WISCONSIN PUBLIC RECORDS LAW

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government

2016 Joint Law Enforcement Training Conference
Body Camera Implementation and Awareness
May 26, 2016

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

"Authority"

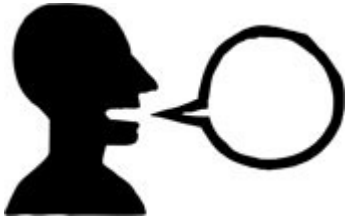
- Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- Very similar to "governmental body" in Open Meetings law
- Includes quasi-governmental corporation
- Public records law obligations apply separately to each authority
- *Wis. Prof'l Police Ass'n v. Wis. Cntys. Ass'n*, 2014 WI App 106, 357 Wis. 2d 687 (unincorporated association is not an authority)

“Legal Custodian”

- Defined in Wis. Stat. § 19.33 - vested by an authority with full legal power to render decisions and carry out public records responsibilities
- Elective official, chairperson of a committee of elected officials, or designee
- Other authorities to designate one or more positions
- Defaults are highest ranking officer and chief administrative officer, if any
- Other authority staff may participate or assist
- Helpful to establish an internal public records procedure

“Requester”

- Defined at Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record



- More limited rights for persons committed under mental health laws or incarcerated (must be requesting records containing specific references to themselves or minor children)

- Per Wis. Stat. § 19.35(1)(am), a requester has greater rights to inspect personally identifiable information about himself or herself in a record containing personally identifiable information

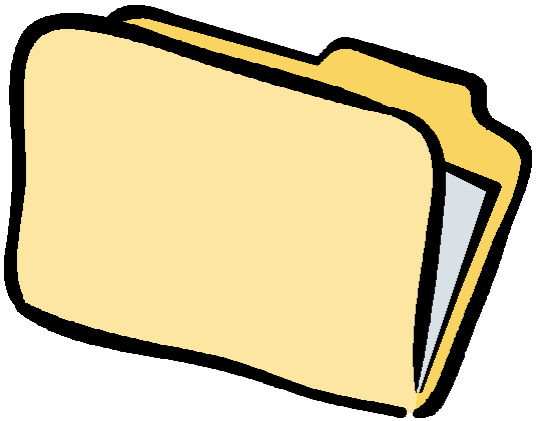
Who Can Request?

- Requester need not state the purpose of the request
- Requester generally need not identify himself or herself
- Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, 354 Wis. 2d 471: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test
- Limited rights for incarcerated or committed persons

“Record”

“Any material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.”

— Wis. Stat. § 19.32(2)



Is it a Record?

- **NO**: Drafts, notes, and preliminary documents
- **NO**: Published material available for sale or at library
- **NO**: Material with limited access rights, such as copyrights or patents
- **YES**: Not created by the authority but in the authority's possession
- **YES**: Personal email, texts, etc. on an authority's accounts and business email, texts, etc. on personal accounts
- **YES**: Social media; contractors' records
- **YES**: Police body camera and dash camera video

Existing Records

- Generally, only records that exist at the time of the request must be produced—to respond, an authority need not create new records
- Continuing requests are not contemplated by the public records law
- Public records law does not require answering questions

No Records Exist

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

Access: Absolute Right/Denial

- **Absolute Right** - Not many exist:
  - Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
  - Daily arrest logs or police “blotters” at police departments
- **Absolute Denial**
  - Can be located in public records statutes
    - Information related to a current investigation of possible employee criminal conduct or misconduct
    - Plans or specifications for state buildings
  - Can be located in other statutes or case law:
    - Patient health care records; pupil records

The Balancing Test

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

Some Sources of Public Policies

- Policies expressed in other statutes (such as patient health care records, student records)
- Court decisions
- Exemptions to open meetings requirements in Wis. Stat. § 19.85(1) – but only if there is specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
- Public interest in protecting privacy of individuals

Body Camera Policy Considerations

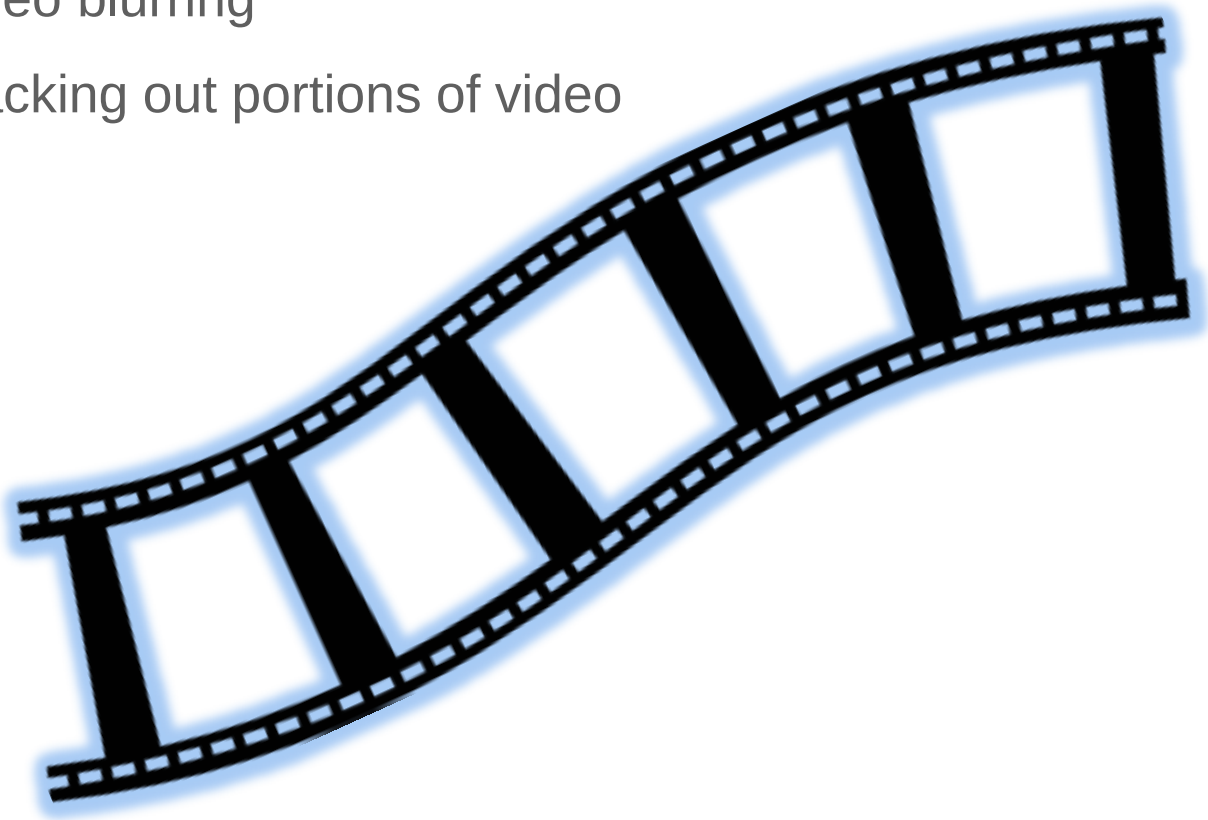
- Presumption of complete public access – public's right to know
- Crime victim rights expressed in statutes, constitutional provisions, and case law
  - Consideration of family of crime victims
- Protection of witnesses
  - Safety and security
  - "Chilling" future cooperation with law enforcement
- Children and juveniles

Redaction

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- Redaction constitutes denial of access to the redacted information (and therefore subject to review by mandamus)
- Effective July 1, 2016, certain personally identifiable and financial information will be required to be redacted from records filed with Wisconsin's circuit courts.

Redaction – Body Cameras

- Technology
- Video blurring
- Blacking out portions of video



Body Camera Special Issues

- Home addresses
- Information in the background
- Home interiors
- Family photographs
- Personal documents

Other Special Issues

- Records related to children or juveniles:
  - Wis. Stat. ch. 48: Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. *See* Wis. Stat. § 48.396.
  - Wis. Stat. ch. 938: Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. *See* Wis. Stat. § 938.396.
  - Access to other records regarding or mentioning children subject to general public records rules

Other Special Issues, continued

- *Prosecutor's* files are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991).
  - Law enforcement records: balancing test must be applied on a case-by-case basis
- Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise
- Driver's Privacy Protection Act (DPPA)

Written Response?

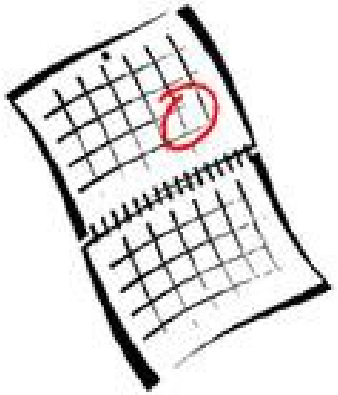
- A written request requires a written response, if the request is denied in whole or in part
- May respond in writing to a verbal request
- A request for clarification, without more, is not a denial
- Must inform requestor that denial is subject to review in an enforcement action for mandamus under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

Reasons for Denial

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

Timing of Response

- Response is required, “as soon as practicable and without delay”
- **No specific time limits**, depends on circumstances
- DOJ policy: 10 business days generally reasonable for response to simple, narrow requests
- May be prudent to send an acknowledgement
- Penalties for arbitrary and capricious delay



Notice Before Release

- Required by Wis. Stat. § 19.356(2)(a)1
  - Records information resulting from closed investigation into a disciplinary matter or possible employment-related violation of policy, rule, or statute
  - Records obtained by subpoena or search warrant
  - Records prepared by an employer other than the authority about employees of that employer
  - “Record subject” can try to stop disclosure in court
- Required by Wis. Stat. § 19.356(9)–officer or employee holding state or local public office
  - OAG-07-14 (October 15, 2014)
- Courtesy notice

Costs

- Actual, necessary, and direct costs only—unless otherwise specified by law
  - Copying and reproduction
  - Location, if costs exceed $50.00
  - Mailing/shipping to requester
  - Others specified in Wis. Stat. § 19.35(3)
  - Authorities **may not** charge for redaction costs
- Prepayment may be required if total costs exceed $5.00
- Authority may choose to provide records for free or reduced charge

Remedies and Enforcement

- Mandamus action to challenge:
  - Withholding a record or part of a record
  - Delay in granting access to record or part of record
- Authority may be ordered to release records
- Attorney's fees and costs may be awarded if mandamus action was a cause of the release

Body Camera Video Retention

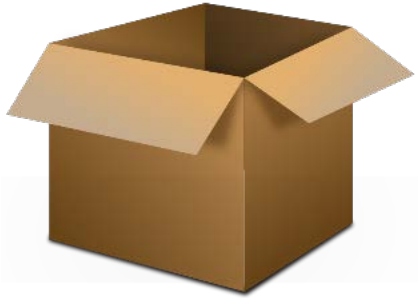
- How long to keep body camera video?
- Wis. Stat. § 19.35(5) - after receiving a request:
  - No destruction until request granted or until at least 60 days after request is denied
  - 90 days if requester is committed or incarcerated
  - No destruction during enforcement action
- Consult legal counsel

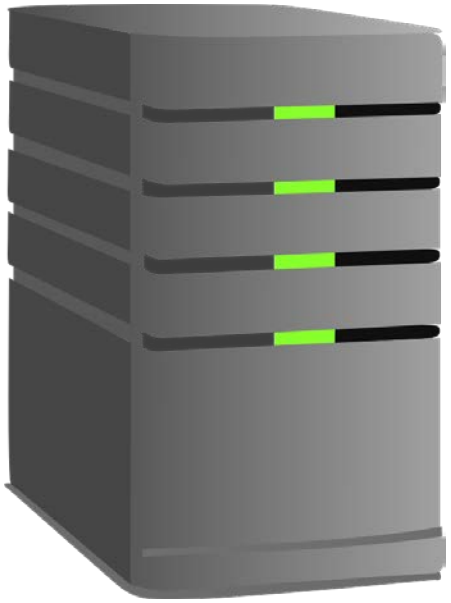
Body Camera Video Retention, cont.

- Records retention laws
  - State authorities: Wis. Stat. § 16.61
  - Local authorities: Wis. Stat. § 19.21
- Record Retention Schedules (RDAs)
  - Check for existing RDAs
- http://publicrecordsboard.wi.gov/

Record Retention – Body Cameras

- Storage
  - Costs
    - Equipment
    - Maintenance





Further Information

- Consult legal counsel
- 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: Paul M. Ferguson, Assistant Attorney General
  Office of Open Government
  Department of Justice
  P.O. Box 7857
  Madison, WI 53707-7857

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