

**Wisconsin Department of Justice**  
**Office of the Attorney General**

**PUBLIC RECORDS 101**

August 22, 2016

**1. Access is presumed.**

- A. The public records statutes “shall be construed in every instance 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, and only in an exceptional case may access be denied.” Wis. Stat. § 19.31.
- B. Although the presumption of access is strong, it is not absolute. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551.
- C. “Except as otherwise provided by law, any requester has a right to inspect any record.” Wis. Stat. § 19.35(1)(a).
  - 1. Exceptions may be created by state or federal statutes, or by case law.
  - 2. Access also may be denied pursuant to the public records balancing test when identified public interests favoring non-disclosure of specific records outweigh the public interest in disclosure of those records.
  - 3. Exemptions to the public records law are narrowly construed. *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892, 895 (Ct. App. 1996); *Hathaway v. Jt. Sch. Dist. No 1, Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682, 686-87 (1984).

**2. “Authorities” are subject to the public records law.**

- A. An “authority” includes state and local governments, courts, elected officials, and their sub-units, departments, and employees. Wis. Stat. § 19.32(1).
- B. Each authority is legally responsible for responding to public records requests received by that authority.

3. A “record” is specifically defined, Wis. Stat. § 19.32(2).

- A. A "record" can be virtually anything that contains information created or kept by a government, but drafts, notes, preliminary computation and the like materials are not records if they are prepared for the originator's personal use or prepared on behalf of the ultimate author.
1. A “draft” generally is a document circulated only to persons over whom the person for whom the draft is prepared has authority. 77 Op. Att’y Gen. 100, 102-03 (1988); Labeling documents as “drafts” is not controlling. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 594 (1989).
  2. A document is not a “draft” if it is used for the purposes for which it was commissioned. *Fox*, 149 Wis. 2d at 414; *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 455-56, 521 N.W.2d 165, 171 Ct. App. 1994).
  3. In general, sharing notes with other persons transforms them beyond “personal use.”
- B. Content determines whether something is a “record” for public records law purposes—not medium, format, or location. OAG I-06-09 (December 23, 2009), at 2.
- C. A “record” must be created or kept in connection with the official purpose or function of the authority. 72 Op. Att’y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965).
- D. "Records" do not include published material available for sale or at a library. Wis. Stat. § 19.32(2).
- E. "Records" do not include purely personal property of the custodian with no relation to his or her office. Wis. Stat. § 19.32(2).
1. Email sent on personal email accounts but pertaining to official business is a record.
  2. Purely personal email sent on government email accounts also is a record, but is not subject to disclosure in response to a public records request if it does not evince any violation of law or policy. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, 786 N.W.2d 177 (Abrahamson, C.J., lead

opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

**4. The public records law applies to records that exist at the time a public records request is received.**

- A. The public records law generally does not require creating new records in order to respond to a public records request, or obtaining records from another authority.
  - 1. An authority can offer to create a record (e.g., payroll data or other data that exists in numerous records, but a computer program can pull pertinent data from those records and create one short spreadsheet)
- B. The public records law does not require complying with “continuing” or prospective requests.
- C. The public records law does not require answering questions about a topic of interest to the requester.
- D. An authority may choose to provide information not required by the public records law.
- E. Alternate means of obtaining the same or similar information, such as subpoena or discovery, are governed by different rules.

**5. Record preservation requirements apply.**

- A. When a public records request is made, the authority must preserve potentially responsive records. Wis. Stat. §§ 19.35(5); 19.356(5).
- B. Don't confuse public records preservation with record retention laws.

**6. Response is required “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a).**

- A. There is no mandatory time frame for response, such as 48 hours or ten days, required by statute.
- B. A reasonable time for responding to a specific request depends on the totality of circumstances, including the nature of the request, the extent of the request, and the staff and other resources available to

process the request. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736.

**7. The requester's identity and motive generally are not relevant.**

- A. A requester need not identify the motive or purpose of his or her request. Wis. Stat. § 19.35(1)(h) and (i).
  - 1. If the requestor's identity or motive is known to the Authority, the Authority may consider that information in the balancing test under limited and compelling circumstances. *Ardell v. Milwaukee Bd. of Sch. Dir.*, 2014 WI App 66, ¶ 23, 354 Wis.2d 471, 849 N.W.2d 894.
- B. A requester generally need not identify himself or herself, or show identification. Wis. Stat. § 19.35(1)(i).
  - 1. Identification may be required when needed for security reasons.
  - 2. Identification may be requested when required by law for access to certain types of records (such as certain law enforcement records and patient health care records).
  - 3. To verify identity when documents are only available to the records subject under Wis. Stat. § 19.35(1)(am).
- C. A requester seeking records containing personally identifiable information about himself or herself has greater rights of access under Wis. Stat. § 19.35(1)(am).

**8. A request need not be in writing, but must be reasonably specific.**

- A. Public records requests need not be made in writing. Wis. Stat. § 19.35(1)(h).
- B. A request without a reasonable limitation as to time or subject matter of the requested records is not sufficient. Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187, 189-90 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 24, 306 Wis. 2d 247, 742 N.W.2d 530.

- C. A records custodian should not have to guess at what records a requester desires. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, 740 N.W.2d 177.
- D. That a public records request may result in production of voluminous records is not—in and of itself—a sufficient reason to deny a request. At some point, an overly broad request becomes sufficiently excessive to warrant rejection. There is no bright line test. The public records law will not be interpreted to impose such a burden on a records custodian that normal functioning of the office would be severely impaired. *Gehl*, 2007 WI App 238, ¶¶ 23-24, 306 Wis. 2d 247, 742 N.W.2d 530.
- E. It is fine for a custodian to contact a requester to try and clarify what records he or she wants.

**9. Suggested framework for analyzing public records requests.**

- A. Step One: Is there such a record?
- B. Step Two: Is the requester entitled to access the record pursuant to statute or court decision?
- C. Step Three: Is the requester prohibited from accessing the record pursuant to statute or court decision?
- D. Step Four: Does the balancing test compel access to the record?
  - 1. The balancing test requires the records custodian to balance the strong public interest in disclosure against identifiable public interests against disclosure.
    - a. Fact-intensive, case-by-case analysis is required. *Kroepelin v. Wis. Dep't of Natural Res.*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, 725 N.W.2d 286.
    - b. The totality of circumstances must be considered. *Seifert*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, 740 N.W.2d 177.
    - c. The identity of the requester and the purpose of the request generally are not part of the balancing test. *See Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75, 83 (Ct. App. 1999). But whether the requester's identity presents a safety concern properly

considered in the balancing test is a fact-intensive inquiry determined on a case by case basis. *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dir.*, 2014 WI App 66, ¶ 17, 354 Wis. 2d 471, 849 N.W. 2d 894.

- d. The private interest of a person mentioned or identified in the records is properly considered only indirectly in the balancing test—whether there is a public interest in protecting the person’s privacy or reputational interest (such as encouraging quality applicants for government service positions). *Linzmeier v. Forcey*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811.
- e. Without more, potential embarrassment is not a sufficient reason for withholding a record. *Milwaukee Journal Sentinel v. Wisconsin Dep’t of Admin.*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, 768 N.W.2d 700.

2. Some public policies that may be considered.

- a. Policies expressed in exemptions to the open meetings law, such as discussion of personnel matters or rendition of legal advice as to pending or probable litigation, if the authority or custodian makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made. Wis. Stat. § 19.35(1)(a); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82, 312 Wis. 2d 84, 752 N.W.2d 295; 73 Op. Att’y Gen. 20, 22 (1984).
- b. Public policy interest supporting effective investigation and prosecution of crime. *Linzmeier*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, 646 N.W.2d 811.
- c. Public policy interest in attracting quality candidates for public employment, which might be undermined if there is a perception that personnel files are regularly open for review. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, 699 N.W.2d 551.

3. Note that there is no balancing test under Wis. Stat. § 19.35(1)(am). *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56, 284 Wis. 2d 162, 699 N.W.2d 557.

- 10. There is no blanket rule exempting personnel records from disclosure.**
- A. Exempt from disclosure, pursuant to the public records law: Information relating to one or more specific employees that is used for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, promotions, job assignments, letters of reference, or other comments or ratings relating to employees. Wis. Stat. § 19.36(10)(d).
  - B. Many personnel records must be reviewed page by page; the balancing test or other considerations may apply to certain records.
- 11. If part of the record is disclosable, that part must be disclosed.**
- A. Other parts of the record not subject to disclosure must be separated, or “redacted.” Wis. Stat. § 19.36(6). There is no mandatory method of making redactions.
- 12. A response denying some or all requested records must be legally sufficient and explained with sufficient specificity.**
- A. Reasons stated for denying a public records request, or redacting certain information, must be sufficient and specific—they must reasonably explain the denial or redaction. *Hempel*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, 699 N.W.2d 551; *Portage Daily Register v. Columbia County Sheriff’s Dep’t*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, 746 N.W.2d 525.
  - B. A written request requires a written response, if the request is denied in full or in part. It is fine to respond in writing to an oral request. Wis. Stat. § 19.35(4)(b).
  - C. If denial of a request is challenged in a mandamus proceeding, the judge’s review usually is limited to the reasons stated in the response. If the response fails to state sufficient reasons for denying the request, the court will require disclosure of the requested records. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158; *accord Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501, 503 (1967); *but see Journal Times v. City of Racine Bd. of Police and Fire Comm’rs*, 2015 WI 56, ¶ 69, 362 Wis. 2d 577, ---N.W.2d --- (court may consider statutory exemption not previously asserted).

**13. Notice before releasing records is required only in limited circumstances, Wis. Stat. § 19.356**

- A. There are three circumstances when notice is required and the recipient is entitled to petition for a court order attempting to restrain release of the records: certain employee disciplinary records, records obtained through subpoena or search warrant, records prepared by an employer other than the authority. Wis. Stat. § 19.356(2)(a).
- B. A different kind of notice is required if an authority decides to permit access to records containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office. These notice recipients may supplement the records before release. Wis. Stat. § 19.356(9).

**14. An authority may charge for “actual, necessary and direct” costs specified in Wis. Stat. § 19.35(3).**

- A. An authority may charge only for the specific tasks identified by the Legislature in Wis. Stat. § 19.35(3). *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 50, 341 Wis. 2d 607, 815 N.W.2d 367 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring)
  - 1. Reproduction costs incurred in the process of producing a counterpart, image, or copy. Wis. Stat. § 19.35(3)(a).
  - 2. Transcription costs. Wis. Stat. § 19.35(3)(a).
  - 3. Location costs incurred in searching, examining, or experimenting to find a responsive record. Wis. Stat. § 19.35(3)(c).
    - a. Location costs usually consist of staff time, calculated at time x hourly rate (can include fringes).
    - b. Caveat: Costs of locating records may not be charged unless they total \$50.00 or more.
  - 4. Photography and photographic reproduction charges. Wis. Stat. § 19.35(3)(b).
  - 5. Mailing and shipping fees. Wis. Stat. § 19.35(3)(d).

- B. Costs of reviewing and redacting records may not be charged. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58, 341 Wis. 2d 607, 815 N.W.2d 367, (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring).
- C. Prepayment may be required if the total cost exceeds \$5.00. Wis. Stat. § 19.35(3)(f).
- D. An authority may choose to provide records at reduced or no charge. Wis. Stat. § 19.35(3)(e).

**15. Public records law resources.**

- A. Review sources available on the DOJ website, *www.doj.state.wi.us*.
  - 1. *Wisconsin Public Records Law Compliance Outline*.
    - a. Available to view, download, or print free of charge
  - 2. Sample notice forms, letters, and other reference materials.
  - 3. Recording of public records webinars.
  - 4. Attorney General’s opinions.
- B. Consult with a DOJ public records lawyer. Contact the Public Records/Open Meetings hotline at (608) 267-2220 to arrange a consultation.
- C. Write to the Office of Open Government, Wisconsin Department of Justice, Post Office Box 7857, Madison, WI 53707-7857. Include copies of request, response and other relevant correspondence.
- D. Review Melanie R. Swank, *The Wisconsin Public Records and Open Meetings Handbook* (5th ed. 2012)
- E. Review resources available on the Wisconsin Freedom of Information Council website, *www.wisfoic.org*.
  - 1. Statutes, case law, and Attorney General’s opinions.
  - 2. Frequently asked questions.
  - 3. “Your Right to Know” columns.