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# Wisconsin Department of Justice

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# 2022 New Legislator Conference



# Wisconsin Public Records Law: Essentials for New Legislators

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Wisconsin Department of Justice

Office of Open Government

November 30, 2022

Madison



# INTRODUCTION

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# Presentation Overview

- Describe the importance of the public records law
- Define what is a record and who can request records
- Discuss the receipt and processing of public records requests
- Detail how to respond to public records requests
- Offer the opportunity for questions



# Government Transparency and the 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**
  - Sheds light on workings of government and acts of public officers and employees
  - Assists members of the public in becoming an informed electorate
  - Serves a basic tenet of our democratic system by providing opportunity for public oversight



# Presumption

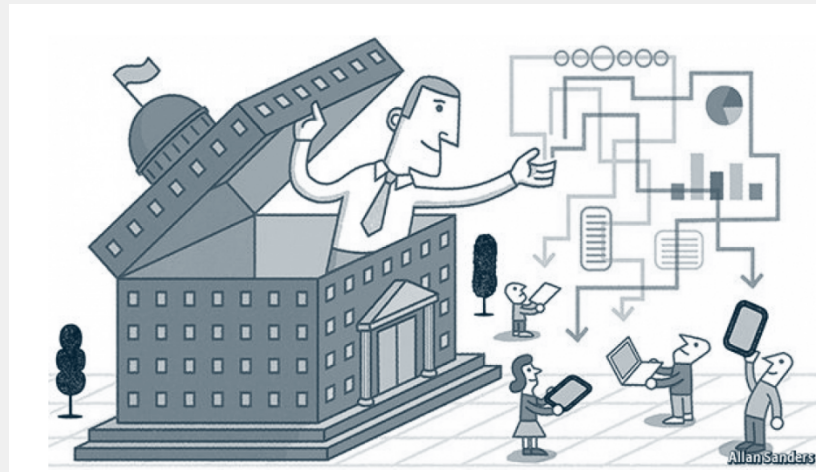
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



# Presumption of Openness

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



# PUBLIC RECORDS ROLES

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# Authorities and Custodians

- **Authority:** Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
  - Any of specified entities having custody of a record
    - Includes each legislator and each chief clerk's office
  - Public records law obligations apply separately to each authority
  - The authority that receives a request **must** respond
- **Legal Custodian:** 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

- 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)
- Requesters may be anonymous, and generally, **need not identify** themselves
  - However, public records requests are records subject to disclosure
- Requesters **need not state the purpose** of their requests
  - Motive generally not relevant, but context appropriately considered



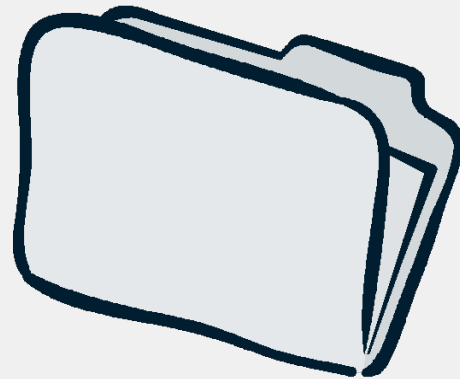
# RECORDS

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# “Record” Defined

- 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.”



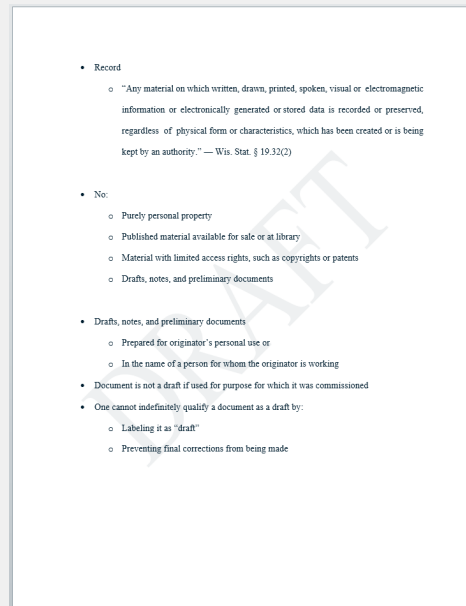
# Is it a Record?

- Records **include** the following:
  - **Material not created by the authority but in the authority's possession**
  - Electronic records, including audio and video
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files
- 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



# Electronic Records: Email, Texts, etc.

- **Personal** email, texts, 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, texts, calls, and documents on **personal 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



# RECEIVING AND PROCESSING A REQUEST

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# Public Records Request Process

- PRR is received and forwarded to the authority's records custodian
- The authority begins the 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 a letter explaining any redactions



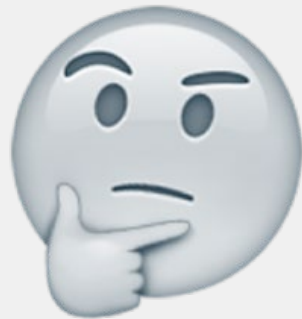
# Receiving a Request

- A request may be submitted to anyone working for an authority
  - A request may be **verbal** or **in writing**
  - An authority may **not** require the use of a form
  - “Magic words” are not required
- In order to be a **sufficient request**, it 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
- **Tip:** It is okay to contact the requester to clarify



# Records Must 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.



# The Balancing Test

- Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
  - Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.
- Fact intensive; “blanket rules” disfavored
- Must conduct on **case-by-case basis** taking into consideration totality of circumstances
- Identity of requester and the purpose of request are generally not part of balancing test



# REDACTION

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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
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information**
  - Therefore, subject to review by mandamus

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# RESPONDING TO A REQUEST

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# Response Preparation

- Analyze the request
- Okay to communicate with the requester for clarification
- Have a plan
- Okay to work with other offices, chief clerks, etc.
- Be mindful of confidential attorney-client privileged communications





# Response Format

- Restate the request
- Inspection or copies
- Native formats (*Lueders v. Krug* case)
  - Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
    - Printed copies of requested records were not sufficient
- Electronic responses
- Inclusion of background, context, or additional information



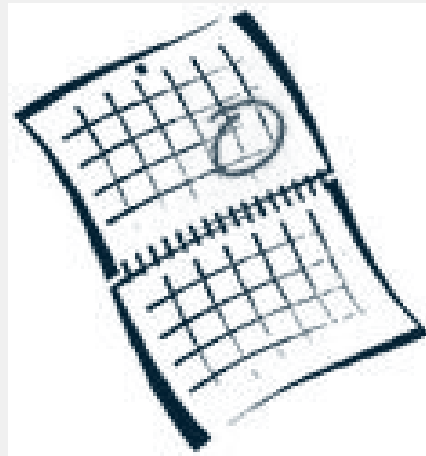
# Written Response

- 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 the custodian has exercised judgment
  - Reviewing court usually limited to reasons stated in denial
  - **Availability of the same records from other sources generally not a sufficient reason**
  - Must inform the 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



# 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
- Penalties for arbitrary and capricious delay



# 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 employer other than the authority about employees of that employer
    - “Record subject” can try to prevent 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
- AG opinions regarding notice: OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- Courtesy notice



# PERMISSIBLE FEES

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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
    - **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
- OOG Advisory: Charging Fees under the Wisconsin Public Records Law available at [https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18\\_OOG\\_Advisory\\_Fees\\_0.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf)



# 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
  - Mandamus action may be filed by:
    - Requester, with or without attorney
    - District attorney
    - Attorney General
  - 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.”





# RECORDS RETENTION

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# Record Retention and Preservation

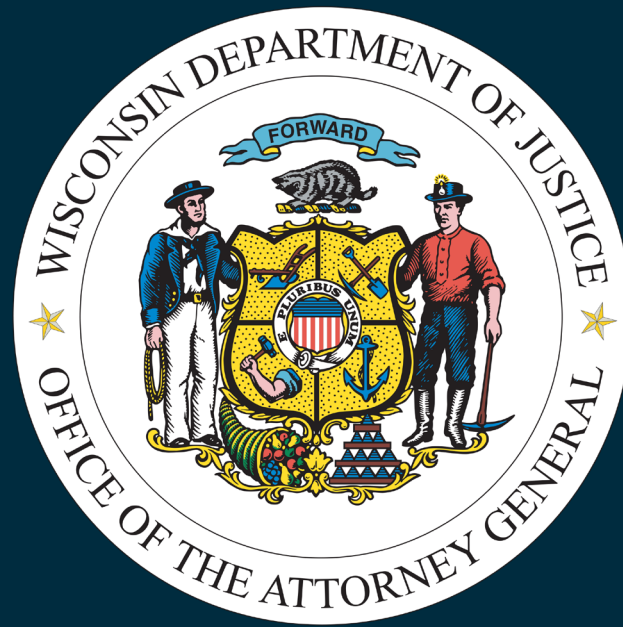
- Legislators are exempt from records retention requirements. See Wis. Stat. § 16.61(2)(b)1.
- Legislators are subject to Wis. Stat. § 19.35(5) records preservation requirement when a public records request is submitted
  - Cannot destroy records which are subject to a pending public records request
  - Must preserve records for 60 days after denial (90 days if requester is incarcerated); indefinitely if litigation is filed



# Resources and Further Information

- Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Contact:
  - Chief clerk
  - Legislative Council's Open Records Task Force: (608) 266-1304
  - DOJ's Office of Open Government PROM Help Line: (608) 267-2220





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Thank You!

