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

Introduction
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
  - Any person may request AG's advice
- Provide training and open government resources

Wis. Stat. §§ 19.39 and 19.98

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. Reppenbach, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
  - 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

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."
Public Record Roles

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

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. Arbello v. Milwaukee Board of School Directors, 2014 WI App 86, 354 Wis. 2d 471, 849 N.W.2d 894.
Records

“Record”

- Wis. Stat. § 19.32(2):
  "Any material on which written, drawn, 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."

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
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

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, disclosures 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 disclosures
  - Recommendation: Conduct a careful search of all relevant accounts

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
Receiving and Processing a Request

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

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
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

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

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

See Journal Times v. Police & Fire Com’rs Bd., 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 163.
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

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 requestor and the purpose of the request are generally not part of the balancing test

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
Special Issues

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

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.
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 338
  - Accident reports: permitted to be released unredacted
  - 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

Other Special Issues
- Wis. Stat. § 895.03(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

Responding to a Request
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.

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 requester 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

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 acknowledgment and status updates
- Penalties for arbitrary and capricious delay
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.

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 employee other than the authority about employees of that employer
  - “Record subject” can try to stop disclosure in court
  - Required by Wis. Stat. § 19.356(3):
    - 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

Costs
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

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 specialist
  - Limit amount of time spent by specialist
  - Charge lowest hourly rate of individual capable of searching
  - DOJ recently revised its fee schedule

Enforcement
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."

Record Retention

- 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

- 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](http://publicrecordsboard.gov)

Record Retention – Format

- Hard copies v. electronic copies
  - Copies of records in electronic format 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

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
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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