



Public Records for Legislators

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Transparency

Credibility

Accountability

Objectives

Working knowledge of public records law



Separate personal and public



Respond to records requests



Contents

- Presumption of openness
- What is a record
- Responding to a request
- The law in action

Presumption of openness

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.**”





Presumption of openness

- Assume that every document, paper or electronic, that enters your office is subject to public disclosure.
- Public policy favors disclosure.
- There are statutes requiring non-disclosure of certain information.



Who is covered under the public records law?

An “Authority”

- Any of specified entities “having custody of a record”
- Each legislator
- Each chief clerk’s office
- Public records law obligations apply separately to each authority
- Authority that receives a request must respond

“RECORD”

“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 or is being kept by an authority.”

— Wis. Stat. § 19.32(2)



A “record” is a tangible thing that exists at the time of the request

- 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
- An authority may choose to do more than the public records law requires



NOT A RECORD

- Drafts, notes, and preliminary documents
- Published material available for sale or at library
- Purely personal materials with no relation to office
- Material with limited access rights, such as copyrights or patents

Purely personal

Not a record

- Emails or text messages sent or received:
 - on a personal device, and
 - through a personal service provider, and
 - that does NOT relate to government business
- Family photos in your office or on your work computer (provided they are limited)
- Your grocery list or personal notes in your office

“Record” - may or may not be subject to disclosure

- Emails or text messages sent or received:
 - on a personal device but through a government service provider (e.g., your work email on your personal cell phone) regardless of the subject matter
 - on a government device regardless of subject matter
- Excessive personal photos/business conducted on your government devices



Avoid comingling

Analyzing the request

- What is being requested?
- Do you have the record?
 - *Look for it*
- Is there an absolute right of access? If yes, produce.
- Is access absolutely denied? If yes, deny.
- Apply the balancing test



REQUESTER IDENTITY & MOTIVE

Limitations on requests by prisoners and committed persons

Requester need not state the purpose of the request or identify themselves - Motive not relevant, but context appropriately considered

Requests do not have to be in writing

Must be reasonably specific as to time and subject matter

Custodian doesn't have to guess what requester wants
– OK to contact requester to clarify

TIME FOR RESPONSE

No specific time limits, depends on
circumstances

Penalties for arbitrary and capricious delay or
denial

Response is required, “as soon as practicable
and without delay”

DOJ policy: 10 business days generally
reasonable for response to simple, narrow
requests

May be prudent to send an acknowledgement



Balancing test

- Public interest in disclosure against the public interest in non- disclosure
 - Fact intensive
 - Must conduct on a case-by-case basis
 - Blanket rules disfavored
-
- Law enforcement records
 - Employee personnel records
 - Peer review materials
 - Medical information (when not covered by medical privacy laws)
 - Personal safety
 - Private information in emails from constituents



DENIALS

- 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
- Go through your chief clerk's office

REDACTION

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted
- No mandated way to make redactions: black magic marker, cover up with white paper when photocopying, electronic redaction

[REDACTED]

[REDACTED] is being s [REDACTED]
[REDACTED] in the areas of [REDACTED]
and biological study at [REDACTED] The pr [REDACTED]
[REDACTED], [REDACTED].

his [REDACTED]
[REDACTED] l effects of [REDACTED]
[REDACTED] areas, [REDACTED] ors w:
to be D [REDACTED], [REDACTED] and [REDACTED]

PRE-RELEASE NOTICE

- 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
- Required by Wis. Stat. § 19.356(9) – officer or employee holding state or local public office
- Courtesy notice

The background of the slide is a collage of various US dollar bills, including \$100, \$50, and \$20 bills, scattered across the page. The bills are shown in different orientations and some are faded, creating a sense of motion and abundance. The word "COSTS" is prominently displayed in the center in a large, blue, serif font.

COSTS

- Only “actual, necessary and direct” costs specified in Wis. Stat. § 19.35(3)
- Copying and reproduction
- Location, if over \$50.00
- Can’t charge redaction costs
- May request prepayment if over \$5.00
- Keep track of costs if payment will be requested

FOLLOW-UP AND REMEDIES

- Use judgment regarding follow-up contacts from requesters
- Public records law is enforceable by petition for writ of mandamus
- Mandamus action may be filed by requester, with or without attorney; district attorney; or Attorney General





Set your office up for success

- Office procedures
 - Ask your colleagues what they do
 - Talk to the legislative administrative offices
 - Call the Office of Open Government
- Not required by law – but helpful
 - Facilitate continuity when staff changes
 - Ensure public records requests are given priority and handled in a timely manner
 - Organization of requests and responses

**Requester:**

List your high volume requesters

**Employees:**

List the employees (or departments) who process the requests

**Tools:**

List the non-human resources necessary to process the requests

**Processes:**

What do your employees need to do before the requests are fulfilled

**Delivery:**

How the records are given to the requester

**Outcome:**

These are the goals, legal requirements, and expectations of the requester

**Map the
workflow
and list the
outcomes**

Map the workflow and list the outcomes

Requester	Employees	Tools	Processes	Delivery	Outcome
<ul style="list-style-type: none"> -Media -Government -Individuals -Interest groups -Businesses 	<ul style="list-style-type: none"> -Records custodian -Lawyers -IT people -Section chiefs -Individual employees 	<ul style="list-style-type: none"> -Vault searching capabilities -E-discovery software -Adobe Acrobat Pro (redaction) 	<ul style="list-style-type: none"> -Data retrieval -Email retrieval -Physical records search -Electronic records search -Redaction -Legal review - -Correspondence with requester 	<ul style="list-style-type: none"> -in-person inspection -email -CD/DVD -paper copies - Automated 	<ul style="list-style-type: none"> -Transparency -Speed -Efficiency -Comply with law -Low costs -Consistency

RETENTION AND PRESERVATION

Legislators are exempt from Wis. Stat. § 16.61(2)(b) records retention requirements

Legislators are subject to Wis. Stat. § 19.35(5) records preservation requirement when a public records request is filed

Cannot destroy records which are subject to a pending public records request

Must preserve records for 60 days after denial; indefinitely if litigation filed.

Recent legislation



Wis. Stat. § 165.87

Body Cameras and law enforcement

- Policies and training
- Record retention
- Public policy
balancing/victim's rights
- Defines authority



Cases against legislators

- *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862.
 - Constituent emails
- *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898
 - Electronic records

Proposed but withdrawn

Motion # 999

- Create a deliberative materials exception
- Allow legislators to refuse to disclose records related to the office
- Make LRB research requests and drafting files confidential
- Allow Senate or Assembly policy to trump public records laws

Public records provisions dropped

- Opposition from press, democratic and republican legislators, the Attorney General, liberal and conservative think tanks, and the public

RESOURCES

- Department of Justice website
- <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Public Records Compliance Guide
- Contact our “PROM” hotline at 608-267-2220
- Chief clerks
- Legislative Council’s Open Records Task Force at 608-266-1304