

<sup>415</sup> [OAG-07-14](#) (Oct. 15, 2014).

<sup>416</sup> [OAG-02-18](#) (Feb. 23, 2018).

<sup>417</sup> See Wis. Stat. § 19.356(9)(a) (emphasis added).

### *What Are the Requirements of the Notice?*

The notice must briefly describe the requested records and describe the record subject's right to augment the records as provided in Wis. Stat. § 19.356(9)(b).<sup>418</sup>

### *When and How Must the Notice Be Served?*

- Notice must be served on the record subject personally or by certified mail within three business days of making the decision to permit access to the records, and before releasing the records.<sup>419</sup>
- As discussed above, Wis. Stat. § 19.356 is silent on what an authority must do should service via certified mail and personal service fail. The Attorney General, however, has opined that best practices include following other service of process laws that are consistent with the public records law's purpose.<sup>420</sup>
  - For a discussion of the best practices, see "Records for Which Notice is Required and Pre-Release Court Review May Be Sought," above.

### *After the Notification Is Given, When Can the Records Be Released?*

Before releasing the records, the authority must wait the requisite number of days specified in Wis. Stat. § 19.356(9)(a) and (b) to allow an opportunity for the record subject to augment or supplement the record.

### *What Is the Procedure for Supplementation of the Record?*

- Within five business days after receipt of a notice pursuant to Wis. Stat. § 19.356(9)(a), the record subject may augment the record with written comments and documents of the record subject's choosing.<sup>421</sup>
- After the augmentation period is over, the authority must release the record as augmented by the record subject, except as otherwise authorized or required by statute.<sup>422</sup>

## **Courtesy Notice**

- Written or verbal notice of anticipated public records releases may be provided as a courtesy to persons not entitled to receive Wis. Stat. § 19.356 notices, such as crime victims or public information officers.
- Courtesy notices are not required by law. They can be used to provide affected persons with some advance notice of public records releases related to those persons.

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<sup>418</sup> Wis. Stat. § 19.356(9)(a).

<sup>419</sup> Wis. Stat. §§ 19.345, 19.356(9)(a).

<sup>420</sup> [OAG-02-18](#) (Feb. 23, 2018).

<sup>421</sup> Wis. Stat. §§ 19.345, 19.356(9)(b).

<sup>422</sup> Wis. Stat. § 19.356(9)(b).

- The first step is to perform the usual public records analysis. There is no need to consider whether courtesy notice should be provided if no records are going to be released.
- Courtesy notices should not suggest that the recipient is entitled to seek pre-release court review.
- Courtesy notice procedures should not unduly delay related records releases.

## ELECTRONIC RECORDS

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### Introduction

The same general principles apply to records in electronic format, but unique or unresolved problems relating to storage, retention, and access abound.

- The public records law defines the term “record” broadly to include “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.”<sup>423</sup>
- Because the content or substance of information contained in a document determines whether it is a “record” or not, information concerning public access set forth in the remainder of this outline generally applies.<sup>424</sup> Many questions unique to electronic records have not yet been addressed by the legislature or published court decisions. However, the court of appeals in a recent decision, *Lueders v. Krug*, addressed the issue of whether an authority has a duty under the public records law to provide responsive emails in the format requested, and held that the requester was “entitled to the emails in electronic form” when the requester specifically requested email “records in electronic form.”<sup>425</sup>

### Record Identification

- Electronically stored information generally constitutes a “record” within the meaning of the public records law so long as the recorded information is created or kept in connection with official business. The substance, not the format, controls whether it is a record or not.<sup>426</sup>
  - Emails and other records created or maintained on a personal computer or mobile device, or from a personal email account, constitute records if they relate to government business.<sup>427</sup>
  - Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include word processing documents, database files, email correspondence, web-based information,

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<sup>423</sup> Wis. Stat. § 19.32(2); see Key Definitions, above.

<sup>424</sup> OAG I-06-09, at 2.

<sup>425</sup> *Lueders v. Krug*, 2019 WI App 36, ¶¶ 2, 15, 388 Wis. 2d 147, 931 N.W.2d 898.

<sup>426</sup> *Youmans*, 28 Wis. 2d at 679.

<sup>427</sup> See Key Definitions, above.

PowerPoint presentations, and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions.<sup>428</sup>

- Electronic records include content posted by or on behalf of authorities to social media sites, such as Facebook and Twitter, to the extent that the content relates to government business. If an authority uses social media, the content must be produced if it is responsive to a public records request. This includes not only currently “live” content, but also past content.
- Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes “electronically formatted documents” in its definition of public records.
- If an authority makes use of social media, or if employees use mobile devices to conduct government business (whether the device is personal or provided by the authority), the authority should adopt procedures to retain and preserve all such records consistent with Wis. Stat. § 16.61 (state authorities), Wis. Stat. § 19.21 (local authorities), and applicable records disposition authorizations.
- Information regarding government business kept or received by an elected official on her personal website, “Making Salem Better,” more likely than not constituted a record.<sup>429</sup>
- Drafts, notes, and personal use exceptions to the definition of “record” apply to electronic information. Electronic information may fall into these exceptions to the definition of “record,” based on application of the general concepts set out in Key Definitions, above.
  - As with paper documents, whether electronic information fits within the “draft” or “notes” exceptions requires consideration of how the information has been used and the individuals to whom the information has been circulated.<sup>430</sup>
  - Personal emails.
    - Purely personal emails sent or received by employees or officers on an authority’s computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request.<sup>431</sup>
    - Personal emails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the emails and a government function, such as a personnel investigation.<sup>432</sup>

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<sup>428</sup> See Analyzing the Request, above.

<sup>429</sup> OAG I-06-09, at 2–3.

<sup>430</sup> See Key Definitions, above.

<sup>431</sup> *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring).

<sup>432</sup> *Id.* ¶ 23 (Abrahamson, C.J., lead opinion), ¶ 166 (Bradley, J., concurring), ¶ 180 (Gableman, J., concurring).

For additional information, see Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010).<sup>433</sup>

- Electronic documents may contain contextual information and file history preserved only when viewed in certain formats, such as data generated automatically by computer operating systems or software programs. Whether this information is considered a “record” subject to public access remains largely unanswered.
  - Metadata. Literally defined as “data about data,” metadata has different meanings, depending on context. Generally, metadata is electronic information that is not contained on a paper copy, but may reveal information about the document if contained in an electronic record, such as email headers or other information that shows when the document was created and who created it.<sup>434</sup>
    - No controlling Wisconsin precedent squarely addresses the application of the public records law to such data, although the court of appeals reasoned that paper copies of emails would not contain “metadata” or other “substantive information” that is contained in electronic copies of emails.<sup>435</sup> The court also reasoned that a flash drive containing electronic copies of emails would contain that information.<sup>436</sup>
    - Legal commentary and federal cases addressing the treatment of metadata during litigation and civil discovery also are helpful for understanding access and retention issues related to metadata.<sup>437</sup>
    - Courts in some other jurisdictions interpreting their freedom of information laws (which may differ significantly from the Wisconsin public records law) have held that metadata is part of electronic records and must be disclosed in response to a freedom of information request for those records.<sup>438</sup>
  - Email messages may contain transmission information in the original format that does not appear on a printed copy or when stored electronically.<sup>439</sup>
    - In *Lueders*, the court of appeals stated that it was undisputed that the electronic copies of the emails, as received and stored on the authority’s computer, contained the same information as the emails themselves, but that “substantive information” was missing

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<sup>433</sup> Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010), <https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf>.

<sup>434</sup> *Lueders*, 2019 WI App 36, ¶¶ 12–13.

<sup>435</sup> *Id.* ¶¶ 11, 15.

<sup>436</sup> *Id.*

<sup>437</sup> See, e.g., selected publications from The Sedona Conference and its working groups, including *The Sedona Guidelines: Best Practice Guidelines for Managing Information & Records in the Electronic Age* (Sept. 2005), and *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. June 2007), <https://thesedonaconference.org/publications>; see also *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646–47 (D. Kan. 2005); *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008).

<sup>438</sup> E.g., *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enft Agency*, No. 10 Civ. 3488, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (subsequently withdrawn due to incomplete factual record); *Irwin v. Onondaga Cty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 319 (N.Y. App. Div. 2010); *O’Neill v. City of Shoreline*, 240 P.3d 1149, 1152 (Wash. 2010); *Lake v. City of Phoenix*, 218 P.3d 1004, 1007–08 (Ariz. 2009).

<sup>439</sup> *Lueders*, 2019 WI App 36, ¶¶ 11–12.

from the printed-out copies of those emails.<sup>440</sup> Therefore, the court held that paper copies of the emails did not fulfill the requester’s request for electronic copies of the emails. However, copying emails onto a flash drive would have contained all the information, including the metadata, that the original emails themselves contained.<sup>441</sup>

- The court of appeals has also stated that providing a record in PDF format satisfied a request for records in “electronic, digital” format.<sup>442</sup>
- Computers contain “cookies,” temporary internet files, deleted files, and other files that are not consciously created or kept by the user, but are instead generated or stored automatically. In addition, although a user may delete files, deleted materials remain on the computer until overwritten, unlike conventional documents discarded and destroyed as trash. Some of these materials are akin to drafts or materials prepared for personal use, or are simply not materials created or kept in connection with official business. Nonetheless, when such materials are collected, organized, and kept for an official purpose, they may constitute a record accessible under the public records statute.<sup>443</sup>

## Access

If electronically stored material is a record, the records custodian must determine whether the public records law requires access. Recurring issues relating to access include the following.

- Sufficiency of requests. Under Wis. Stat. § 19.35(1)(h), a request must be reasonably limited “as to subject matter or length of time represented by the record.”<sup>444</sup> Record requests describing only the format requested (“all e-mails”) without reasonable limitations as to time and subject matter are often not legally sufficient. If so, the custodian may insist that the requester reasonably describe the records being requested. Even if a requester appears to limit a request by specifying the time period or particular search terms or individual electronic mail boxes to be searched, such requests for voluminous electronic records have been held to be insufficient and unreasonably burdensome.<sup>445</sup>
- Manner of access.
  - Wisconsin Stat. § 19.35(1)(k) permits an authority to impose reasonable restrictions on the manner of access to original records if they are irreplaceable or easily damaged. Concerns for protecting the integrity of original records may justify denial of direct access to an agency’s operating system or to inspect a public employee’s assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security

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<sup>440</sup> *Id.*

<sup>441</sup> *Id.* ¶¶ 13–15.

<sup>442</sup> *WIREdata II*, 2008 WI 69, ¶¶ 97–98.

<sup>443</sup> See, e.g., *Zellner I*, 2007 WI 53, ¶¶ 22–31 (holding that a CD-ROM containing adult images and internet searches compiled in the course of an employee disciplinary action was not within the copyright exception to the definition of a public record; assuming without discussion that the material was a record based on its use by the school district).

<sup>444</sup> See The Request, above; *Schopper*, 210 Wis. 2d at 212–13.

<sup>445</sup> *Gehl*, 2007 WI App 238, ¶¶ 23–24 (search requests for all emails exchanged by numerous individuals without specifying any subject matter, and for searches based on numerous broad search terms, were properly denied as insufficient).

concerns may also justify such a restriction.<sup>446</sup> Provision of a copy of the requested data “in an appropriate format”—in this case, as portable document files (“PDFs”)—was sufficient.<sup>447</sup>

- Records posted on the internet. The Attorney General has advised that agencies may not use online record posting as a substitute for their public records responsibilities, and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in Wis. Stat. §§ 19.32(2) or 19.35(1)(g).<sup>448</sup> Nonetheless, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters.
- The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself.<sup>449</sup>
- Must the authority provide a record in the format requested?
  - If the requester appears personally to request a copy of a record, Wis. Stat. § 19.35(1)(b) requires that copies of written documents be “substantially as readable” as the original.<sup>450</sup> Wisconsin Stat. § 19.35(1)(c) and (d) also require that audiotapes be “substantially as audible,” and copies of videotapes be “substantially as good” as the originals.
  - By analogy, providing a copy of an electronic document that is “substantially as good” as the original is a sufficient response where the requester does not specifically request access in the original format.<sup>451</sup>
  - Wisconsin Stat. § 19.36(4) provides, however, that material used as input for or produced as the output of a computer is subject to examination and copying. *Jones* ultimately held that, when a requester specifically asked for the original DAT recording of a 911 call, the custodian did not fulfill the requirements of Wis. Stat. § 19.36(4) by providing only the analog copy.<sup>452</sup>
  - In *WIREData II*, the Wisconsin Supreme Court declined to address the issue of whether the provision of documents in PDF format would have satisfied a subsequent request specifying in detail that the data should be produced in a particular format which included

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<sup>446</sup> See *WIREData II*, 2008 WI 69, ¶¶ 97–98 (reversing court of appeals decision allowing requesters direct access to an authority’s electronic database; recognizing that “such direct access . . . would pose substantial risks”).

<sup>447</sup> *Id.* ¶ 97.

<sup>448</sup> Letter from James E. Doyle, Wisconsin Attorney General, to John Muench (July 24, 1998).

<sup>449</sup> OAG I-06-09, at 3–4.

<sup>450</sup> *Lueders*, 2019 WI App 36, ¶ 6.

<sup>451</sup> See *WIREData II*, 2008 WI 69, ¶¶ 97–98 (provision of records in PDF format satisfied requests for records in “electronic, digital” format); *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, ¶ 10, 237 Wis. 2d 840, 615 N.W.2d 190 (holding that provision of an analog copy of a digital audio tape (“DAT”) complied with Wis. Stat. § 19.35(1)(c) by providing a recording that was “substantially as audible” as the original); see also *Autotech Techs.*, 248 F.R.D. at 558 (where litigant did not specify a format for production during civil discovery, responding party had option of providing documents in the “form ordinarily maintained or in a reasonably usable form”).

<sup>452</sup> *Jones*, 2000 WI App 146, ¶ 17.

fixed length, pipe delimited, or comma-quote outputs,<sup>453</sup> leaving open the question of the degree to which a requester can specify the precise electronic format that will satisfy a record request.

- Nevertheless, the court of appeals has provided some guidance in *Lueders* on whether an authority needs to provide records in a format specified by the requester, holding that the requester in that case was “entitled to the e-mails in electronic form” when the request was for emails “in electronic form.”<sup>454</sup> The court also stated that the authority must provide “electronic copies” not paper copies of records, to a requester who asks for records in electronic format.<sup>455</sup>
- Computer programs are expressly protected from examination or copying even though material used as computer input or produced as output may be subject to examination and copying unless otherwise exempt from public access.<sup>456</sup> For the definition of “computer program,” see Wis. Stat. § 16.971(4)(c).
- Wisconsin Stat. § 19.35(1)(e) gives requesters a right to receive a written copy of any public record that is not in readily comprehensible form. If the requester does not have access to a machine that will translate the information into a comprehensible form, the agency can fulfill its duties under the public records law by providing the requester with access to such a machine.<sup>457</sup>
- With limited exceptions, Wis. Stat. § 19.35(1)(L) provides that a records custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format.<sup>458</sup> Under Wis. Stat. § 19.36(6), however, the records custodian is required to delete or redact confidential information contained in a record before providing access to the parts of a record that are subject to disclosure.
  - When records are stored electronically, the distinction between redaction of existing records and the creation of an entirely new record can become difficult to discern.<sup>459</sup>
  - The Attorney General has advised that where information is stored in a database a person can “within reasonable limits” request a data run to obtain the requested information.<sup>460</sup> Use a rule of reason to determine whether retrieving electronically stored data entails the creation of a new record. Consider the time, expense, and difficulty of extracting the data requested, and whether the agency itself ever looks at the data in the format requested.<sup>461</sup>

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<sup>453</sup> *WIREData II*, 2008 WI 69, ¶¶ 8 n.7, 93, 96.

<sup>454</sup> *Lueders*, 2019 WI App 36, ¶ 15.

<sup>455</sup> *Id.*

<sup>456</sup> Wis. Stat. § 19.36(4).

<sup>457</sup> See 75 Op. Att’y Gen. 133, 145 (1986).

<sup>458</sup> *George*, 169 Wis. 2d 573.

<sup>459</sup> See *Osborn*, 2002 WI 83, ¶¶ 41–46.

<sup>460</sup> 68 Op. Att’y Gen. 231, 232 (1979).

<sup>461</sup> Cf. *N.Y. Pub. Interest Research Grp. v. Cohen*, 729 N.Y.S.2d 379, 382–83 (N.Y. Sup. Ct. 2001) (where a “few hours” of computer programming would produce records that would otherwise require weeks or months to redact manually, the court concluded that requiring the necessary programming did not violate the New York statutory prohibition against creation of a new record).

- A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law.<sup>462</sup>
  - “Political subdivision” means any city, village, town, or county.<sup>463</sup>
  - “Land information” means any physical, legal, economic, or environmental information, or characteristics concerning land, water, groundwater, subsurface resources, or air in Wisconsin. It includes information relating to topography, soil, soil erosion, geology, minerals, vegetation, land cover, wildlife, associated natural resources, land ownership, land use, land use controls and restriction, jurisdictional boundaries, tax assessment, land value, land survey records and references, geodetic control networks, aerial photographs, maps, planimetric data, remote sensing data, historic and prehistoric sites, and economic projections.<sup>464</sup>
- Wisconsin Stat. § 19.35(1)(a) provides that “any requester has a right to inspect any *record*.” Compare this to the language of the federal Freedom of Information Act, 5 U.S.C. § 552, which requires that “public information” be made available. Cases in other jurisdictions have found this distinction significant in deciding whether information must be provided in a particular format.<sup>465</sup>
- Role of the records custodian. Under Wis. Stat. § 19.34(2), the records custodian is legally responsible for providing access to public records.
  - The records custodian must protect the right of public access to electronic records stored on individual employees’ computers, such as email, even though the individual employee may act as the *de facto* records custodian of such records. Related problems arise when individual employees or elected officials use personal email accounts to correspond concerning official business.
  - Shared-access databases involving multiple agencies.
    - Information of common use or interest increasingly is shared electronically by multiple agencies. To prevent confusion among participating agencies and unnecessary delays in responding to requests for records, establishment of such a database should be accompanied by detailed rules identifying who may enter information and who is responsible for responding to requests for particular records.
    - Special custodial and disclosure rules govern public records requests for certain shared law enforcement records.<sup>466</sup>

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<sup>462</sup> Wis. Stat. § 66.1102(4).

<sup>463</sup> Wis. Stat. § 66.1102(1)(b).

<sup>464</sup> Wis. Stat. § 66.1102(1)(a) (incorporating by reference Wis. Stat. § 59.72(1)(a)).

<sup>465</sup> Cf. *AFSCME v. Cty. of Cook*, 555 N.E.2d 361, 366 (Ill. 1990); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. Ct. App. 1995).

<sup>466</sup> See Key Definitions, above.

- Government data collected and processed by independent contractors. A government entity may not avoid its responsibilities under the public records law by contracting with an independent contractor for the collection and maintenance of government records and then simply directing requesters to the independent contractor for handling of public records requests. The government entity remains the “authority” responsible for complying with the law and is liable for a contractor’s failure to comply.<sup>467</sup>

## Retention and Storage

- The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is made.<sup>468</sup>
- **Caution:** The fact that an authority has violated its own retention policy is irrelevant to whether the record must be disclosed under public records law.<sup>469</sup>
- Issues related to record retention that are exclusive to electronic records often derive from their relative fragility, susceptibility to damage or loss, and difficulties in insuring their authenticity and accessibility.
  - The Wisconsin Department of Administration (DOA) has statutory rule-making authority to prescribe standards for storage of optical disks and electronic records.<sup>470</sup> DOA has promulgated Wis. Admin. Code ch. Adm 12 which governs the management of records stored exclusively in electronic format by state and local agencies, but does not require an agency to maintain records in electronic format. Wisconsin Admin. Code ch. Adm 12 defines terms of art relating to electronic records, establishes requirements for accessibility of electronic records from creation through use, management, preservation, and disposition, and requires that state and local agencies must also comply with the statutes and rules relating to retention of non-electronic records. Wisconsin Admin. Code ch. Adm 12 is available at [http://docs.legis.wisconsin.gov/code/admin\\_code/adm/12.pdf](http://docs.legis.wisconsin.gov/code/admin_code/adm/12.pdf). A primer on Wis. Admin. Code ch. Adm 12 can be found under Reference Materials at [http://publicrecordsboard.wi.gov/docs\\_all.asp?locid=165](http://publicrecordsboard.wi.gov/docs_all.asp?locid=165).
  - Beyond Wis. Admin. Code ch. Adm 12, the Wisconsin Public Records Board has published a best practices document entitled, *Guidelines for the Management and Retention of Public Record E-Mail*, <http://publicrecordsboard.wi.gov/docview.asp?docid=21209&locid=165>.
  - Documents posted online. In recent years, agencies have frequently taken advantage of the ease of posting public records on government websites. State agencies are required by law, Wis. Stat. § 35.81, *et seq.*, to provide copies of agency publications to the Wisconsin Reference and Loan Library for distribution to public libraries through the Wisconsin Document Depository Program. The Wisconsin Digital Archives has been established to

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<sup>467</sup> *WIREData II*, 2008 WI 69, ¶¶ 82–89.

<sup>468</sup> See *Gehl*, 2007 WI App 238, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)).

<sup>469</sup> *Id.* ¶¶ 12–15.

<sup>470</sup> Wis. Stat. §§ 16.611, 16.612.

preserve state agency web content for access and use in the future, and to provide a way for state agencies to fulfill their statutory obligation to participate in the Document Depository Program with materials in electronic formats. For more information about this program, see <https://dpi.wi.gov/rl3/wi-document-depository>.

## INSPECTION, COPIES, AND FEES

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### Inspection

- A requester generally may choose to inspect a record and/or to obtain a copy of the record. “Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.”<sup>471</sup>
- A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority’s employees.<sup>472</sup>
- A records custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.<sup>473</sup>
- For unique issues concerning inspection and copying of electronic records, see Electronic Records, Access, above.

### Copies

- A requester is entitled to a copy of a record, including copies of audio recordings and video recordings.<sup>474</sup> The records custodian must provide a copy if requested.<sup>475</sup>
  - If requested by the requester, the authority may provide a transcript of an audio recording instead of a copy of the recording.<sup>476</sup>
  - Any requester has the right to receive from an authority having custody of a record in the form of a video recording, a copy of the recording substantially as good as the original.<sup>477</sup>
  - If an authority receives a request to inspect or copy a handwritten record or a voice recording that the authority is required to protect because the handwriting or recorded voice would identify an informant, the authority must provide—upon request by the requester—a transcript of the record or the information contained in the record if the

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<sup>471</sup> Wis. Stat. § 19.35(1)(b).

<sup>472</sup> Wis. Stat. § 19.35(2).

<sup>473</sup> Wis. Stat. § 19.35(1)(k).

<sup>474</sup> Wis. Stat. § 19.35(1).

<sup>475</sup> *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 525–27, 549 N.W.2d 253 (Ct. App. 1996).

<sup>476</sup> Wis. Stat. § 19.35(1)(c).

<sup>477</sup> Wis. Stat. § 19.35(1)(d).

record or information is otherwise subject to copying or inspection under the public records law.<sup>478</sup>

- Except as otherwise provided by law, a requester has a right to inspect records, the form of which does not permit copying (other than written record, audio recordings, video recordings, and records not in readily comprehensible form).<sup>479</sup>
  - The authority may permit the requester to photograph the record.
  - The authority must provide a good quality photograph of a record, the form of which does not permit copying, if the requester asks that a photograph be provided.
- The requester has a right to a copy of the original record, *i.e.*, “source” material.
  - A request for a copy of a 911 call in its original digital form was not met by providing an analog copy.<sup>480</sup>
  - A request for an “electronic/digital” copy was satisfied by provision of a PDF document containing the requested information, even though the PDF did not have all of the characteristics the requester might have wished.<sup>481</sup>
  - A requester that requests access to emails in electronic form is “entitled to the e-mails in electronic form.”<sup>482</sup>
  - A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law.<sup>483</sup>
- The requester does not have a right to make requested copies. If the requester appears in person to request a copy of a record that permits photocopying, the records custodian may decide whether to make copies for the requester or let the requester make them, and how the records will be copied.<sup>484</sup>

## Fees

- An authority may charge a requester only for the specific tasks identified by the legislature in the fee provisions of Wis. Stat. § 19.35(3), unless otherwise provided by law.<sup>485</sup>

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<sup>478</sup> Wis. Stat. § 19.35(1)(em).

<sup>479</sup> Wis. Stat. § 19.35(1)(f).

<sup>480</sup> *Jones*, 2000 WI App 146, ¶¶ 10–19; *see* Electronic Records, Access, above.

<sup>481</sup> *WIREdata II*, 2008 WI 69, ¶ 96.

<sup>482</sup> *Lueders*, 2019 WI App 36, ¶ 15.

<sup>483</sup> Wis. Stat. § 66.1102(4); *see* Electronic Records, Access, above.

<sup>484</sup> Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, 624 N.W.2d 892 (requester was not entitled to make copies on requester’s own portable copying machine).

<sup>485</sup> *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 50 (Abrahamson, C.J., lead opinion), ¶ 76 (Roggensack, J., concurring); *see* Inspection, Copies, and Fees, below. For more information about permissible fees, *see also* *Office of Open Government Advisory: Charging Fees Under the Public Records Law* (Aug. 8, 2018).

- *Copy and transcription fees* may be charged.
  - Copy fees are limited to the “actual, necessary and direct cost” of reproduction unless a fee is otherwise specifically established or authorized to be established by law.<sup>486</sup>
  - “Reproduction” means the act, condition, or process of producing a counterpart, image, or copy. Reproduction is a rote, ministerial task that does not alter a record or change the content of the record. It instead involves only copying the record—for example, by making a photocopy of a paper record.<sup>487</sup>
  - *Costs of a computer run* may be imposed on a requester if the computer run is necessary to assemble and reduce a record to written form on paper.<sup>488</sup> An authority may charge a requester for any computer programming expenses required to respond to a request.<sup>489</sup>
  - *Transcription fees* may be charged, but are limited to the “actual, necessary and direct cost” of transcription, unless a fee is otherwise specifically established or authorized to be established by law.<sup>490</sup>
- *Photography and photographic reproduction fees* may be charged if the authority provides a photograph of a record, the form of which does not permit copying, but are limited to the “actual, necessary and direct” costs.<sup>491</sup>
- *Location costs.* Costs associated with locating records may be charged if they total \$50.00 or more. “Locating” a record means to find it by searching, examining, or experimenting. Subsequent review and redaction of the record are separate processes, not included in location of the record, for which a requester may not be charged.<sup>492</sup> Only actual, necessary, and direct location costs are permitted.<sup>493</sup>
- *Mailing and shipping fees* may be charged, but are limited to the “actual, necessary and direct cost” of mailing or shipping.<sup>494</sup>
- An authority may not charge a requester for the costs of deleting, or “redacting,” nondisclosable information included in responsive records.<sup>495</sup>
- If a record is produced or collected by a person who is not an authority pursuant to a contract with the authority, *i.e.*, a contractor, the fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record by the person who makes the reproduction or transcription, unless another fee is established or authorized by law.<sup>496</sup>

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<sup>486</sup> Wis. Stat. § 19.35(3)(a).

<sup>487</sup> *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 31 (Abrahamson, C.J., lead opinion).

<sup>488</sup> Wis. Stat. § 19.35(1)(e), (3)(a); 72 Op. Att’y Gen. 68, 70 (1983).

<sup>489</sup> *WIREdata II*, 2008 WI 69, ¶ 107.

<sup>490</sup> Wis. Stat. § 19.35(3)(a).

<sup>491</sup> Wis. Stat. § 19.35(3)(b).

<sup>492</sup> *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 29 (Abrahamson, C.J., lead opinion).

<sup>493</sup> Wis. Stat. § 19.35(3)(c).

<sup>494</sup> Wis. Stat. § 19.35(3)(d).

<sup>495</sup> *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion), ¶ 76 (Roggensack, J., concurring).

<sup>496</sup> Wis. Stat. § 19.35(3)(g).

- An authority may require prepayment of any fees if the total amount exceeds \$5.00.<sup>497</sup> The authority may refuse to make copies until payment is received.<sup>498</sup> Except for prisoners, the statute does not authorize a requirement for prepayment based on the requester’s failure to pay fees for a prior request.
- An authority has discretion to provide requested records for free or at a reduced charge.<sup>499</sup>
- An authority may not make a profit on its response to a public records request.<sup>500</sup>
- Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task.
- Specific statutes may establish express exceptions to the general fee provisions of Wis. Stat. § 19.35(3). Examples include Wis. Stat. § 814.61(10)(a) (court records), Wis. Stat. § 59.43(2)(b) (land records recorded by registers of deeds), and Wis. Stat. § 6.36(6) (authorizing fees for copies of the official statewide voter registration list).

## RIGHT TO CHALLENGE ACCURACY OF A RECORD

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Statutory authorization for an individual to challenge the accuracy of a record containing personally identifiable information pertaining to an individual was removed from the public records law by 2013 Wis. Act 171. The same statutory language was renumbered Wis. Stat. § 19.70 and now exists outside the public records law.

An individual authorized to inspect a record under Wis. Stat. § 19.35(1)(a) or (am), or a person authorized by that individual, may challenge the accuracy of a record containing personally identifiable information pertaining to that individual.<sup>501</sup>

In *Teague v. Schimel*, the Wisconsin Supreme Court ruled that Wis. Stat. § 19.70 applied to a case where, as a result of identity theft, an individual’s name was associated with the name of another person.<sup>502</sup>

- The court ruled that DOJ’s criminal background check was a record, and that the record was inaccurate when released in response to searches for the plaintiff’s name. Thus, the record was subject to correction under Wis. Stat. § 19.70.<sup>503</sup>
- The court also ruled that DOJ’s “innocence letter” procedures were insufficient safeguards to protect the individual’s due process rights.<sup>504</sup>

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<sup>497</sup> Wis. Stat. § 19.35(3)(f).

<sup>498</sup> *Hill*, 196 Wis. 2d at 429–30.

<sup>499</sup> Wis. Stat. § 19.35(3)(e).

<sup>500</sup> *WIREData II*, 2008 WI 69, ¶¶ 103, 107.

<sup>501</sup> Wis. Stat. § 19.70(1).

<sup>502</sup> *Teague v. Schimel*, 2017 WI 56, ¶¶ 29, 35, 375 Wis. 2d 458, 896 N.W.2d 286.

<sup>503</sup> *Id.* ¶ 35.

<sup>504</sup> *Id.* ¶¶ 74–78.

*Exceptions.* This right does not apply if the record has been transferred to an archival repository, or if the record pertains to an individual and a specific state statute or federal law governs challenges to the accuracy of that record.<sup>505</sup>

The challenger must notify the authority, in writing, of the challenge.<sup>506</sup> The authority then may: (1) concur and correct the information; or (2) deny the challenge, notify the challenger of the denial, and allow the challenger to file a concise statement of reasons for the individual's disagreement with the disputed portions of the record. A state authority must also notify the challenger of the reasons for the denial.<sup>507</sup>

## ENFORCEMENT AND PENALTIES

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### Mandamus

The public records law encourages assertion of the right to access.

- If an authority withholds a record or part of a record, or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may:
  - Bring an action for mandamus asking a court to order release of the record; or
  - Submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that an action for mandamus be brought asking the court to order release of the record to the requester.<sup>508</sup>
- Mandamus procedures are set forth in chapters 781 and 783 of the Wisconsin Statutes.
- Mandamus is the exclusive remedy provided by the legislature to enforce the public records law and obtain the remedies specified in Wis. Stat. § 19.37.<sup>509</sup>
- **Caution:** Inmates who seek mandamus must first exhaust their administrative remedies before filing an action as required by Wis. Stat. § 801.02(7).<sup>510</sup>
- A request must be made in writing before a mandamus action to enforce the request is commenced.<sup>511</sup> However, mandamus actions to enforce the public records law are exempt from the notice of claim requirements of Wis. Stat. §§ 893.80 and 893.82.<sup>512</sup>

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<sup>505</sup> Wis. Stat. § 19.70(2).

<sup>506</sup> Wis. Stat. § 19.70(1).

<sup>507</sup> See Wis. Stat. § 19.70(2)(a)–(b).

<sup>508</sup> Wis. Stat. § 19.37(1).

<sup>509</sup> *Stanley*, 2012 WI App 42, ¶¶ 60–64 (cannot be enforced by supervisory writ); *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶¶ 4–6, 337 Wis. 2d 544, 807 N.W.2d 666; *State v. Zien*, 2008 WI App 153, ¶¶ 34–35, 314 Wis. 2d 340, 761 N.W.2d 15.

<sup>510</sup> *Moore v. Stahowiak*, 212 Wis. 2d 744, 749–50, 569 N.W.2d 70 (Ct. App. 1997); see also *State ex rel. Pressley v. Fiacchino*, No. 2015AP2620, 2016 WL 7470533 (Wis. Ct. App. Dec. 28, 2016) (unpublished).

<sup>511</sup> Wis. Stat. § 19.35(1)(h).

<sup>512</sup> Wis. Stat. § 19.37(1n).

- In a mandamus action, the court must decide whether the records custodian gave sufficiently specific reasons for denying an otherwise proper public records request. If the records custodian's reasons for denying the request were sufficiently specific, the court must decide whether the records custodian's reasons are based on a statutory or judicial exception or are sufficient to outweigh the strong public policy favoring disclosure. Ordinarily the court examines the record to which access is requested *in camera*.<sup>513</sup>
  - To obtain a writ of mandamus, the requester must establish four things.<sup>514</sup>
    - The requester has a clear right to the records sought.
    - The authority has a plain legal duty to disclose the records.
    - Substantial damage would result if the petition for mandamus was denied.
    - The requester has no other adequate remedy at law.
  - A records custodian who has denied access to requested records defeats the issuance of a writ of mandamus compelling their production by establishing, for example, that the requester does not have a clear right to the records.<sup>515</sup>
- The court may allow the parties or their attorneys limited access to the requested record for the purpose of presenting their mandamus cases, under such protective orders or other restrictions as the court deems appropriate.<sup>516</sup> See the *Ardell* discussion at The Response to the Request, Content of Denials, above. A reviewing court may examine requested records *in camera* on mandamus, but is not required to do so. *In camera* review is not necessary when a custodian identifies sufficiently specific public policy reasons supporting nondisclosure and those reasons override the presumption in favor of disclosure.
- Statutes of limitation.
  - Except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced with three years after the cause of action accrues.<sup>517</sup>
  - A committed or incarcerated person must bring an action for mandamus challenging denial of a request for access to a record within ninety days after the request is denied by the authority.<sup>518</sup> Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37.<sup>519</sup> The ninety-day time period excludes Saturdays, Sundays, and legal holidays.<sup>520</sup>

<sup>513</sup> *Youmans*, 28 Wis. 2d at 682–83; *George*, 169 Wis. 2d at 578, 582–83.

<sup>514</sup> *Watton*, 2008 WI 74, ¶ 8; see *Journal Times*, 2014 WI App 67, ¶ 10 (voluntary release of records following initiation of a mandamus action renders the mandamus action moot).

<sup>515</sup> *Watton*, 2008 WI 74, ¶ 8 n.9.

<sup>516</sup> Wis. Stat. § 19.37(1)(a); *Appleton Post-Crescent v. Janssen*, 149 Wis. 2d 294, 298–305, 441 N.W.2d 255 (Ct. App. 1989) (allowing limited attorney access only for purposes of case preparation).

<sup>517</sup> Wis. Stat. § 893.93(1m)(a).

<sup>518</sup> Wis. Stat. § 19.37(1m).

<sup>519</sup> See Wis. Stat. § 801.07(7); *Moore*, 212 Wis. 2d at 749–50.

<sup>520</sup> See Wis. Stat. § 19.345.

## Penalties Available on Mandamus

- Attorneys' fees, damages of not less than \$100.00, and other actual costs shall be awarded to a requester who prevails in whole or in substantial part in a mandamus action concerning access to a record under Wis. Stat. § 19.35(1)(a).<sup>521</sup>
  - The purpose of Wis. Stat. § 19.37(2) is to encourage voluntary compliance, so a judgment or order favorable in whole or in part in a mandamus action is not a necessary condition precedent to finding that a party prevailed against an authority under Wis. Stat. § 19.37(2).<sup>522</sup>
  - **Caution:** Damages may be awarded if the prevailing requester is a committed or incarcerated person, but that requester is not entitled to any minimum amount of damages.<sup>523</sup>
  - **Caution:** For an attorney fee award to be made, there must be an attorney-client relationship.<sup>524</sup>
  - **Caution:** Costs and fees are only available to a party that has filed, or has requested a district attorney or DOJ to file, an original mandamus action.<sup>525</sup>
  - To establish that he or she has "prevailed," the requester must show that the prosecution of the mandamus action could "reasonably be regarded as necessary to obtain the information" and that a "causal nexus" exists between the legal action and the records custodian's disclosure of the requested information.<sup>526</sup>
  - There are several cases discussing recovery of attorney fees where plaintiff "substantially prevails" and recovering fees and costs after the case is dismissed for being moot.<sup>527</sup>
  - Actual damages shall be awarded to a requester who files a mandamus action under Wis. Stat. § 19.35(1)(am), relating to access to a record containing personally identifiable information, if the court finds that the authority acted in a willful or intentional manner.<sup>528</sup> There are no automatic damages in this type of mandamus case nor is there statutory authority for the court to award attorney fees and costs.
- Punitive damages may be awarded to a requester if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excess

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<sup>521</sup> Wis. Stat. § 19.37(2)(a); see *Journal Times*, 2014 WI App 67, ¶¶ 10–11 (even if release of records renders mandamus action moot, authority still may be liable for requester's attorneys fees and costs if mandamus action was a cause of the records release).

<sup>522</sup> *Eau Claire Press Co.*, 176 Wis. 2d at 159–60.

<sup>523</sup> Wis. Stat. § 19.37(2)(a).

<sup>524</sup> *Young*, 165 Wis. 2d at 294–97 (no attorney fees for *pro se* litigant).

<sup>525</sup> *Stanley*, 2012 WI App 42, ¶¶ 60–64.

<sup>526</sup> *Eau Claire Press Co.*, 176 Wis. 2d at 160.

<sup>527</sup> *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326–30, 385 N.W.2d 510 (Ct. App. 1986); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 522–25, 427 N.W.2d 414 (Ct. App. 1988); *Eau Claire Press Co.*, 176 Wis. 2d at 159–60.

<sup>528</sup> Wis. Stat. § 19.37(2)(b).

fees.<sup>529</sup> However, a requester cannot obtain punitive damages unless it timely files a mandamus action and actual damages are ordered.<sup>530</sup>

- A civil forfeiture of not more than \$1,000.00 may be imposed against an authority or legal custodian who arbitrarily or capriciously denies or delays response to a request or charges excessive fees.<sup>531</sup>

## Related Criminal Offenses

In addition to the mandamus relief provided by the public records law, criminal penalties are available for:

- Destruction, damage, removal, or concealment of public records with intent to injure or defraud.<sup>532</sup>
- Alteration or falsification of public records.<sup>533</sup>

## Miscellaneous Enforcement Issues

- A requester cannot seek relief under the public records law for alleged violations of record retention statutes when the non-retention or destruction predates submission of the public records request.<sup>534</sup>
- An authority may not avoid liability under the public records law by contracting with an independent contractor for the collection, maintenance, and custody of its records, and by then directing any requester of those records to the independent contractor.<sup>535</sup>
- If the requested records are released before a mandamus action is filed, the plaintiff has no viable claim for mandamus and no right to seek the other remedies provided in Wis. Stat. § 19.37.<sup>536</sup>
- A small claims action is not the proper way to secure production of public records, and one attempt to do so was found to be frivolous.<sup>537</sup>
- In a public records law mandamus action, a requester cannot recover reasonable attorney fees, damages, and other actual costs under Wis. Stat. § 19.37(2) for an alleged violation of the open meetings law.<sup>538</sup>

## Interpretation by Attorney General

In addition to the methods of enforcement discussed above, the Attorney General also has express statutory authority to respond to requests for advice from any person as to the applicability of the open meetings

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<sup>529</sup> Wis. Stat. § 19.37(3).

<sup>530</sup> *Capital Times Co.*, 2011 WI App 137, ¶¶ 6, 11.

<sup>531</sup> Wis. Stat. § 19.37(4).

<sup>532</sup> Wis. Stat. § 946.72.

<sup>533</sup> Wis. Stat. § 943.38.

<sup>534</sup> Cf. Wis. Stat. § 19.35(5); *Gehl*, 2007 WI App 238, ¶¶ 13–15.

<sup>535</sup> *WIREdata II*, 2008 WI 69, ¶ 89.

<sup>536</sup> *Capital Times Co.*, 2011 WI App 137, ¶¶ 12–15.

<sup>537</sup> *Knuth v. Town of Cedarburg*, No. 2009AP1485, 2010 WL 174141 (Wis. Ct. App. Jan. 20, 2010) (unpublished).

<sup>538</sup> *Journal Times*, 2015 WI 56, ¶ 51.

and public records laws.<sup>539</sup> This differs from other areas of law, in which the Attorney General is only authorized to give legal opinions or advice to specified governmental officials and agencies.

Citizens with questions about matters outside the scope of the open meetings and public records laws should seek assistance from a private attorney. Citizens and public officials with questions about the open meetings law or the public records law are advised to first consult the applicable statutes, the corresponding discussions in this compliance guide and in DOJ's Open Meetings Law Compliance Guide, court decisions, and prior Attorney General opinions, and to confer with their own private or governmental attorneys. In the rare instances where a question cannot be resolved in this manner, a written request for advice may be made to DOJ. In submitting such requests, it should be remembered that DOJ cannot conduct factual investigations, resolve disputed issues of fact, or make definitive determinations on fact-specific issues. Any response will thus be based solely on the information provided.

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<sup>539</sup> Wis. Stat. §§ 19.39, 19.98.

# Appendix A

Wisconsin Department of Justice

Public Records Notice



## Wisconsin Department of Justice Public Records Notice

The Wisconsin Department of Justice (DOJ) provides legal services, forensic science testing and analysis, criminal investigative assistance, crime victim services, and other law enforcement services to state and local government, and in certain matters, directly to state citizens. Within DOJ, the Divisions of Criminal Investigation, Forensic Sciences, Law Enforcement Services, Legal Services, and Management Services and the Offices of Crime Victim Services, Open Government, and School Safety are responsible for administering agency programs and services. Several positions within DOJ constitute state public offices for purposes of the Wisconsin public records law, including the position of Attorney General and the Attorney General's appointees working within DOJ.

DOJ has designated a Custodian of Public Records for DOJ and Deputy Custodians for each Division in order to meet its obligations under State public records laws. Members of the public may obtain access to DOJ's Public Records, or obtain copies of these records, by making a request of DOJ's Custodian of Public Records during DOJ's office hours of Monday through Friday, 8:00 a.m. to 4:30 p.m. Such requests should be made to:

Mr. Paul M. Ferguson, Office of Open Government  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

The law permits DOJ to impose fees for certain "actual, necessary and direct" costs associated with responding to public records requests. DOJ may bill requestors \$0.0135 (black and white) or \$0.0632 (color) for each photocopied page provided. DOJ may charge for actual costs to copy records to electronic formats and/or physical media. DOJ may charge for the physical media used to provide electronic records to requesters at \$0.13 per DVD and \$5.02 (8GB), \$6.53 (16 GB), \$10.08 (32 GB), \$18.52 (64 GB), \$32.21 (128 GB), \$53.81 (500 GB), \$60.14 (1 TB), and \$74.83 (2 TB) for flash drives. The actual cost of postage, courier, or delivery services may be charged. There will be an additional charge for criminal history searches, for specialized documents and photographs, and for retrieving records and files from the State Records Center. The cost of locating responsive records may be charged if it is \$50.00 or more and will be calculated as hourly pay rate (including fringe benefits) of the person locating records multiplied by actual time expended to locate records. Requests which exceed a total cost of \$5.00 may require prepayment. Requesters appearing in person may be asked to make their own copies, or DOJ may make copies for requesters at its discretion. All requests will be processed as soon as practicable and without delay.

Below you will find a brief description of the services provided by each DOJ division or office.

**Division of Criminal Investigation (DCI)** | DCI is responsible for investigating, either independently or in conjunction with local law enforcement agencies, certain criminal cases which are of statewide influence and importance. The division's responsibilities are delegated to several specialized bureaus: Arson Bureau/State Fire Marshall's Office, Financial Crimes Unit, Gaming Bureau, Investigative Services Bureau, Narcotics Bureau, Public Integrity Unit, and the Special Assignments Bureau.

**Division of Forensic Sciences (DFS)** | DFS includes the Wisconsin State Crime Laboratories in Madison, Milwaukee, and Wausau. The division is a nationally recognized accredited forensic laboratory system with areas of expertise including: controlled substances, toxicology, latent print examination, footwear examination, forensic imaging, firearms and toolmark examination, trace, biology/DNA, ten-print examination/AFIS administration, DNA databank/CODIS administration and the state's scientific crime scene response. Together these disciplines provide objective scientific testing and analysis of evidence for every community in Wisconsin.

**Division of Law Enforcement Services (DLES)** | DLES provides technical assistance to local law enforcement agencies and establishes training standards for law enforcement officers. The division is comprised of the Bureau of Justice Information and Analysis, the Crime Information Bureau, and the Training and Standards Bureau.

**Division of Legal Services (DLS)** | DLS is responsible for providing legal advice and counsel to state and local agencies as well as to citizens in certain matters. The division is comprised of six units specializing in different areas including Civil Litigation, Criminal Appeals, Criminal Litigation, Medicaid Fraud Control & Elder Abuse, Public Protection, and Special Litigation & Appeals.

**Division of Management Services (DMS)** | DMS provides basic staff support services to DOJ's other divisions in the areas of budget preparation, fiscal control, personnel management, payroll, training, facilities, and information technology.

**Office of Crime Victims Services (OCVS)** | OCVS provides various resources and services to crime victims including compensation to persons who are the innocent victims of certain violent crimes or, in the event of death, to their dependents.

**Office of Open Government (OOG)** | OOG is responsible for interpretation and application of laws and rules related to open government and ensures efficient response to public records requests.

**Office of School Safety (OSS)** | OSS administers the school safety grant program and helps improve school safety statewide.

# Appendix B

Wis. Stat. §§ 19.31–19.39

(3) (e) and except as provided under sub. (7). This section does not apply to pupil records under s. 118.125.

(7) Notwithstanding any minimum period of time for retention set under s. 16.61 (3) (e), any taped recording of a meeting, as defined in s. 19.82 (2), by any governmental body, as defined under s. 19.82 (1), of a city, village, town or school district may be destroyed no sooner than 90 days after the minutes have been approved and published if the purpose of the recording was to make minutes of the meeting.

(8) Any metropolitan sewerage commission created under ss. 200.21 to 200.65 may provide for the destruction of obsolete commission records. No record of the metropolitan sewerage district may be destroyed except by action of the commission specifically authorizing the destruction of that record. Prior to any destruction of records under this subsection, the commission shall give at least 60 days' prior notice of the proposed destruction to the state historical society, which may preserve records it determines to be of historical interest. Upon the application of the commission, the state historical society may waive this notice. Except as provided under sub. (7), the commission may only destroy a record under this subsection after 7 years elapse from the date of the record's creation, unless a shorter period is fixed by the public records board under s. 16.61 (3) (e).

**History:** 1971 c. 215; 1975 c. 41 s. 52; 1977 c. 202; 1979 c. 35, 221; 1981 c. 191, 282, 335; 1981 c. 350 s. 13; 1981 c. 391; 1983 a. 532; 1985 a. 180 ss. 22, 30m; 1985 a. 225; 1985 a. 332 s. 251 (1); Sup. Ct. Order, 136 Wis. 2d xi (1987); 1987 a. 147 ss. 20, 25; 1989 a. 248; 1991 a. 39, 185, 316; 1993 a. 27, 60, 172; 1995 a. 27, 201; 1999 a. 150 s. 672; 2017 a. 207 s. 5.

Sub. (1) provides that a police chief, as an officer of a municipality, is the legal custodian of all records of that officer's department. *Town of LaGrange v. Auchinleck*, 216 Wis. 2d 84, 573 N.W.2d 232 (Ct. App. 1997), 96–3313.

This section relates to records retention and is not a part of the public records law. An agency's alleged failure to keep sought-after records may not be attacked under the public records law. *Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06–2455.

Under sub. (1), district attorneys must indefinitely preserve papers of a documentary nature evidencing activities of prosecutor's office. 68 Atty. Gen. 17.

A county with a population under 500,000 [now 750,000] may by ordinance under s. 19.21 (6), [now s. 19.21 (5)] provide for the destruction of obsolete case records maintained by the county social services agency under s. 48.59 (1). 70 Atty. Gen. 196.

A VTAE (technical college) district is a "school district" under s. 19.21 (7) [now s. 19.21 (6)]. 71 Atty. Gen. 9.

**19.22 Proceedings to compel the delivery of official property.** (1) If any public officer refuses or neglects to deliver to his or her successor any official property or things as required in s. 19.21, or if the property or things shall come to the hands of any other person who refuses or neglects, on demand, to deliver them to the successor in the office, the successor may make complaint to any circuit judge for the county where the person refusing or neglecting resides. If the judge is satisfied by the oath of the complainant and other testimony as may be offered that the property or things are withheld, the judge shall grant an order directing the person so refusing to show cause, within some short and reasonable time, why the person should not be compelled to deliver the property or things.

(2) At the time appointed, or at any other time to which the matter may be adjourned, upon due proof of service of the order issued under sub. (1), if the person complained against makes affidavit before the judge that the person has delivered to the person's successor all of the official property and things in the person's custody or possession pertaining to the office, within the person's knowledge, the person complained against shall be discharged and all further proceedings in the matter before the judge shall cease.

(3) If the person complained against does not make such affidavit the matter shall proceed as follows:

(a) The judge shall inquire further into the matters set forth in the complaint, and if it appears that any such property or things are withheld by the person complained against the judge shall by warrant commit the person complained against to the county jail, there to remain until the delivery of such property and things to the complainant or until the person complained against be otherwise discharged according to law.

(b) If required by the complainant the judge shall also issue a warrant, directed to the sheriff or any constable of the county, commanding the sheriff or constable in the daytime to search such places as shall be designated in such warrant for such official property and things as were in the custody of the officer whose term of office expired or whose office became vacant, or of which the officer was the legal custodian, and seize and bring them before the judge issuing such warrant.

(c) When any such property or things are brought before the judge by virtue of such warrant, the judge shall inquire whether the same pertain to such office, and if it thereupon appears that the property or things pertain thereto the judge shall order the delivery of the property or things to the complainant.

**History:** 1977 c. 449; 1991 a. 316; 1993 a. 213.

**19.23 Transfer of records or materials to historical society.** (1) Any public records, in any state office, that are not required for current use may, in the discretion of the public records board, be transferred into the custody of the historical society, as provided in s. 16.61.

(2) The proper officer of any county, city, village, town, school district or other local governmental unit, may under s. 44.09 (1) offer title and transfer custody to the historical society of any records deemed by the society to be of permanent historical importance.

(3) The proper officer of any court may, on order of the judge of that court, transfer to the historical society title to such court records as have been photographed or microphotographed or which have been on file for at least 75 years, and which are deemed by the society to be of permanent historical value.

(4) Any other articles or materials which are of historic value and are not required for current use may, in the discretion of the department or agency where such articles or materials are located, be transferred into the custody of the historical society as trustee for the state, and shall thereupon become part of the permanent collections of said society.

**History:** 1975 c. 41 s. 52; 1981 c. 350 s. 13; 1985 a. 180 s. 30m; 1987 a. 147 s. 25; 1991 a. 226; 1995 a. 27.

**19.24 Refusal to deliver money, etc., to successor.** Any public officer whatever, in this state, who shall, at the expiration of the officer's term of office, refuse or willfully neglect to deliver, on demand, to the officer's successor in office, after such successor shall have been duly qualified and be entitled to said office according to law, all moneys, records, books, papers or other property belonging to the office and in the officer's hands or under the officer's control by virtue thereof, shall be imprisoned not more than 6 months or fined not more than \$100.

**History:** 1991 a. 316.

**19.25 State officers may require searches, etc., without fees.** The secretary of state, treasurer and attorney general, respectively, are authorized to require searches in the respective offices of each other and in the offices of the clerk of the supreme court, of the court of appeals, of the circuit courts, of the registers of deeds for any papers, records or documents necessary to the discharge of the duties of their respective offices, and to require copies thereof and extracts therefrom without the payment of any fee or charge whatever.

**History:** 1977 c. 187, 449.

**19.31 Declaration of policy.** In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, con-

sistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

**History:** 1981 c. 335, 391.

An agency cannot promulgate an administrative rule that creates an exception to the open records law. *Chavala v. Bubolz*, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95–3120.

Although the requester referred to the federal freedom of information act, a letter that clearly described open records and had all the earmarkings of an open records request was in fact an open records request and triggered, at minimum, a duty to respond. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510, 02–0216.

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought-after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. *Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06–2455.

Absent a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping a public record confidential, the public records law shall be construed in every instance with a presumption of complete public access. As the denial of public access generally is contrary to the public interest, access may be denied only in an exceptional case. An exceptional case exists when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure. *Hagen v. Board of Regents of the University of Wisconsin System*, 2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198, 17–2058.

The Wisconsin public records law. 67 MLR 65 (1983).

Municipal responsibility under the Wisconsin revised public records law. Maloney. WBB Jan. 1983.

The public records law and the Wisconsin department of revenue. Boykoff. WBB Dec. 1983.

The Wis. open records act: an update on issues. Trubek and Foley. WBB Aug. 1986.

Toward a More Open and Accountable Government: A Call For Optimal Disclosure Under the Wisconsin Open Records Law. Roang. 1994 WLR 719.

Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records. Holcomb & Isaac. 2008 WLR 515.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

### 19.32 Definitions. As used in ss. 19.32 to 19.39:

(1) "Authority" means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50 percent of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

(1b) "Committed person" means a person who is committed under ch. 51, 971, 975 or 980 and who is placed in an inpatient treatment facility, during the period that the person's placement in the inpatient treatment facility continues.

(1bd) "Elective official" means an individual who holds an office that is regularly filled by vote of the people.

(1bg) "Employee" means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.

(1c) "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. 973.09 (4) as a condition of placement, during the period of confinement for which the person has been sentenced.

(1d) "Inpatient treatment facility" means any of the following:

- (a) A mental health institute, as defined in s. 51.01 (12).
- (c) A facility or unit for the institutional care of sexually violent persons specified under s. 980.065.
- (d) The Milwaukee County mental health complex established under s. 51.08.

(1de) "Local governmental unit" has the meaning given in s. 19.42 (7u).

(1dm) "Local public office" has the meaning given in s. 19.42 (7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. 111.70 (1) (j).

(1e) "Penal facility" means a state prison under s. 302.01, county jail, county house of correction or other state, county or municipal correctional or detention facility.

(1m) "Person authorized by the individual" means the parent, guardian, as defined in s. 48.02 (8), or legal custodian, as defined in s. 48.02 (11), of an individual who is a child, as defined in s. 48.02 (2); the guardian of an individual adjudicated incompetent in this state; the personal representative or spouse of an individual who is deceased; or any person authorized, in writing, by an individual to act on his or her behalf.

(1r) "Personally identifiable information" has the meaning specified in s. 19.62 (5).

(2) "Record" means 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, that has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

(2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.

(3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

(3m) "Special purpose district" means a district, other than a state governmental unit or a county, city, village, or town, that is created to perform a particular function and whose geographic jurisdiction is limited to some portion of this state.

(4) "State public office" has the meaning given in s. 19.42 (13), but does not include a position identified in s. 20.923 (6) (f) to (gm).

**History:** 1981 c. 335; 1985 a. 26, 29, 332; 1987 a. 305; 1991 a. 39, 1991 a. 269 ss. 26pd, 33b; 1993 a. 215, 263, 491; 1995 a. 158; 1997 a. 79, 94; 1999 a. 9; 2001 a. 16; 2003 a. 47; 2005 a. 387; 2007 a. 20; 2013 a. 171, 265; 2015 a. 195, 196.

**NOTE:** 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

A study commissioned by the corporation counsel and used in various ways was not a "draft" under sub. (2), although it was not in final form. A document prepared other than for the originator's personal use, although in preliminary form or marked "draft," is a record. *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W.2d 589 (1989).

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access. *Journal/Sentinel v. Shorewood School Bd.* 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

Individuals confined as sexually violent persons under ch. 980 are not "incarcerated" under sub. (1c). *Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998), 97–0679.

A nonprofit corporation that receives 50 percent of its funds from a municipality or county is an authority under sub. (1) regardless of the source from which the municipality or county obtained those funds. *Cavey v. Walrath*, 229 Wis. 2d 105, 598 N.W.2d 240 (Ct. App. 1999), 98–0072.

A person aggrieved by a request made under the open records law has standing to raise a challenge that the requested materials are not records because they fall within the exception for copyrighted material under sub. (2). Under the facts of this case, the language of sub. (2), when viewed in light of the fair use exception to copyright infringement, applied so that the disputed materials were records within the statutory

definition. *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06–1143.

“Record” in sub. (2) and s. 19.35 (5) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. *Stone v. Board of Regents of the University of Wisconsin*, 2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d 774, 06–2537.

A municipality’s independent contractor assessor was not an authority under sub. (1) and was not a proper recipient of an open records request. In this case, only the municipalities themselves were the “authorities” for purposes of the open records law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

A corporation is quasi–governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case–by–case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city Web site, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. *State v. Beaver Dam Area Development Corporation*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, 06–0662.

Employees’ personal emails were not subject to disclosure in this case. *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, 08–0967.

Redacted portions of emails, who sent the emails, and where they were sent from were not “purely personal” and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. *The John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, 13–1187.

To be a “quasi–governmental corporation” under sub. (1) an entity must first be a corporation. To hold that the term “quasi–governmental corporation” includes an entity that is not a corporation would effectively rewrite the statute to eliminate the legislature’s use of the word corporation. *Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Association*, 2014 WI App 106, 357 Wis. 2d 687, 855 N.W.2d 715, 14–0249.

“Notes” in sub. (2) covers a broad range of frequently created, informal writings. Documents found to be notes in this case were mostly handwritten and at times barely legible. They included copies of post–it notes and telephone message slips, and in other ways appeared to reflect hurried, fragmentary, and informal writing. A few documents were in the form of draft letters, but were created for and used by the originators as part of their preparation for, or as part of their processing after, interviews that they conducted. *The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, 2015 WI App 53, 364 Wis. 2d 429, 867 N.W.2d 825, 14–1256.

The exception from the definition of “record” in sub. (2) of notes “prepared for the originator’s personal use” may apply to notes that are created or used in connection with government work and with a governmental purpose. *The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, 2015 WI App 53, 364 Wis. 2d 429, 867 N.W.2d 825, 14–1256.

A district attorney is employed by an authority and holds a state public office and therefore is not an “employee” within the meaning of sub. (1bg). *Moustakis v. Department of Justice*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142, 14–1853.

“Records” must have some relation to the functions of the agency. 72 Atty. Gen. 99.

The treatment of drafts under the public records law is discussed. 77 Atty. Gen. 100.

Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness? Mayer. 1996 WLR 295.

**19.33 Legal custodians.** (1) An elective official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.

(2) The chairperson of a committee of elective officials, or the designee of the chairperson, is the legal custodian of the records of the committee.

(3) The cochairpersons of a joint committee of elective officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.

(4) Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority’s highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all

employees of the authority entrusted with records subject to the legal custodian’s supervision.

(5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.

(6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.

(7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.

(8) No elective official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee’s records by rule or by law.

**History:** 1981 c. 335; 2013 a. 171.

The right to privacy law, s. 895.50, [now s. 995.50] does not affect the duties of a custodian of public records under s. 19.21, 1977 stats. 68 Atty. Gen. 68.

### 19.34 Procedural information; access times and locations.

(1) Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the authority that constitutes a local public office or a state public office. This subsection does not apply to members of the legislature or to members of any local governmental body.

(2) (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.

(b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:

1. Permit access to its records upon at least 48 hours’ written or oral notice of intent to inspect or copy a record; or

2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours’ advance written or oral notice of intent to inspect or copy a record.

(c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.

(d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day’s notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

**History:** 1981 c. 335; 2003 a. 47; 2013 a. 171.

**NOTE:** 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

**19.345 Time computation.** In ss. 19.33 to 19.39, when a time period is provided for performing an act, whether the period is expressed in hours or days, the whole of Saturday, Sunday, and any legal holiday, from midnight to midnight, shall be excluded in computing the period.

**History:** 2003 a. 47.

**NOTE:** 2003 Wis. Act 47, which creates this section, contains extensive explanatory notes.

**19.35 Access to records; fees. (1) RIGHT TO INSPECTION.**

(a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy information in a record under this paragraph does not apply to any of the following:

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

2. Any record containing personally identifiable information that, if disclosed, would do any of the following:

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85 (2) (bg), juvenile correctional facility, as defined in s. 938.02 (10p), secured residential care center for children and youth, as defined in s. 938.02 (15g), mental health institute, as defined in s. 51.01 (12), center for the developmentally disabled, as defined in s. 51.01 (3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

2m. The actual address, as defined in s. 165.68 (1) (b), of a participant in the program established in s. 165.68.

3. Any record that is part of a records series, as defined in s. 19.62 (7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(b) Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio recording a copy of the recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record

which is in the form of a video recording a copy of the recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36 (8) (b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Notwithstanding par. (b) and except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (c) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) FEES. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is \$50 or more.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds \$5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.

(g) Notwithstanding par. (a), if a record is produced or collected by a person who is not an authority pursuant to a contract entered into by that person with an authority, the authorized fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record incurred by the person who makes the reproduction or transcription, unless a fee is otherwise established or authorized to be established by law.

**(4) TIME FOR COMPLIANCE AND PROCEDURES.** (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37 (1) or upon application to the attorney general or a district attorney.

(c) If an authority receives a request under sub. (1) (a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1) (a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1) (a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1) (a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1) (am) and grant or deny the request accordingly.

**(5) RECORD DESTRUCTION.** No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under s. 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

**(6) ELECTIVE OFFICIAL RESPONSIBILITIES.** No elective official is responsible for the record of any other elective official unless he or she has possession of the record of that other official.

**(7) LOCAL INFORMATION TECHNOLOGY AUTHORITY RESPONSIBILITY FOR LAW ENFORCEMENT RECORDS.** (a) In this subsection:

1. "Law enforcement agency" has the meaning given s. 165.83 (1) (b).

2. "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.

3. "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.

(b) For purposes of requests for access to records under sub. (1), a local information technology authority that has custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology usage is not the legal custodian of the record. For such purposes, the legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.

(c) A local information technology authority that receives a request under sub. (1) for access to information in a law enforcement record shall deny any portion of the request that relates to information in a local law enforcement record.

**History:** 1981 c. 335, 391; 1991 a. 39, 1991 a. 269 ss. 34am, 40am; 1993 a. 93; 1995 a. 77, 158; 1997 a. 94, 133; 1999 a. 9; 2001 a. 16; 2005 a. 344; 2009 a. 259, 370; 2013 a. 171; 2015 a. 356.

**NOTE:** The following annotations relate to public records statutes in effect prior to the creation of s. 19.35 by ch. 335, laws of 1981.

A mandamus petition to inspect a county hospital's statistical, administrative, and other records not identifiable with individual patients, states a cause of action under this section. State ex rel. Dalton v. Mundy, 80 Wis. 2d 190, 257 N.W.2d 877 (1977).

Police daily arrest lists must be open for public inspection. Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

This section is a statement of the common law rule that public records are open to public inspection subject to common law limitations. Section 59.14 [now s. 59.20 (3)] is a legislative declaration granting persons who come under its coverage an absolute right of inspection subject only to reasonable administrative regulations. State ex rel. Bilder v. Town of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

A newspaper had the right to intervene to protect its right to examine sealed court files. State ex rel. Bilder v. Town of Delavan 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

Examination of birth records cannot be denied simply because the examiner has a commercial purpose. 58 Atty. Gen. 67.

Consideration of a resolution is a formal action of an administrative or minor governing body. When taken in a proper closed session, the resolution and result of the vote must be made available for public inspection absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Inspection of public records obtained under official pledges of confidentiality may be denied if: 1) a clear pledge has been made in order to obtain the information; 2) the pledge was necessary to obtain the information; and 3) the custodian determines that the harm to the public interest resulting from inspection would outweigh the public interest in full access to public records. The custodian must permit inspection of information submitted under an official pledge of confidentiality if the official or agency had specific statutory authority to require its submission. 60 Atty. Gen. 284.

The right to inspection and copying of public records in decentralized offices is discussed. 61 Atty. Gen. 12.

Public records subject to inspection and copying by any person would include a list of students awaiting a particular program in a VTAE (technical college) district school. 61 Atty. Gen. 297.

The investment board can only deny members of the public from inspecting and copying portions of the minutes relating to the investment of state funds and documents pertaining thereto on a case-by-case basis if valid reasons for denial exist and are specially stated. 61 Atty. Gen. 361.

Matters and documents in the possession or control of school district officials containing information concerning the salaries, including fringe benefits, paid to individual teachers are matters of public record. 63 Atty. Gen. 143.

The department of administration probably had authority under s. 19.21 (1) and (2), 1973 stats., to provide a private corporation with camera-ready copy of session laws that is the product of a printout of computer stored public records if the costs are minimal. The state cannot contract on a continuing basis for the furnishing of this service. 63 Atty. Gen. 302.

The scope of the duty of the governor to allow members of the public to examine and copy public records in his custody is discussed. 63 Atty. Gen. 400.

The public's right to inspect land acquisition files of the department of natural resources is discussed. 63 Atty. Gen. 573.

Financial statements filed in connection with applications for motor vehicle dealers' and motor vehicle salvage dealers' licenses are public records, subject to limitations. 66 Atty. Gen. 302.

Sheriff's radio logs, intradepartmental documents kept by the sheriff, and blood test records of deceased automobile drivers in the hands of the sheriff are public records, subject to limitations. 67 Atty. Gen. 12.

Plans and specifications filed under s. 101.12 are public records and are available for public inspection. 67 Atty. Gen. 214.

Under s. 19.21 (1), district attorneys must indefinitely preserve papers of a documentary nature evidencing activities of prosecutor's office. 68 Atty. Gen. 17.

The right to examine and copy computer-stored information is discussed. 68 Atty. Gen. 231.

After the transcript of court proceedings is filed with the clerk of court, any person may examine or copy the transcript. 68 Atty. Gen. 313.

**NOTE: The following annotations relate to s. 19.35.**

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by sub. (1) (a) to state specific and sufficient public policy reasons why the public's interest in nondisclosure outweighed the right of inspection. *Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

Courts must apply the open records balancing test to questions involving disclosure of court records. The public interests favoring secrecy must outweigh those favoring disclosure. *C. L. v. Edson*, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

Public records germane to pending litigation were available under this section even though the discovery cutoff deadline had passed. *State ex rel. Lank v. Rzentkowski*, 141 Wis. 2d 846, 416 N.W.2d 635 (Ct. App. 1987).

To uphold a custodian's denial of access, an appellate court will inquire whether the trial court made a factual determination supported by the record of whether documents implicate a secrecy interest, and, if so, whether the secrecy interest outweighs the interests favoring release. *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

That releasing records would reveal a confidential informant's identity was a legally specific reason for denial of a records request. The public interest in not revealing the informant's identity outweighed the public interest in disclosure of the records. *Mayfair Chrysler-Plymouth v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638 (1991).

Items subject to examination under s. 346.70 (4) (f) may not be withheld by the prosecution under a common law rule that investigative material may be withheld from a criminal defendant. *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

Prosecutors' files are exempt from public access under the common law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991).

Records relating to pending claims against the state under s. 893.82 need not be disclosed under s. 19.35. Records of non-pending claims must be disclosed unless an *in camera* inspection reveals that the attorney-client privilege would be violated. *George v. Record Custodian*, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

The public records law confers no exemption as of right on indigents from payment of fees under sub. (3). *George v. Record Custodian*, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

The denial of a prisoner's information request regarding illegal behavior by guards on the grounds that it could compromise the guards' effectiveness and subject them to harassment was insufficient. *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 536 N.W.2d 130 (Ct. App. 1995), 94-2710.

The amount of prepayment required for copies may be based on a reasonable estimate. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995), 94-1861.

The *Foust* decision does not automatically exempt all records stored in a closed prosecutorial file. The exemption is limited to material actually pertaining to the prosecution. *Nichols v. Bennett*, 199 Wis. 2d 268, 544 N.W.2d 428 (1996), 93-2480.

Department of Regulation and Licensing test scores were subject to disclosure under the open records law. *Munroe v. Braatz*, 201 Wis. 2d 442, 549 N.W.2d 452 (Ct. App. 1996), 95-2557.

Subs. (1) (i) and (3) (f) did not permit a demand for prepayment of \$1.29 in response to a mail request for a record. *Borzzych v. Paluszcyk*, 201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996), 95-1711.

An agency cannot promulgate an administrative rule that creates an exception to the open records law. *Chavala v. Bubolz*, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95-3120.

While certain statutes grant explicit exceptions to the open records law, many statutes set out broad categories of records not open to an open records request. A custodian faced with such a broad statute must state with specificity a public policy reason

for refusing to release the requested record. *Chavala v. Bubolz*, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95-3120.

The custodian is not authorized to comply with an open records request at some unspecified date in the future. Such a response constitutes a denial of the request. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 125 (Ct. App. 1996), 96-0053.

Subject to the redaction of officers' home addresses and supervisors' conclusions and recommendations regarding discipline, police records regarding the use of deadly force were subject to public inspection. *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996), 95-2956.

A public school student's interim grades are pupil records specifically exempted from disclosure under s. 118.125. If records are specifically exempted from disclosure, failure to specifically state reasons for denying an open records request for those records does not compel disclosure of those records. *State ex rel. Blum v. Board of Education*, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997), 96-0758.

Requesting a copy of 180 hours of audiotape of "911" calls, together with a transcription of the tape and log of each transmission received, was a request without "reasonable limitation" and was not a "sufficient request" under sub. (1) (h). *Schopfer v. Gehring*, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96-2782.

If the requested information is covered by an exempting statute that does not require a balancing of public interests, there is no need for a custodian to conduct such a balancing. Written denial claiming a statutory exception by citing the specific statute or regulation is sufficient. *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 586 N.W.2d 36 (Ct. App. 1998), 97-3356.

Protecting persons who supply information or opinions about an inmate to the parole commission is a public interest that may outweigh the public interest in access to documents that could identify those persons. *State ex rel. Bergmann v. Faust*, 226 Wis. 2d 273, 595 N.W.2d 75 (Ct. App. 1999), 98-2537.

Sub. (1) (b) gives the record custodian, and not the requester, the choice of how a record will be copied. The requester cannot elect to use his or her own copying equipment without the custodian's permission. *Greber v. Schiebel*, 2001 WI App 17, 240 Wis. 2d 551, 624 N.W.2d 892, 00-1549.

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio-economic background was not a request for personally identifiable information, and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). *Osborn v. Board of Regents of the University of Wisconsin System*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00-2861.

The police report of a closed investigation regarding a teacher's conduct that did not lead either to an arrest, prosecution, or any administrative disciplinary action, was subject to release. *Linzmeier v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, 01-0197.

When a requested item is a public record under the open records law, and there is no statutory or common law exception, the open records law applies and the presumption of openness attaches to the record. The court must then decide whether that presumption can be overcome by a public policy favoring non-disclosure of the record. The fundamental question is whether there is harm to a public interest that outweighs the public interest in inspection of the record. A balancing test is applied on a case-by-case basis. If the harm to the public interest caused by release overrides the public interest in release, the inspection of the record may be prevented in spite of the general policy of openness. *Linzmeier v. Forcey*, 2002 WI 84, 646 N.W.2d 811, 254 Wis. 2d 306, 01-0197.

The John Doe statute, s. 968.26, which authorizes secrecy in John Doe proceedings, is a clear statement of legislative policy and constitutes a specific exception to the public records law. On review of a petition for a writ stemming from a secret John Doe proceeding, the court of appeals may seal parts of a record in order to comply with existing secrecy orders issued by the John Doe judge. *Unnamed Persons Numbers 1, 2, and 3 v. State*, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260, 01-3220.

Sub. (1) (am) is not subject to a balancing of interests. Therefore, the exceptions to sub. (1) (am) should not be narrowly construed. A requester who does not qualify for access to records under sub. (1) (am) will always have the right to seek records under sub. (1) (a), in which case the records custodian must determine whether the requested records are subject to a statutory or common law exception, and if not whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure determined by applying a balancing test. *Hempel v. City of Baraboo*, 2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551, 03-0500.

Sub. (1) (a) does not mandate that, when a meeting is closed under s. 19.85, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeier*. *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06-1143.

A general request does not trigger the sub. (4) (c) review sequence. Sub. (4) (c) recites the procedure to be employed if an authority receives a request under sub. (1) (a) or (am). An authority is an entity having custody of a record. The definition does not include a reviewing court. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06-2071.

The open records law cannot be used to circumvent established principles that shield attorney work product, nor can it be used as a discovery tool. The presumption of access under sub. (1) (a) is defeated because the attorney work product qualifies under the "otherwise provided by law" exception. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06-2071.

Sub. (1) (am) 1. plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery in actual litigation. The balancing of interests under sub. (1) (a) must include examining all the relevant factors in the context of the particular circumstances and may include the balancing the competing interests consider sub. (1) (am) 1. when evaluating the entire set of facts and making its specific demonstration of the need for withholding the records. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06-2071.

The sub. (1) (am) analysis is succinct. There is no balancing. There is no requirement that the investigation be current for the exemption for records "collected or maintained in connection with a complaint, investigation or other circumstances that

may lead to . . . [a] court proceeding” to apply. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06–2071.

“Record” in sub. (5) and s. 19.32 (2) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. *Stone v. Board of Regents of the University of Wisconsin*, 2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d 774, 06–2537.

*Schopper* does not permit a records custodian to deny a request based solely on the custodian’s assertion that the request could reasonably be narrowed, nor does *Schopper* require that the custodian take affirmative steps to limit the search as a prerequisite to denying a request under sub. (1) (h). The fact that the request may result in the generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited, but at some point, an overly broad request becomes sufficiently excessive to warrant rejection under sub. (1) (h). *Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06–2455.

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency’s alleged failure to keep sought-after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. *Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06–2455.

*Foust* held that a common law categorical exception exists for records in the custody of a district attorney’s office, not for records in the custody of a law enforcement agency. A sheriff’s department is legally obligated to provide public access to records in its possession, which cannot be avoided by invoking a common law exception that is exclusive to the records of another custodian. That the same record was in the custody of both the law enforcement agency and the district attorney does not change the outcome. To the extent that a sheriff’s department can articulate a policy reason why the public interest in disclosure is outweighed by the interest in withholding the particular record it may properly deny access. *Portage Daily Register v. Columbia Co. Sheriff’s Department*, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525, 07–0323.

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

Employees’ personal emails were not subject to disclosure in this case. *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, 08–0967.

Under sub. (3) the legislature provided four tasks for which an authority may impose fees on a requester: “reproduction and transcription,” “photographing and photographic processing,” “locating,” and “mailing or shipping.” For each task, an authority is permitted to impose a fee that does not exceed the “actual, necessary and direct” cost of the task. The process of redacting information from a record does not fit into any of the four statutory tasks. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367, 11–1112.

Redacted portions of emails, who sent the emails, and where they were sent from were not “purely personal” and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. The John K. MacIver Institute for Public Policy, Inc. v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, 13–1187.

The record requester’s identity was relevant in this case. As a general proposition, the identity and purpose of the requester of public records is not a part of the balancing test to be applied in determining whether to release records. However, the determination of whether there is a safety concern that outweighs the presumption of disclosure is a fact-intensive inquiry determined on a case-by-case basis. *Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894, 13–1650.

In the present case, although the defendant commission’s responses did not state that no record existed, that omission did not impair the court’s ability to determine whether a statutory exemption to disclosure applied. Under the facts of the case, the defendant commission lawfully denied the plaintiff newspaper’s request because no responsive record existed at the time of the request. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

Sub. (4) (a) does not require immediate disclosure of a record. It allows a custodian a reasonable amount of time to respond to a public records request. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

There is no obligation to create a record in response to an open records request and a requester is not entitled to the release of information in response to a public records request. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

The question asked by the balancing test is whether there is a risk to the public if information is released, not whether there is a risk to an individual if the information is released. *Voces de la Frontera, Inc. v. Clarke*, 2016 WI App 39, 369 Wis. 2d 103, 880 N.W.2d 417, 15–1152.

Reversed on other grounds. *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16, 373 Wis. 2d 348, 891 N.W.2d 803, 15–1152.

In applying the balancing test to a requested video in this case, the court concluded that the public interest in preventing release of specific police and prosecution strategies and techniques being taught and used in Wisconsin outweighed the general legislative presumption that public records should be disclosed. Because the video consisted almost entirely of police tactics and specific prosecution strategies in cases involving sexual exploitation of children, disclosure would result in public harm — if local criminals learn the specific techniques and procedures used by police and

prosecutors, the disclosed information could be used to circumvent the law. The public policy factors favoring nondisclosure thus overcame the presumption in favor of disclosure. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584, 14–2536.

The context of the records’ request, although not always relevant, was considered in this case. By asserting that, upon information and belief, several or all of the requested tapes in this case may have included offensive racial remarks and ethnic slurs, including but not limited to stereotyped accents, as well as sexist remarks, made by the attorney general when he was a district attorney, the language of the Democratic Party’s petition in this case for a writ of mandamus suggested a partisan purpose underlying the request. When weighed against the likely harm to law enforcement’s efforts to capture and convict sexual predators who target children, the justification offered for the request clearly did not tip the balance toward releasing the requested records. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584, 14–2536.

The common law exception to disclosure for a prosecutor’s case files, discussed in *Foust*, applied in this case. Under *Foust*, a district attorney’s closed files were not subject to the public records law based on the broad discretion a district attorney has in charging, the confidential nature of the contents of a file, and the threat disclosure poses to the orderly administration of justice. In this case, the prosecutor in charge of a sex extortion case discussed his thought processes for charging and walked through the case in a recorded educational presentation for prosecutors. The presentation was in great respect the oral equivalent of a prosecutor’s closed case file. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584, 14–2536.

A video requested in this case discussed the victims of a sex extortion case and the devastating impact of those crimes. Disclosing the recording would have reignited interest in the case and allowed identification in the same way it occurred the first time around. There was sufficient factual detail in the recording to easily connect the dots to identify the dozens of victims, who would have been re-traumatized should this case have resulted in a repeat exposure of their identities almost a decade after those events occurred. Disclosure leading to revictimization would have run afoul of Wisconsin’s constitutional commitment to treating victims with “fairness, dignity and respect for their privacy” under Article I, section 9m, of the Wisconsin Constitution. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584, 14–2536.

When WERC had received detailed and specific complaints of past coercion in other certification elections, a WERC employee lawfully performed the balancing test in concluding that the public interest in elections free from voter intimidation and coercion outweighed the public interest in favor of openness of public records. The public interest in certification elections that are free from intimidation and coercion is evidenced by the requirement that those elections be conducted by secret ballot and free from prohibited practices. The public interest in elections that are free from intimidation and coercion outweighs the public interest in favor of open public records under the circumstances presented in this case. *Madison Teachers, Inc. v. Scott*, 2018 WI 11, 379 Wis. 2d 439, 906 N.W.2d 436, 16–2214.

Sub. (3) (a) defers to other statutes that specifically authorize records custodians to charge fees for records that differ from the fees that the open records law itself authorizes. Section 343.24 (2m) grants the Department of Transportation (DOT) authority to charge parties for inspecting accident reports. Therefore, the requester was not entitled to free access to DOT’s database because both Wisconsin open records law and statutory authority permit DOT to charge access fees for certain records and because case law has held that the right to access records does not extend to the right to access databases. *Media Placement Services, Inc. v. DOT*, 2018 WI App 34, 382 Wis. 2d 191, 913 N.W.2d 224, 17–0791.

A custodian may not require a requester to pay the cost of an unrequested certification. Unless the fee for copies of records is established by law, a custodian may not charge more than the actual and direct cost of reproduction. 72 Atty. Gen. 36.

Copying fees, but not location fees, may be imposed on a requester for the cost of a computer run. 72 Atty. Gen. 68.

The fee for copying public records is discussed. 72 Atty. Gen. 150.

Public records relating to employee grievances are not generally exempt from disclosure. Nondisclosure must be justified on a case-by-case basis. 73 Atty. Gen. 20.

The disclosure of an employee’s birthdate, sex, ethnic heritage, and handicapped status is discussed. 73 Atty. Gen. 26.

The department of regulation and licensing may refuse to disclose records relating to complaints against health care professionals while the matters are merely “under investigation.” Good faith disclosure of the records will not expose the custodian to liability for damages. Prospective continuing requests for records are not contemplated by public records law. 73 Atty. Gen. 37.

Prosecutors’ case files are exempt from disclosure. 74 Atty. Gen. 4.

The relationship between the public records law and pledges of confidentiality in settlement agreements is discussed. 74 Atty. Gen. 14.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

Ambulance records relating to medical history, condition, or treatment are confidential while other ambulance call records are subject to disclosure under the public records law. 78 Atty. Gen. 71.

Courts are likely to require disclosure of legislators’ mailing and distribution lists absent a factual showing that the public interest in withholding the records outweighs the public interest in their release. OAG 2–03.

If a legislator custodian decides that a mailing or distribution list compiled and used for official purposes must be released under the public records statute, the persons whose names, addresses or telephone numbers are contained on the list are not entitled to notice and the opportunity to challenge the decision prior to release of the record. OAG 2–03.

Access Denied: How *Woznicki v. Erickson* Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law. *Munro*. 2002 WLR 1197.

## 19.356 Notice to record subject; right of action.

(1) Except as authorized in this section or as otherwise provided

by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

(2) (a) Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:

1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

(b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. 111.

(c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. 106.54 or 230.45 or subch. II of ch. 111 if the record is provided by an authority having responsibility for that function.

(d) Paragraph (a) does not apply to the transfer of a record by the administrator of an educational agency to the state superintendent of public instruction under s. 115.31 (3) (a).

(3) Within 5 days after receipt of a notice under sub. (2) (a), a record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the requested record.

(4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2) (a). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.

(6) The court, in an action commenced under sub. (4), may restrain the authority from providing access to the requested

record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.

(7) The court, in an action commenced under sub. (4), shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

(8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law. An appeal shall be taken within the time period specified in s. 808.04 (1m).

(9) (a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

(b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

**History:** 2003 a. 47; 2011 a. 84.

**NOTE:** 2003 Wis. Act 47, which creates this section, contains extensive explanatory notes.

The right of a public employee to obtain de novo judicial review of an authority's decision to allow public access to certain records granted by this section is no broader than the common law right previously recognized. It is not a right to prevent disclosure solely on the basis of a public employee's privacy and reputational interests. The public's interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling. *Local 2489 v. Rock County*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03–3101.

An intervenor as of right under the statute is "a party" under sub. (8) whose appeal is subject to the "time period specified in s. 808.04 (1m)." The only time period referenced in s. 808.04 (1m) is 20 days. *Zellner v. Herrick*, 2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305, 07–2584.

This section does not set forth the only course of action that the subject of a disclosure may engage in to prevent disclosure. Subs. (3) and (4) state that "a record subject may commence an action." The plain language of the statute in no way discourages the subject of a records request from engaging in less litigious means to prevent disclosure nor does it prevent a records custodian from changing its mind. *Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894, 13–1650.

For challenges to decisions by authorities under the public records law to release records, as opposed to decisions by authorities to withhold records, the legislature has precluded judicial review except in defined circumstances. The right-of-action provision under sub. (1) unambiguously bars any person from seeking judicial review of an authority's decision to release a record unless: 1) a provision within this section authorizes judicial review; or 2) a statute other than this section authorizes judicial review. *Teague v. Van Hollen*, 2016 WI App 20, 367 Wis. 2d 547, 877 N.W.2d 379, 14–2360.

A district attorney is not an "employee" as defined in s. 19.32 (1bg) and as used in sub. (2) (a) 1. A district attorney may not maintain an action under sub. (4) to restrain an authority from providing access to requested records where the requested records do not fall within the sub. (2) (a) 1. exception to the general rule that a "record subject" is not entitled to notice or pre-release judicial review of the decision of an authority to provide access to records pertaining to that record subject. *Moustakis v. Department of Justice*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142, 14–1853.

Sub. (5) applies to an "authority" and does not preclude a court from providing limited access to the requested records on an attorney's eyes-only basis for purposes of briefing a case before the court. Section 19.37 (1) (a), which applies when a party seeks release of records in an action for mandamus, provides guidance. Whether the action seeks release or an injunction, the need for limited review by a party who intervenes by right, in order to ensure fair and fully informed adjudication of the dispute, is equally applicable. *Hagen v. Board of Regents of the University of Wisconsin System*, 2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198, 17–2058.

Sub. (2) (a) 1. must be interpreted as requiring notification when an authority proposes to release records in its possession that are the result of an investigation by an employer into a disciplinary or other employment matter involving an employee, but not when there has been an investigation of possible employment-related violation by the employee and the investigation is conducted by some entity other than the employee's employer. *OAG 1–06*.

Sub. (2) (a) 2. is unambiguous. If an authority has obtained a record through a subpoena or a search warrant, it must provide the requisite notice before releasing the records. The duty to notify, however, does not require notice to every record subject

who happens to be named in the subpoena or search warrant records. Under sub. (2) (a), DCI must serve written notice of the decision to release the record to any record subject to whom the record pertains. **OAG 1–06.**

To the extent any requested records proposed to be released are records prepared by a private employer and those records contain information pertaining to one of the private employer’s employees, sub. (2) (a) 3. does not allow release of the information without obtaining authorization from the individual employee. **OAG 1–06.**

Sub. (9) does not require advance notification and a 5–day delay before releasing a record that mentions the name of a person holding state or local public office in any way. A record mentioning the name of a public official does not necessarily relate to that public official within the meaning of sub. (9) (a). Sub. (9) is not limited, however, to the specific categories of records enumerated in sub. (2) (a). **OAG 7–14.**

The use of the phrase “is created” in sub. (2) (a) 1. implies that the status of the record subject should be consistent with when the record was created. Therefore, if the record subject is an employee at the time the record is created, he or she is entitled to notice even if the employee is no longer employed by the authority at the time the authority receives the request. **OAG 2–18.**

Sub. (9) does not apply when a record contains information relating to a record subject who is an officer or employee who formerly held a local or state public office. The provision only applies when an officer or employee of the authority currently holds a local or state public office. **OAG 2–18.**

Should service fail in the manner specifically required in subs. (2) (a) 1. and (9) (a), after reasonable diligence, the alternatives to personal service in s. 801.11 may be used to provide notice to record subjects. Section 801.11 (1) appears reasonable and consistent with the public records law’s purposes with the exception of the publication requirement. An authority may leave a copy of the notice at the record subject’s usual place of abode in a manner substantially similar to s. 801.11(1) (b). If the record subject’s usual place of abode cannot be located after reasonable diligence, an authority may leave a copy of the notice at the record subject’s usual place of business in a manner substantially similar to s. 801.11 (4) (b). If, after reasonable diligence, the authority is unable to effectuate service according to the public records law’s provisions and other alternatives to personal service that are consistent with the public records law’s purpose, the authority may release the records. **OAG 2–18.**

### 19.36 Limitations upon access and withholding.

**(1) APPLICATION OF OTHER LAWS.** Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

**(2) LAW ENFORCEMENT RECORDS.** Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

**(3) CONTRACTORS’ RECORDS.** Each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

**(4) COMPUTER PROGRAMS AND DATA.** A computer program, as defined in s. 16.971 (4) (c), is not subject to examination or copying under s. 19.35 (1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

**(5) TRADE SECRETS.** An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90 (1) (c).

**(6) SEPARATION OF INFORMATION.** If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

**(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS.** (a) In this subsection:

1. “Final candidate” means 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 any of the following:

- a. A state position that is not a position in the classified service and that is not a position in the University of Wisconsin System.
- b. A local public office.

c. The position of president, vice president, or senior vice president of the University of Wisconsin System; the position of chancellor of an institution; or the position of the vice chancellor who serves as deputy at each institution.

2. “Final candidate” includes all of the following, but only with respect to the offices and positions described under subd. 1. a. and b.:

a. Whenever there are at least 5 applicants for an office or position, each of the 5 applicants who are considered the most qualified for the office or position by an authority.

b. Whenever there are fewer than 5 applicants for an office or position, each applicant.

c. Whenever an appointment is to be made from a group of more than 5 applicants considered the most qualified for an office or position by an authority, each applicant in that group.

3. “Institution” has the meaning given in s. 36.05 (9).

(b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

**(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS.** (a) In this subsection:

1. “Informant” means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:

a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.

b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.

2. “Law enforcement agency” has the meaning given in s. 165.83 (1) (b), and includes the department of corrections.

(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

**(9) RECORDS OF PLANS OR SPECIFICATIONS FOR STATE BUILDINGS.** Records containing plans or specifications for any state-owned or state-leased building, structure or facility or any proposed state-owned or state-leased building, structure or facility are not subject to the right of inspection or copying under s. 19.35 (1) except as the department of administration otherwise provides by rule.

**(10) EMPLOYEE PERSONNEL RECORDS.** Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employee’s representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to

fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

(a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

(d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

**(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE.** Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records, except to an individual to the extent required under s. 103.13, containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

**(13) FINANCIAL IDENTIFYING INFORMATION.** An authority shall not provide access to personally identifiable information that contains an individual's account or customer number with a financial institution, as defined in s. 134.97 (1) (b), including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

**History:** 1981 c. 335; 1985 a. 236; 1991 a. 39, 269, 317; 1993 a. 93; 1995 a. 27; 2001 a. 16; 2003 a. 33, 47; 2005 a. 59, 253; 2007 a. 97; 2009 a. 28; 2011 a. 32; 2013 a. 171; 2015 a. 55; 2017 a. 59.

**NOTE:** 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access under sub. (3). *Journal/Sentinel v. School District of Shorewood*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

Sub. (3) does not require providing access to payroll records of subcontractors of a prime contractor of a public construction project. *Building and Construction Trades Council v. Waunakee Community School District*, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1999), 97–3282.

Production of an analog audio tape was insufficient under sub. (4) when the requester asked for examination and copying of the original digital audio tape. *State ex rel. Milwaukee Police Association v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, 98–3629.

The ultimate purchasers of municipal bonds from the bond's underwriter, whose only obligation was to purchase the bonds, were not contractor's records under sub. (3). *Machotka v. Village of West Salem*, 2000 WI App 43, 233 Wis. 2d 106, 607 N.W.2d 319, 99–1163.

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio-economic background was not a request for personally identifiable information and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). *Osborn v. Board of Regents of the University of Wisconsin System*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00–2861.

Misconduct investigation and disciplinary records are not excepted from public disclosure under sub. (10) (d). Sub. (10) (b) is the only exception to the open records law relating to investigations of possible employee misconduct. *Kroepflin v. DNR*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286, 05–1093.

"Investigation" in sub. (10) (b) includes only that conducted by the public authority itself as a prelude to possible employee disciplinary action. An investigation achieves its "disposition" when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether the employee elects to pursue grievance arbitration or another review mechanism that may be available.

*Local 2489 v. Rock County*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03–3101. See also, *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06–1143.

Municipalities may not avoid liability under the open records law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and then directing any requester of those records to the independent contractor assessors. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

When requests to municipalities were for electronic/digital copies of assessment records, "PDF" files were "electronic/digital" files despite the fact that the files did not have all the characteristics that the requester wished. It is not required that requesters must be given access to an authority's electronic databases to examine them, extract information from them, or copy them. Allowing requesters such direct access to the electronic databases of an authority would pose substantial risks. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

By procuring a liability insurance policy and allowing the insurance company to retain counsel for it, the county in effect contracted with the law firm and created an attorney-client relationship. Because the liability insurance policy is the basis for the tripartite relationship between the county, insurance company, and law firm and is the basis for an attorney-client relationship between the law firm and county, the invoices produced or collected during the course of the law firm's representation of the county come under the liability insurance policy and sub. (3) governs the accessibility of the invoices. *Juneau County Star-Times v. Juneau County*, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457, 10–2313.

Responding to a public records request is not a "function" of the police department for purposes of the "agency functions" exception to the federal Driver's Privacy Protection Act, which allows disclosure of personal information from state motor vehicle records for use by a government agency in carrying out its functions. *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W.2d 339, 14–1938.

Under subs. (1) and (2), any record specifically exempted from disclosure pursuant to federal law also is exempt from disclosure under Wisconsin law. Federal regulations preclude release of any information pertaining to individuals detained in a state or local facility, and federal immigration detainer (I-247) forms contain only such information. Read together, subs. (1) and (2) and 8 C.F.R. § 236.6 exempt I-247 forms from release under Wisconsin public records law and the forms are not subject to common-law exemptions or the public interest balancing test. *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16, 373 Wis. 2d 348, 891 N.W.2d 803, 15–1152.

Separation costs must be borne by the agency. 72 Atty. Gen. 99.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

An exemption to the federal Freedom of Information Act was not incorporated under sub. (1). 77 Atty. Gen. 20.

Sub. (7), 2011 stats., is an exception to the public records law and should be narrowly construed. In sub. (7), 2011 stats., "applicant" and "candidate" are synonymous. "Final candidates" are the five most qualified unless there are less than five applicants, in which case all are final candidates. 81 Atty. Gen. 37.

Public access to law enforcement records. *Fitzgerald*. 68 MLR 705 (1985).

**19.37 Enforcement and penalties. (1) MANDAMUS.** If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

**(1m) TIME FOR COMMENCING ACTION.** No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

**(1n) NOTICE OF CLAIM.** Sections 893.80 and 893.82 do not apply to actions commenced under this section.

**(2) COSTS, FEES AND DAMAGES.** (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which

the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) **PUNITIVE DAMAGES.** If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) **PENALTY.** Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than \$1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

**History:** 1981 c. 335, 391; 1991 a. 269 s. 43d; 1995 a. 158; 1997 a. 94.

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a “causal nexus” exists between that action and the agency’s surrender of the information. *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs under sub. (2). *Racine Education Association v. Racine Board of Education*, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988).

Assuming sub. (1) (a) applies before mandamus is issued, the trial court retains discretion to refuse counsel’s participation in an *in camera* inspection. *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

If the trial court has an incomplete knowledge of the contents of the public records sought, it must conduct an *in camera* inspection to determine what may be disclosed following a custodian’s refusal. *State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 455 N.W.2d 893 (1990).

A *pro se* litigant is not entitled to attorney fees. *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2). A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

Actions brought under the open meetings and open records laws are exempt from the notice provisions of s. 893.80 (1), 1993 stats. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94–2809.

An inmate’s right to mandamus under this section is subject to s. 801.02 (7), which requires exhaustion of administrative remedies before an action may be commenced. *Moore v. Stahowiak*, 212 Wis. 2d 744, 569 N.W.2d 711 (Ct. App. 1997), 96–2547.

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05–1473.

The legislature did not intend to allow a record requester to control or appeal a mandamus action brought by the attorney general under sub. (1) (b). Sub. (1) outlines two distinct courses of action when a records request is denied, dictates distinct courses of action, and prescribes different remedies for each course. Nothing suggests that a requester is hiring the attorney general as a sort of private counsel to proceed with the case, or that the requester would be a named plaintiff in the case with the attorney general appearing as counsel of record when proceeding under sub. (1) (b). *State v. Zien*, 2008 WI App 153, 314 Wis. 2d 340, 761 N.W.2d 15, 07–1930.

This section unambiguously limits punitive damages claims under sub. (3) to mandamus actions. The mandamus court decides whether there is a violation and, if so, whether it caused actual damages. Then, the mandamus court may consider whether punitive damages should be awarded under sub. (3). *The Capital Times Company v. Doyle*, 2011 WI App 137, 337 Wis. 2d 544, 807 N.W.2d 666, 10–1687.

Under the broad terms of s. 51.30 (7), the confidentiality requirements created under s. 51.30 generally apply to “treatment records” in criminal not guilty by reason of insanity cases. All conditional release plans in NGI cases are, by statutory definition, treatment records. They are “created in the course of providing services to individuals for mental illness,” and thus should be deemed confidential. An order of placement in an NGI case is not a “treatment record.” *La Crosse Tribune v. Circuit Court for La Crosse County*, 2012 WI App 42, 340 Wis. 2d 663, 814 N.W.2d 867, 10–3120.

The plaintiff newspaper argued that s. 19.88 (3), of the open meetings law, which requires “the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection,” in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records

law for the commission’s alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under sub. (2) for an alleged violation of the open meetings law. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

A record custodian should not automatically be subject to potential liability under sub. (2) (a) for actively providing information, which it is not required to do in response to a public records request, to a requester when no record exists. While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian, or both. Section 895.46 (1) (a) probably provides indemnification for punitive damages assessed against a custodian, but not for forfeitures. 72 Atty. Gen. 99.

**19.39 Interpretation by attorney general.** Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

**History:** 1981 c. 335.

### SUBCHAPTER III

#### CODE OF ETHICS FOR PUBLIC OFFICIALS AND EMPLOYEES

**19.41 Declaration of policy.** (1) It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

(2) It is the intent of the legislature that in its operations the commission shall protect to the fullest extent possible the rights of individuals affected.

**History:** 1973 c. 90; Stats. 1973 s. 11.01; 1973 c. 334 s. 33; Stats. 1973 s. 19.41; 1977 c. 277; 2015 a. 118 s. 266 (10).

**19.42 Definitions.** In this subchapter:

(1) “Anything of value” means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(2) “Associated,” when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer, or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10 percent of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

(3m) “Candidate,” except as otherwise provided, has the meaning given in s. 11.0101 (1).

(3s) “Candidate for local public office” means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a local public official or any individual who is nominated for the purpose of appearing on the ballot for election as a local public official through the write-in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4) “Candidate for state public office” means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a state public official or any individual who is nominated for the purpose of