

## Responding to Open Records Requests

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Much of the material in a legislator’s office or kept by a legislator qualifies as a public “record” under Wisconsin’s Open Records Law [ss. 19.31 to 19.39, Stats.]. This material is required to be available for inspection and copying by the public, including the news media.

As an example, correspondence from and to a constituent is a public record and generally is open to inspection. Although personal correspondence between individuals is usually thought to be private, legislators are public officials and correspondence with them is public, unless the Open Records Law provides a reason to deny access. For example, in certain circumstances, a legislator may redact from a letter personally identifiable information about a constituent.

The general rule under the Open Records Law is that all records held by a legislator are open to the public unless a specific provision in the law allows the records to be kept confidential. This rule embodies the public policy of the state that all persons should have the greatest possible information about the decisions and activities of state and local government. In practice, very few requests to inspect or copy records are denied.

The purpose of this document is to set forth the steps a legislator may take to deal with a request to inspect records.

A decision to deny access to a record should be made very carefully, since it most likely will be challenged--in court, in the news media, or in partisan debate.

*Legislators are strongly advised, prior to responding to a request to inspect records, to seek additional advice beyond that set out in this chapter. Legislative leaders can provide pragmatic and political advice. Legislative Council staff can provide procedural advice.*

Not only are decisions to deny access to records legally and politically sensitive, but the law on public records is complex and difficult to apply in specific instances. This document describes the statutes that constitute the Open Records Law. In addition to the statutes, the Wisconsin courts have interpreted and applied the Open Records Law in a number of cases. Certain constitutional

provisions also may apply to a given request for access to legislative records. The constitution, statutes, and cases constitute the legal basis for decisions to release or deny access to records.

The Open Records Law and the court cases are technical and do not provide a straightforward guide to decisions on record requests. This document describes the statute in plain language, but even this document cannot fully guide a legislator's decisions in the variety of situations that may arise.

## Clarify, in Advance, Who Is the “Custodian” of the Office's Records

*The **custodian** is the person who responds to a request to inspect records.*

The custodian is the person who responds to a request to inspect records. Each legislator is automatically the custodian of his or her records, unless an office staff member is designated as custodian. A legislator and his or her staff should have a clear understanding of who makes the decisions when responding to a request to inspect records.

In most cases, it appears preferable that a legislator retain the role of custodian of his or her records, since the legislator is the person directly affected by an inappropriate release of records. Note, however, that in the event that a request is made during a period of time that a legislator is unavailable (e.g., a vacation), action on the request will be delayed. The law makes no provision for appointment of a temporary custodian under such circumstances.

## Respond Reasonably Promptly to a Request

*A response must be made “as soon as practicable and without delay.”*

A response to a record request must be made “as soon as practicable and without delay” under the law. In practical terms, a custodian may need some amount of time to retrieve and inspect the record before formulating a response.

The response to a request for a record is either: (1) to provide the record; or (2) to deny the request. If a written request is denied, the reasons for the denial must be given in writing.

## Respond to a Request in Kind

If the request is made orally, and is going to be denied, the denial may be made orally. If a requester who was orally denied a request later demands a written statement of denial, and the demand is made within five business days of the oral denial, the written statement must be provided.

If a request is made in writing, the response must be in writing giving the reasons for the denial. Written responses denying written requests must include this statement--“This determination is subject to review by mandamus under s. 19.37 (1), Stats., or by application to the Attorney General or a district attorney.”

## Demand That a Request Be Reasonably Specific

*There is no blanket exemption for constituent mail--in most cases, it is a "record."*

A request must be honored if it "reasonably describes the requested record or the information requested." However, requests to go through an office's files (a "fishing expedition") do not have to be honored.

For example, requests such as the following must be given a response: "All constituent mail on Assembly Bill 000" and "all correspondence on the Highway XO project in your district."

Also, there is no blanket exemption for constituent mail--in most cases, it is a "record," although in certain circumstances a legislator may redact from a letter personally identifiable information about a constituent.

## Seeking Identity of Requester; Purpose of Request

A record request may not be denied because the requester refuses to provide identification or to state the purpose of the request. However, if the record is at a private residence, or valid security reasons exist, a requester may be required to show acceptable identification. Also, if it is known that a person making a record request is an incarcerated person or a person committed to an inpatient treatment facility, a legislator is under no obligation to respond to the request, unless:

- The record contains specific references to the person or to his or her minor children to whom he or she has not been denied physical placement; and
- The record is otherwise accessible to the person by law.

## Decide if the Requested Material Is a "Record"

A "record" is any material which bears information, regardless of form ("written, drawn, printed, spoken, visual, or electromagnetic information") and which was created or is being kept by a custodian, except any of the following:

- Personal property of the legislator that has no relation to his or her office of legislator.
- Drafts, notes, preliminary computations, and similar material prepared for the originator's personal use or prepared in the name of a legislator by a member of his or her staff.
- Material to which access is limited by copyright, patent, or bequest.
- Published materials that are available for sale or are available at a public library.

If the requested material falls into one of the above exceptions, it is not a "record" and the request may be denied for that reason.

## Make a Decision on the Request

It is the public policy of the state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. **The law is to be construed with a presumption of complete public access, consistent with the conduct of governmental business.** The denial of public access generally is contrary to the public interest. Access may be denied only in exceptional cases--that is, under specific statutory or common law exemptions and in cases where it can be demonstrated that the harm done to the public interest by disclosure outweighs the right of access to public records.

If a record requester appears in person, a legislator may permit the person to photocopy the record or provide the person with a copy substantially as readable as the original. Similar provisions apply to records in an audio, video, photographic, or computer format. The legislator must provide a record requester with facilities comparable to those used by employees to inspect, copy, and abstract the record during established office hours. However, the legislator is not required to purchase new equipment or provide a separate room for a record requester.

If a legislator decides to provide access to a record, a person identified in the record must be given an opportunity to seek judicial review of the decision prior to release of the record if any of the following apply:

- The record is the result of an investigation into an employee disciplinary matter.
- The record is obtained through a subpoena or search warrant.
- The record is prepared by an independent contractor and it contains information relating to an employee of the independent contractor.

However, in the case of any record containing information identifying a state or local public official, a legislator, prior to the release of the record, must provide the official with an opportunity to augment the record with written comments and documentation.

## Denial of a Request

*Legislative Council staff can advise a legislator of the exemptions to the Open Records Law.*

In some instances, access to records may be denied. However, any written denial must specifically cite a statutory or common law exemption or demonstrate that there is a need to restrict public access at the time that the request is made.

The exemptions to the Open Meetings Law are used as a guide for denial. The applicable exemptions in that law are:

- “Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.”
- “Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a public body or the investigation of charges against such person . . . and the taking of formal action on any such matter . . . .”
- “Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.”

- “Deliberating or negotiating the purchasing of public properties, the investing of public funds or conducting other specific public business, whenever competitive or bargaining reasons require a closed session.”
- “Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons . . . which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of any person referred to in such histories or data, or involved in such problems or investigations.”
- “Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.”
- “Consideration of requests for confidential written advice from the government accountability board under s. 5.05 (6a), or from any county or municipal ethics board.”
- “Considering any and all matters related to acts by businesses under s. 560.15 (economic adjustment program where a business is shutting down or laying off employees) which, if discussed in public, could adversely affect the business, its employees or former employees.”

(In addition to the above, meetings can also be closed to discuss probation or parole applications, crime fighting strategy, burial sites, and certain Unemployment Insurance Advisory Council and Worker’s Compensation Advisory Council matters. In specific situations, these less-common grounds may be applicable to a record request made to a legislator.)

The Wisconsin Supreme Court has stated that access to information collected under a pledge of confidentiality, where the pledge was necessary to obtain the information, may be denied. The Open Records Law also exempts records from access if: (1) federal or state law requires nondisclosure; (2) the record is a computer program; (3) the record is a trade secret; or (4) the record contains specified personal information regarding an employee. Other statutory and common law exemptions exist--a legislator can be advised of the exemptions to the Open Records Law by Legislative Council staff.

## Partial Denial

If part of a record qualifies for confidential treatment, the remainder must be released. In those instances, a legislator should either separate the confidential information, or delete it and release the remainder.

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## Provide Copies on Request

Persons having a right to inspect a record are entitled to a copy, if they ask for it. The custodian should copy the record in order to retain control over the original record. A fee for copying, which does not exceed the actual copying cost, may be charged based on per copy charges established by the chief clerk in each house. A search fee also may be imposed, but only if the cost of the search is \$50 or more.