

ELECTRONIC RECORDS: COMPLYING WITH THE PUBLIC RECORDS LAW IN THE MODERN WORKPLACE

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
2017 SPET Spring Conference
Lake Geneva, May 11, 2017



Overview of the Office of Open Government



Office of Open Government (OOG)

- Goals:
 - Increase openness and transparency
 - Improve DOJ's service to clients and citizens in the area of open government
- Interpret and apply the Open Meetings Law, Public Records Law, and other open government statutes and rules
- Manage DOJ's public records request process
 - DOJ Records Custodian
- Develop open government policies



OOG, continued

- Provide legal counsel to DOJ and clients
- Provide training and open government resources
- Operate the PROM help line and respond to citizen correspondence concerning open government issues
 - Wis. Stat. §§ 19.39 and 19.98
 - Any person may request AG's advice
 - **Electronic records are a popular question topic**



Wisconsin Public Records Law



Wisconsin Public Records Law

- Wis. Stat. §§ 19.31 to 19.39
- Objectives:
 - Shed light on workings of government and acts of public officers and employees
 - Assist public in becoming an informed electorate
 - Serve a basic tenet of our democratic system by providing opportunity for public oversight



Presumption

The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Wisconsin Public Records Law, cont.

- Took much of its present form in 1981
- What happened in 1981?
 - Iran released 52 American hostages held for 444 days
 - Ronald Reagan took office as President
 - Sandra Day O'Connor nominated for Supreme Court
 - *Raiders of the Lost Ark* was top-grossing movie
 - *Bette Davis Eyes* was biggest hit single

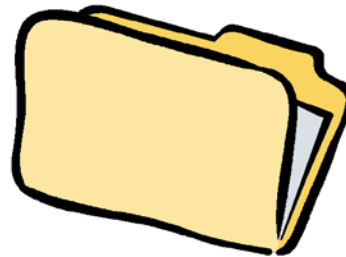


Records



“Record”

- Wis. Stat. § 19.32(2)
 - “Any material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.”
- Content not format
- Includes electronic records



Email

- **Personal** email, calls, and documents on an **authority's account**:
 - Email sent and received on an authority's computer system is a record
 - Includes purely personal email sent by officers or employees of the authority
 - Disclosure generally not required
 - *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177



Email, cont.

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



Cell Phone Content

- Phone call records
 - Also available through the cell phone service provider
- Text messages
 - May not be available elsewhere, including the service provider
- App content including messaging apps
 - Content may be saved on the cell phone or on app server
 - Location of “deleted” content?



Cell Phone Content, continued

- Emails
 - Emails to government accounts found on cell phones are likely already saved in the government agency's email archives
- It is important to check cell phones when gathering records in response to public records requests



Electronic Databases

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



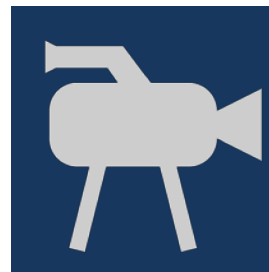
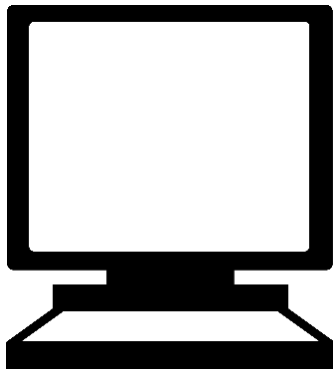
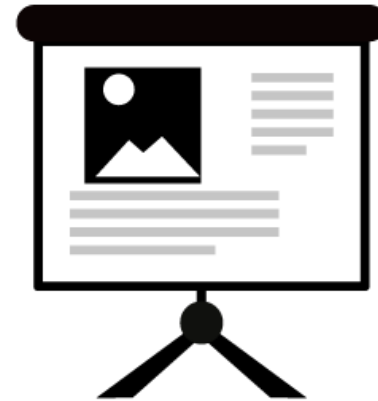
Social Media

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



Electronic Records

- Content not format
- PowerPoint presentations
- Audio and video
- Web-based documents



Metadata

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



Record Retention



Record Retention – Public Records Law

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



Record Retention – Other Statutes

- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21



Public Records Board

- Wisconsin Public Records Board (PRB)
 - Responsibilities:
 - Preservation of important state records
 - Orderly disposition of records
 - Cost-effective management of records
 - Approves General Records Schedules and RDAs
 - Includes Records Management Committee (RMC)



Record Retention Schedules

- Records Retention Schedules govern how long an agency must keep records
 - General Records Schedules – apply to records of state agencies
 - Administrative, HR, IT, others
 - Available via PRB’s website:
 - http://publicrecordsboard.wi.gov/docs_all.asp?locid=165



Record Retention Schedules, continued

- County General Records Schedules
 - Created in 2010
 - General schedules, district attorney, finance, health, register of deeds, sheriff, others
 - It is optional—not required—for counties to follow them
 - But recommended
- No municipal general records schedules



Record Retention Schedules, continued

- Agency/Unit-Specific Records Schedules
 - Records Retention/Disposition Authorization (RDAs)
 - State agency-specific RDAs
 - E.g., 43 DOJ-specific RDAs
 - Available via PRB's website
 - County, city, and other local government RDAs



Record Retention, continued

- Copies of records in electronic formats permissible
 - State authorities: Wis. Stat. § 16.61(5)(a)
 - Local authorities: Wis. Stat. § 19.21(4)(c)
 - See Wis. Stat. § 16.611; Administrative Rule 12
 - “Maintain electronic public records that are accessible, accurate, authentic, reliable, legible, and readable throughout the record life cycle.”



Best Practices



Personal and Business Accounts

- Email and cell phones
 - Only use personal accounts for personal matters and government accounts for government business matters
 - Forward work-related content to government accounts immediately or as soon thereafter as practicable
 - Search personal accounts (email, cell phones, etc.) when a public records request is received
 - Establish policy so all employees are aware



Social Media

- Considerations:
 - Be familiar with the site
 - Are the records archived? Archiving options?
 - How long is content available?
 - Who may post, manage, or control?
 - Third party messages
 - Does the authority have a social media policy?



Email Records

- File/sort email records as they are received
 - Based on content, not format
 - Look to records retention schedules
 - E.g., felony or related cases, traffic cases, payroll
- Searchable central archive
 - E.g., DOJ uses an email vault system



Redaction



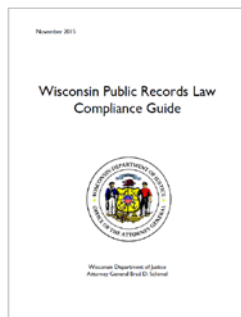
Redaction

- Wis. Stat. § 19.36(10)(a)
- Wis. Stat. § 19.36(11)
- Balancing Test
 - Purely personal information likely not subject to disclosure
- *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991).
 - A prosecutor's files are not subject to public inspection under the public records law
 - Documents integral to criminal investigation and prosecution



Resources

- Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Call the Office of Open Government: (608) 267-2220
- Write to: Office of Open Government
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857



ELECTRONIC RECORDS: COMPLYING WITH THE PUBLIC RECORDS LAW IN THE MODERN WORKPLACE

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
2017 SPET Spring Conference
Lake Geneva, May 11, 2017

