



# Public Records Law: Application to Individual Local Officials

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Most public records requests are handled by municipal clerks, treasurers, administrators, or department heads, and involve records that are routinely created or kept by municipalities in the normal course of business. This article is not directed at officials who routinely receive such requests and is not intended to address those kinds of public records requests or thoroughly explain the public records law and all of its nuances.<sup>1</sup>

Instead, this comment focuses on the Wisconsin public records law as it applies to individual local elected and appointed officials such as city alderpersons and village trustees or individual members of municipal boards and commissions. Applying the public records law to individual officials is difficult because most of the law's provisions are geared toward municipal entities or departments and are not easily translated to apply to individual local officials.

## Purpose of the Public Records Law

In recognition of the fact that a representative government is dependent upon an informed electorate,<sup>2</sup> the legislature has declared that the public is "entitled to the greatest possible

information regarding the affairs of government and the official acts of those officers ... who represent them."<sup>3</sup> Providing persons with such information is an "essential function of a representative government" and an "integral part of the routine duties" of government officers and employees.<sup>4</sup> To that end, the public records law must be construed "in every instance with a presumption of complete public access, consistent with the conduct of governmental business."<sup>5</sup> The denial of public access generally "is contrary to the public interest, and only in an exceptional case may access be denied."<sup>6</sup>

## How Does Law Apply to Elected and Appointed Public Officials?

Under Wisconsin law, requesters have the right, with certain exceptions, to inspect any government record.<sup>7</sup> Requests for records are usually made to an "authority" or to the legal custodian of the record. The definition of "authority" includes, among many other things, a local office or elected official.

The public records law provides that every city and village officer is the legal custodian of and shall safely keep and

preserve all property and things received from the officer's predecessor or other persons and required by law to be filed, deposited, or kept in the officer's office, or which are in the officer's lawful possession or control.<sup>8</sup>

## What are Considered "Records" Under the Law?

"Record" is broadly defined as "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created by, or is being kept by, an authority."<sup>9</sup> It includes records not required to be maintained if they are in the officer's possession.<sup>10</sup> "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts, and optical disks.

Although "record" is broadly defined, the definition specifically excludes drafts,<sup>11</sup> 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

1. The Wisconsin Department of Justice's website has a detailed guide explaining Wisconsin's public records law which can be accessed at <https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf>.

2. Wis. Stat. § 19.31.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Wis. Stat. § 19.35(1).

8. Wis. Stat. § 19.21 (1) and 19.33(1).

9. Wis. Stat. § 19.32(1).

10. *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 679, 137 N.W.2d 470 (1965)

11. Stamping or labeling something "DRAFT" does not automatically exempt it from a request under the public records law. The key is how it is being used; the mere fact that something is not in final form does not necessarily make it a "draft." The Wisconsin Supreme Court held that a liability study commissioned by a county corporation counsel and used in various ways was not a "draft" although it was not in final form because it was distributed to those that would be using it. 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).

originator is working. The definition also excludes materials that are purely the personal property of the custodian and have no relation to his or her office. Finally, the definition of “record” excludes 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 which are available for sale, or which are available for inspection at a public library.

Whether or not something is a “record” depends on its content rather than its location. Thus, it doesn’t matter if it was created or received on a personal device; the key question is whether it relates to the office.

### What Kind of Records Should Individual Local Officials Keep?

As noted above, the public records law requires you to safely keep and preserve things which are in your lawful possession or control. “Record” is defined as information *created or kept by* an authority. Documents that you create in your official capacity, that are not otherwise kept or maintained by the municipality, are public records that you should maintain in accordance with the rules relating to public records. Some examples of such records would be newsletters and other correspondence sent by an official to constituents, and calendars or schedules that an official maintains relating to his or her official responsibilities. Although the law does not appear to require it, local officials may wish to keep copies of all correspondence personally sent to them by constituents or people having business with the municipality where the information is directed to the local

official and not the municipality or larger governmental body. If you are not required to maintain something but it’s in your possession when requested, then it’s being “kept” by you and you will likely need to provide access to it unless an exemption applies. 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.<sup>12</sup>

The Wisconsin court of appeals has held that the plain language of “record” in Wis. Stat. §§ 19.32(2) and 19.35(5) does not include identical copies of otherwise available records.<sup>13</sup> Thus, you need not keep or provide copies of things like meeting agendas, and information contained in meeting packets and distributed to you in your official capacity. Such documents are typically maintained by and can be requested from the clerk. As a practical matter, there is no reason for all of the members of the governing body to maintain their own set of such documents.

Some common records that are deemed to have little continuing value once their purpose has been served can be disposed of pursuant to a schedule created by the Department of Administration Records Management Section and approved by the Public Records Board.<sup>14</sup>

Some municipalities have created a central repository to collect records of individual governing body members. To the extent that the municipality maintains a central repository and all records that are collected, the municipality is in a position to respond to record requests and the individual local officials would not need to keep

or maintain the records. However, most municipalities probably do not have such a system and without one, an elected official is typically the legal custodian of records he or she creates or receives and retains.

### How Long do I Need to Keep Records that I Have Created or Kept as an Elected Official?

For offices with a successor, the law clearly requires the incumbent to safely keep and preserve records relating to the office and transfer them to the officer’s successor. The law imposes penalties when a demand is made for the records pertaining to the office to be turned over to the successor and an official fails to do so.<sup>15</sup> However, it is unclear whether individual officers like alderpersons or village trustees or board and commission members have a “successor” in the sense that officers like a mayor, municipal clerk, treasurer, assessor, etc. do.

The default retention period for a “city or village public record” is 7 years<sup>16</sup> but the law does not appear to require retention of records of individual governing body members (trustees and common council members). The lack of clear guidelines or requirements makes determining how long to keep records difficult but records that need to be kept should be maintained, at a minimum, until the official is no longer in office. In DOJ correspondence, an assistant attorney general opined that the public records law did not require a former alderperson to provide public access to records created or maintained during his service in office and under his personal control, as he was no longer an “authority” under the law.<sup>17</sup>

12. Wis. Stat. § 19.35(6)

13. *Stone v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2007 WI App 223, ¶ 27, 305 Wis. 2d 679, 694, 741 N.W.2d 774, 781.

14. For more information on this schedule, visit the Public Records Board’s website or see Public Records 98.

15. Wis. Stat. § 19.21.

16. Wis. Stat. § 19.21(4)(b). However, local governments have authority to enact ordinances that set a shorter retention period for records. Such ordinances must be approved by the Wisconsin Public Records Board.

17. DOJ Correspondence from Assistant Attorney General Lewis Beilin to Lisa Seiser and Kayla Bunge, dated October 4, 2010.

Importantly, documents that are the subject of a request for inspection may *not* be destroyed until the matter has been finally resolved and the requester, if he or she chooses to do so, has had the opportunity to pursue the matter through the various channels of appeal set forth in the law.<sup>18</sup>

## Is there a Time Frame for Responding to a Records Request?

The law requires that you respond “as soon as practicable and without delay.”<sup>19</sup> The Attorney General’s office usually views a response within two weeks as reasonable.

## Can I Ignore a Request if it is Not in Writing or if the Request is for a Record I Don’t Have or if the Requester Refuses to Identify Himself or Explain Why He Wants the Record?

Generally speaking, it is never wise to “ignore” a request. A records request does not have to be made in writing. If a request is oral, a denial may be oral but the requester has the option of demanding a written statement of reasons within five days of the denial. If the request is for a record that the official determines he does not have, then the official should inform the requester that he does not have such a record. Finally, the request may not be denied because the requester is unwilling to be identified or state the purpose of the request. However, a requester may be required to show acceptable identification if the record is kept at a private residence or whenever security reasons or federal law or regulations require.<sup>20</sup>

## What Reasons are Valid Reasons for Denying a Request for a Public Record?

A record request can be denied if it is not reasonably limited as to subject matter or time period,<sup>21</sup> or if the record does not exist and the custodian or authority would have to create a new record by extracting information from existing records and compiling a new format.<sup>22</sup> Access to a record may also be denied if the record is exempted from the public record law’s reach by a clear statutory exception, or if the courts have created a limitation for a certain type of record under the common law. Finally, access may be denied if the custodian conducts what is known as the “balancing test” and determines that the harm to the *public* interest (as opposed to the official’s personal interest) from inspection outweighs the public interest in inspection.<sup>23</sup>

When conducting the balancing test or determining whether a record request should be denied or granted, it is important to remember that there is a very strong presumption in favor of access.<sup>24</sup>

Finally, any denial must be based on specific policy reasons. If the custodian denies access, he or she cannot merely assert, in general terms, that disclosure would be against the public interest. Instead the custodian must give specific reasons for the denial.<sup>25</sup>

## What Should I do if I Receive a Records Request?

Examine the request to see what the requester is seeking and then determine whether you are the legal custodian of any such record. If you have such

a record, then determine whether it is subject to release under the public records law. If you determine that the record is not exempt from disclosure by virtue of a clear statutory or common-law exemption, then conduct the balancing test to determine whether the harm to the *public* interest from disclosure outweighs the public interest in disclosure.

In conducting the balancing test, remember that the public records law is “construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business,” and that the legislature has declared that the “denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”<sup>26</sup> If you determine that the request should be denied after conducting the balancing test, it is necessary to assert specific policy reasons for the denial. It is not enough to state the legal conclusion that the public harm from disclosure outweighs the public interest in disclosure. Make sure that you respond as soon as practicable and without delay.

If the request was made orally, you can deny the request orally unless the requester demands a written statement of the reasons the request was denied within five business days of the oral denial. If you deny a written request, in whole or in part, you must give the requester a written statement of the reasons for denying the written request and must inform the requester that the determination is subject to review by mandamus action or upon application to the district attorney or attorney general.<sup>27</sup>

18. Wis. Stat. § 19.35(5).

19. Wis. Stat. § 19.35(4).

20. Wis. Stat. § 19.35(1).

21. Wis. Stat. § 19.35(1)(h).

22. Wis. Stat. § 19.35(1)(1).

23. *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965).

24. Wis. Stat. § 19.31.

25. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

26. Wis. Stat. § 19.31.

27. Wis. Stat. § 19.35(4)(b).

## Can I Make Someone Pay to Get Records? How Much?

A legal custodian or authority is entitled to impose fees for the “actual, necessary and direct cost” of reproducing or photographing any record and mailing or shipping any record.<sup>28</sup> Copying fees may include labor expenses actually, necessarily, and directly incurred in connection with reproduction.<sup>29</sup> For copies, the Wisconsin Department of Justice generally views 15¢ as reasonable and advises that copying fees should not exceed 25¢ per page. An authority may impose a fee upon a requester for locating the record, not exceeding the actual, necessary and direct cost of location, only if the cost is \$50 or more.<sup>30</sup> The costs of a computer run may be imposed as a copying fee, but not as a location fee.<sup>31</sup> An authority may require prepayment of fees if the total amount exceeds \$5.<sup>32</sup>

## What Happens if I Ignore a Public Records Request or Improperly Deny a Request for a Record or a Court Concludes I Violated the Public Records Law?

A requester may in writing request that the district attorney or attorney general bring a mandamus action asking the court to order release of the record. An

individual requester can also bring a mandamus action on his or her own.<sup>33</sup> However, a mandamus action can be brought only after a written request has been made and the authority withholds the record or delays granting access.<sup>34</sup>

Violating the public records law can be expensive and result in the assessment of costs, fees and damages. If a requester “prevails in whole or in substantial part in any action filed,” the court shall award reasonable attorney fees, damages of not less than \$100 and other actual costs.<sup>35</sup> A court order compelling disclosure of public records is not a condition precedent to an award of fees. A party seeking fees under Wis. Stat. sec. 19.37(2) must show that prosecution of the action could reasonably be regarded as necessary to obtain the public record and that a causal nexus exists between the action and the surrender of information. This question of causation is a factual determination made on a case-by-case basis. The requester is not required to establish that the record would not have been provided “but for” his or her mandamus action.<sup>36</sup>

The law states that costs and fees shall be paid by the authority or unit of government of which it is a part, or by the unit of government employing the

custodian, and may not become a personal liability of any public official.<sup>37</sup>

Any authority or custodian 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. In addition, the court may award punitive damages to the requester.<sup>38</sup>

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28. Wis. Stat. § 19.35(3)(a), (b) and (d).

29. 72 Op. Att’y Gen. 150 (1983).

30. Wis. Stat. § 19.35(3)(c).

31. 72 Op. Att’y Gen. 68 (1983).

32. Wis. Stat. § 19.35(3)(f).

33. Wis. Stat. § 19.37.

34. Wis. Stat. § 19.37.

35. Wis. Stat. § 19.37(2).

36. *State ex rel. Vaughn v. Faust*, 143 Wis.2d 868, 422 N.W.2d 898 (Ct. App. 1988); *Racine Education Association v. Bd. of Education For Racine*, 129 Wis.2d 319, 385 N.W.2d 510 (Ct. App. 1986); and *Racine Education Association v. Bd. of Educ. for Racine*, 145 Wis.2d 518, 427 N.W.2d 414 (Ct. App. 1988).

37. Wis. Stat. § 19.37(2). See 72 Op. Att’y Gen. 99 (1983).

38. Wis. Stat. § 19.37(3) and (4).



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