

Responding to Public Records Requests

Wisconsin Department of Justice
Office of Open Government
League of Wisconsin Municipalities
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Presentation Overview

- Provide background on the Office of Open Government
- Cover public records law essentials
- Explain what a record is and who can request records
- Discuss the receipt and processing of public records requests
 - Including:
 - Application of the public records balancing test
 - Special issues
 - Employee records
- Outline how to respond to public records requests
- Detail permissible costs that may be assessed
- Address record retention



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Introduction



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Office of Open Government (OOG)

- Interpret and apply the Open Meetings Law, Public Records Law, and other open government statutes and rules
- Manage DOJ's public records request process
- Develop open government policies
- Provide legal counsel to DOJ and clients
- Run the PROM help line and respond to citizen correspondence concerning open government issues
 - Wis. Stat. §§ 19.39 and 19.98
 - Any person may request AG's advice
- Provide training and open government resources



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Government Transparency and the Wisconsin Public Records Law

- "Transparency and oversight are essential to honest, ethical governance." *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
- **Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39**
 - Objectives:
 - Shed light on workings of government and acts of public officers and employees
 - Assist members of the public in becoming an informed electorate
 - Serve a basic tenet of our democratic system by providing opportunity for public oversight



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Presumption

- Wis. Stat. § 19.31:
 - 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."



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Public Record Roles



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Authorities and Custodians

- **Authority:** Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- **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
 - E.g., elective official or designee
 - Custodial services: other staff may assist
 - All records belong to the authority



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Requesters

- **Requester:** Defined in Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
 - Incarcerated or committed persons have more limited rights
 - Requester has greater rights to inspect personally identifiable information about himself or herself in a record. Wis. Stat. § 19.35(1)(am)
- Requester generally **need not identify** himself or herself
 - Requesters may be anonymous
 - However, public records requests are records subject to disclosure
- Requester **need not state the purpose** of the request
 - Motive generally not relevant, but context appropriately considered
 - Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.
 - See *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894:



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Records



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“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.”



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Is it a Record?

- Records **include** the following:
 - **Material not created by the authority but in the authority's possession**
 - Electronic records, including:
 - Audio and video
 - Police body cameras and dashboard cameras; surveillance video
 - Accompanying audio
 - 911 recordings
 - Data in a database
 - Emails
 - Social media
- Records **do not include** the following:
 - Published material available for sale or at library
 - Material with limited access rights, such as copyrights or patents
 - Purely personal property
 - Drafts, notes, and preliminary documents



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Drafts, Notes, Preliminary Documents

- Prepared for originator's **personal use** or in the name of a person for whom the originator is working
- Not a draft if used for purpose for which it was commissioned
- One cannot indefinitely qualify a document as a draft by:
 - Simply labeling it "draft" or preventing final corrections from being made



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Email, Texts, etc.

- **Personal** email, calls, and documents on an **authority's account**:
 - Email sent and received on an authority's computer system is a record
 - Includes purely personal email sent by officers or employees of the authority
 - *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
 - Generally, disclosure not required of purely personal e-mails sent or received by employees that evince no violation of law or policy.
- **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
 - Personal materials on the same private accounts are not subject to disclosure
 - **Recommendation:** Conduct a careful search of all relevant accounts



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Electronic Records

- Social media accounts created or maintained by an authority
 - Content posted on an authority's accounts are public records
 - **Recommendation:** Be aware of what you post on your personal accounts and phones
- Cell phone content, including content on phones issued by an authority and government business-related content on personal phones
 - Phone call records, text messages, app content
- **Important:** Check social media accounts and cell phones when gathering records in response to public records requests



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Receiving and Processing a Request



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Public Records Request Process

- PRR received and forwarded to authority's records custodian
- Authority begins search for records
- Any responsive records subject to disclosure are reviewed:
 - **Presumption that they will be disclosed unless:**
 - They are exempt from disclosure pursuant to a **statute** or the **common law**
 - The **public records balancing test** weighs in favor of nondisclosure
- Records are released with letter explaining any redactions



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A Record Subject to Disclosure v. Disclosing A Record

- **Employee's Role:** Search for responsive records and give all responsive records to records custodian to review
 - All responsive records must be given to the records custodian, even if the employee thinks the records should not be disclosed or the employee does not want the records disclosed
- **Record Custodian's Role:** Review responsive records and determine if records must be disclosed
- **Bottom Line:** A record *subject* to disclosure does not necessarily mean it will be disclosed



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Sufficient Request

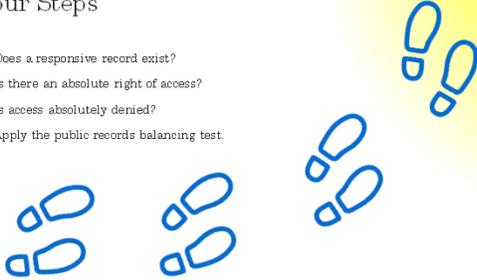
- A request need not be in writing; it may be verbal
- An authority may not require the use of a form
- “Magic words” are not required
- A request must:
 - Reasonably describe the information or records requested
 - Be reasonably specific as to time and subject matter
- Custodian should not have to guess what records the requester wants



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Four Steps

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



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Step 1: Does the Record Exist?

- Generally, only records that exist at the time of the request must be produced
 - To respond, an authority need not create new records
- Public records law does not require answering questions
 - However, if a request asks a question and an existing record answers the question, provide the record or inform the requester
- Continuing requests are not contemplated by the public records law
- If there are no responsive records, inform the requester. See *Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.



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Steps 2 & 3: Absolute Right & Denial of Access

- **Absolute Right** (not many exist):
 - Books and papers "required to be kept" by sheriff, clerk of circuit court, and other specified county officials
 - Daily arrest logs or police "blotters" at police departments
- **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



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Step 4: The Balancing Test

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



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Some Sources of Public Policies

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



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Special Issues



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Employee Records

- Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - Generally, access not permitted for information related to:
 - Employee's home address, email, phone number, SSN
 - Current investigation of possible criminal offense or misconduct connected with employment
 - Employee's employment examination, except the score
 - Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- Other personnel-related records, including disciplinary records may be subject to disclosure
 - Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356



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Children and 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, including application of the balancing test.



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DPPA

- Driver's Privacy Protection Act (DPPA)
 - Purpose: limit release of an individual's personal information contained in a driver's license record
- *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339
 - **Accident reports**: permitted to be released unredacted
 - DPPA exception allows. See 18 U.S.C. § 2721(b)(14).
 - **Incident reports**: release of DMV info. prohibited unless exception applies
 - Compliance with public records request not a "function"
 - Information **verified** using DMV records is not protected by DPPA
 - Presents problem of determining how info. was obtained



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Other Special Issues

- Wis. Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Wis. Stat. § 165.79: Crime Laboratory Privilege
- Other statutes requiring confidentiality



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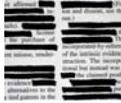
Responding to a Request



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Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- **Redaction constitutes a denial of access to the redacted information**
 - Therefore subject to review by mandamus
- Digital editing programs and equipment for electronic records
 - Audio – accompanying video, dispatch recordings, etc.
 - Video – security video, police body and dashboard cameras, etc.



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Written Response

- **A written request requires a written response, if the request is denied in whole or in part**
 - 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**
- 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
- May respond in writing to a verbal request
- A request for clarification, without more, is not a denial



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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 and status updates
- Penalties for arbitrary and capricious delay



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Format of Records

- Wis. Stat. § 19.35(1)(b), (c), (d): a copy substantially as readable/audible/good as the original
- *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
 - Whether records must be produced in requested format not squarely addressed
 - PDF fulfilled request for "electronic records" despite not having all the characteristics wanted by the requester
 - Sufficient to provide a copy of relevant data in an appropriate format
- **Tip:** If the requested records are already in a requested format, provide the records in that format unless there is a good reason for not doing so.



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Notice Before Release

- Notice to record subjects is only required in limited circumstances
 - Required by Wis. Stat. § 19.356(2)(a)1:
 - Records containing 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 of the authority holding state or local public office
 - "Record subject" may augment the record to be released
- Attorney General opinions regarding notice: OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- Courtesy notice



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Costs



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Costs

- **Actual, necessary, and direct** costs only—unless otherwise specified by law
 - Copying and reproduction
 - Location, if costs are \$50.00 or more
 - Location costs themselves must be \$50 or more: An authority **cannot** combine location costs with other costs to reach the \$50 threshold
 - Mailing/shipping to requester
 - Others specified in Wis. Stat. § 19.35(3)
- Authorities **may not** charge for redaction costs
- Prepayment may be required if total costs exceed \$5.00
- Authority may waive all or part of costs
- **Recommendation:** Keep careful records of time spent working on requests



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OOG Fee Advisory

- Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
 - Available at <https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>
- Overview of costs permissible under the law
- Recent inquiries pertaining to high fees charged by some authorities
 - Copy costs that are not actual, necessary and direct
 - Location costs including time spent by specialists
 - Limit amount of time spent by specialist
 - Charge lowest hourly rate of individual **capable** of searching
- DOJ recently revised its fee schedule
 - Available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf>



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Enforcement



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Enforcement

- Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
 - Authority may be ordered to release records
 - Other remedies
- Wis. Stat. § 946.72: Tampering with public records and notices
 - "Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony."



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Record Retention



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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



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Record Retention – Other Statutes

- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21
- Record Retention Schedules
 - Includes:
 - General Records Schedules (GRSs)
 - Agency-specific Records Retention/Disposition Authorizations (RDAs)
 - E.g., 121 days for body camera video when there is no incident shown
- <http://publicrecordsboard.gov>



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Record Retention – Format

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



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Record Retention – Best Practices

- Establish agency policies regarding retention
- Ensure all agency-specific RDAs are up-to-date
 - RDAs sunset after 10 years
- Train agency records officers and other staff on record retention and relevant agency policies
- Follow your retention schedules
- Consult your legal counsel



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Further Information

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



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