

THE WISCONSIN THE PUBLIC RECORDS LAW: “NUTS AND BOLTS” FOR LEGISLATIVE STAFF

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

January 25, 2019

Madison



Presumption

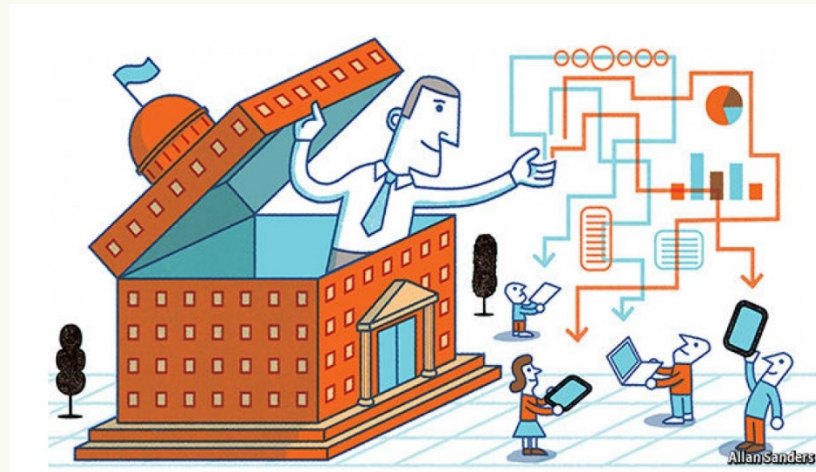
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Presumption of Openness

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



Authority

- Defined in Wis. Stat. § 19.32(1)
- 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
- The authority that receives a request **must** respond



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
- Other staff may assist with custodial services
- All records belong to the authority



Public Records Notice

- Wis. Stat. § 19.34(1)
 - Description of organization and information on its public records request process, including costs
- Not required for legislators
- However, it may be useful to clarify and facilitate the public records process
- Helps direct requests and keep track of them
- Explains how to submit public records requests, potential costs, etc.



Office Procedures

- Not required by law but helpful
- Facilitate continuity when staff changes
- Ensure that public records requests are given priority and handled in a timely manner
- Helps maintain the organization of requests and responses



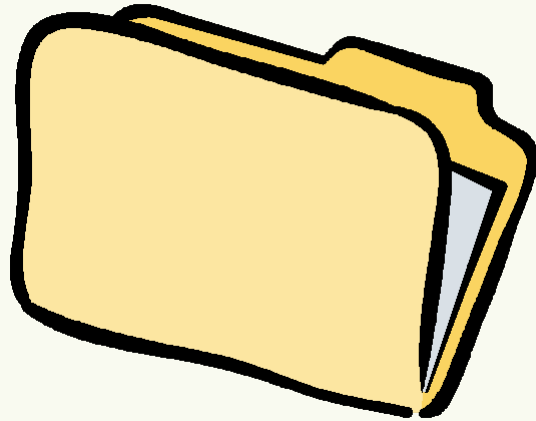
Requesters

- Defined at 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



“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.”



Examples of Records

- **Material not created by the authority but in the authority's possession**
- Electronic records
- Photographs, audio, and video
- Data in a database
- Emails, texts, and calls
 - Personal emails, texts, and calls on government accounts
 - Government business-related emails, texts, and calls on personal accounts
- Social media



Not Records

- 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
 - 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



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



Useful Analysis

- Does a responsive record exist? (**Look for it**)
- Is there an absolute right of access? If yes, produce the records
- Is access absolutely denied? If yes, deny the request
- Apply the balancing test



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, it is advisable that an authority 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 the totality of circumstances
- Identity of the requester and the purpose of the request are generally not part of the balancing test



Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- **Any redaction constitutes a denial of access to the redacted information**
 - Therefore subject to review by mandamus

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Response Preparation

- Analyze the request
- Okay to communicate with the requester for clarification or regarding a possible limitation
- 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)
- Electronic responses
- Inclusion of background, context, or additional information



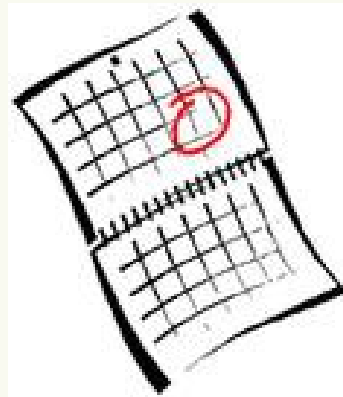
Written Response

- **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 custodian has exercised judgment
 - Reviewing court usually limited to reasons stated in denial
- 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
- **Tip:** Consult your chief clerk's office



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
- **Tips:** It may be prudent to send an acknowledgment and/or status updates



Notice Before Release

- Wis. Stat. § 19.356(2)(a)1: Notice to record subjects is only required in limited circumstances:
 - 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 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



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 Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)



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
 - Attorney General

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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