



PUBLIC RECORDS

**IN THE BOARD ROOM: PUBLIC
RECORDS**

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What is a Record Subject to Disclosure?

- **Statement of Policy.** Wis. Stat. § 19.31 states:

[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 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 exceptional cases may access be denied.

What is a Record Subject to Disclosure?

- “Except as otherwise provided by law, any requester has a right to inspect any record.” Wis. Stat. § 19.35(1)(a).
- The requester gets to see the records unless disclosure is barred by:
 - Statute;
 - Common law; or
 - Public Policy Balancing Test. Whether the public’s strong interest in disclosure is overcome by the public’s greater interest in nondisclosure. Wisconsin’s Supreme Court has held that in every case, the public’s interest in disclosing the record weighs heavily. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

What is a Record Subject to Disclosure?

- **Definition of Record.** Section 19.32(2) defines “Record” broadly!
- “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).
- Must be created or kept in connection with official purpose or function of the agency. 72 Op. Att’y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679 (1965).

What is NOT a Record Subject to Disclosure?

- Drafts
- Notes
- Preliminary documents, and
- Similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working. Wis. Stat. § 19.32(2).

The Record Request

- Requests do not have to be in writing. Wis. Stat. § 19.35(1)(h).
- The requester generally does not have to identify himself or herself. Wis. Stat. § 19.35(1)(i).
- The requester does not need to state the purpose of the request. Wis. Stat. § 19.35(1)(h) and (i).

The Request: Specificity

- The request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h).
- A request without a reasonable limitation as to subject matter or length of time does not constitute a sufficient request. *Id.*
- The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request.

The Request: Specificity

- However, a records custodian may not deny a request solely because the records custodian believes that the request could be narrowed.
- The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited.
- A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request.
- **These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed.**

The Response to the Request: Timing

- Response must be provided "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). The public records law does not require response within any specific time, such as "two weeks" or "48 hours."
- An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a \$1,000.00 forfeiture. Wis. Stat. § 19.37.
- DOJ policy is that ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records.
- For requests that are broader in scope, or that require location, review or redaction of many documents, a reasonable time for responding may be longer.
- To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.

Denying a Request

- If the request is in writing, a denial or partial denial of access also must be in writing. Wis. Stat. § 19.35(4)(b).
- Reasons for denial must be specific and sufficient. *Hempel*, 2005 WI 120, ¶ 25-26.
- Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
- If the custodian fails to state sufficient reasons for denying the request, the court will issue a writ of mandamus compelling disclosure of the requested records. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16.

Denying a Request

- If no responsive records exist, the authority should say so in its response.
- An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test.
- Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as "social security numbers."
- Denial of a written request must inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General. Wis. Stat. § 19.35(4)(b).

Redaction

- If part of the record is disclosable, that part must be disclosed. Wis. Stat. § 19.36(6).
- An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome. *Osborn*, 2002 WI 83, ¶ 46.
- However, an authority does not have to extract information from existing records and compile it in a new format. Wis. Stat. § 19.35(1)(L); *WIREData I*, 2007 WI App 22, ¶ 36.
- Authorities cannot charge a fee for redaction costs. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65.

- In response to *Woznicki*, the legislature enacted Wis. Stat. § 19.356 to clarify pre-release notice requirements and judicial review procedures.
- First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.
- The duty to notify the record subject only applies to three categories of records:
 - Records containing information relating to an employee created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer.
 - Records obtained by the authority through a subpoena or search warrant.
 - Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access.

Limited duty
to notify
record
subject

Limited duty to notify record subject

- When notification is required, follow the procedure in Wis. Stat. § 19.356.
- Must serve written notice personally or by certified mail. Wis. Stat. § 19.356(2)(a).
- Notice must be served before permitting access to the record and within three business days after making the decision to permit access. Wis. Stat. §§ 19.345 and 19.356(2)(a).

The Broad Definition of “Record” and Electronic Communications on Personal Devices and Accounts

- The Wisconsin Attorney General has opined that it is the **content** that determines whether a document is a “record,” not medium, format, or location. 72 Op. Att’y Gen. 99 (1983).
- This means that documents which relate to official governmental business on personal devices and accounts likely constitute a “record” under Wisconsin’s Public Records Law.
- Although a Wisconsin appellate court has not decided this question, other courts from around the country have, and their holdings support the aforementioned conclusion.

The Broad Definition of “Record” and Electronic Communications on Personal Devices and Accounts

City of San Jose v. Smith, 2 Cal. 5th 608 (Cal. 2017):

- The Court held a requester had a right to access voicemails, e-mails, and text messages relating to City of San Jose business contained on the private cell phones of the Mayor and ten council members. The Court reached its holding for the following reasons:
 - The City’s argument that, under the CPRA, a “public record” is limited to records contained on public electronic devices would allow evasion of the CPRA by use of a personal account. Such a result is counter to the legislative intent behind the CPRA.
 - Privacy interests of public employees and officials would be protected by the law’s various safeguards, such as the ability to redact purely personal information, the ability to withhold preliminary drafts, notes, and memoranda, and the ability to withhold records under the “balancing test.”
 - Searches of personal devices and accounts can be done in a fashion that limits the invasiveness of the search.

The Broad Definition of “Record” and Electronic Communications on Personal Devices and Accounts

Comstock Residents Ass’n v. Lyon County Bd. of Commissioners, 414 P. 3d 318 (Nev. 2018):

- The Court ruled that Lyon County Board of Commissioners must disclose communications located on their personal phones relating to an industrial development in the County.
- The Court rejected the County’s argument that the Nevada Public Records Act only applied to records physically located in government offices, noting that the NPRA applies to private entities rendering public services.
- The Court also stated that, because each individual commissioner is a “public entity” under the NPRA, the County has custody over each record despite their location.
- The Court concluded that whenever a communication pertains to the provision of public services, the communication is a record subject to public disclosure under the NPRA, regardless of where the communication is created or stored.

The Broad Definition of “Record” and Electronic Communications on Personal Devices and Accounts

Nissen v. Pierce County, 183 Wash.2d 863 (Wash. 2015):

- A prosecutor received a request for all text messages sent and received on his personal cell phone on a particular date. A detailed call log and text message log were produced in response to the request. No physical text messages were produced.
- The Court held that the Washington Public Records Act captures work product on a public employee’s private cell phone, because the WPRA is explicit that information qualifies as a public record “regardless of its physical form if it is: (1) owned, used, or retained by a state or local agency; and (2) related to the conduct or performance of government.”
- Because the call log and text message log produced by the County were obtained from Verizon Wireless after the County’s receipt of the public records request, the logs did not constitute public records.
- The prosecutor’s physical text messages, which were not produced by the County, were public records subject to disclosure under the WPRA. This is because the text messages related to the prosecutor’s job duties.

So, what do we
do?

- **To the extent you can avoid using personal electronic devices and accounts for official governmental business, DO IT!**
- **To the extent you cannot avoid using personal electronic devices and accounts for official governmental business, ensure all records on such devices and accounts are backed up on official governmental servers/accounts.**

A Step-by-Step Analysis for Handling Records Requests

- Does the request have an unreasonable limitation as to subject matter or length of time?
- Is there a record responsive to the request?
- Does a statutory or common law exception apply?
- Balancing Test. Does the public's interest in not disclosing the record outweigh the public's interest in disclosure?
- Is notice required under Wis. Stat. s. 19.356 prior to release of the record?



Ongoing
Developments

- **Friends of Frame Park, U.A. v. City of Waukesha**
- **Gierl v. Mequon-Thiensville School District**
- **Lueders v. Krug**
- **Weidner v. City of Racine**

Friends of Frame
Park, U.A. v. City of
Waukesha
(2022 WI 57)

- Friends of Frame Park, filed an open records request with Waukesha in 2017 seeking information about the city's plans to bring an amateur baseball team to the community.
- The city fulfilled the records request but withheld a proposed draft contract between Waukesha and Big Top Baseball, because "the City's negotiating and bargaining position could be compromised by public disclosure of the draft contract before the Common Council have had an opportunity to consider the draft."
- The taxpayers filed a lawsuit in Waukesha County Circuit Court. Two days later, following a Dec. 19, 2017, common council meeting, the city released the draft contract to the group.
- The Circuit Court ruled for the city, concluding that Waukesha "properly withheld certain public records temporarily in response to the record request." Friends of Frame Park appealed the decision, and an appeals court reversed Bohren's decision, holding that Waukesha's decision to withhold the draft contract while negotiating "was unwarranted and led to an unreasonable delay in the record's release" and **ordered that the taxpayer group was "entitled to some portion of its attorney's fees."**

Friends of Frame
Park, U.A. v. City of
Waukesha
(2022 WI 57)

- The Supreme Court reversed the Court of Appeals, finding in a 4-3 decision that people seeking information via an open records request that results in a lawsuit are only entitled to attorney's fees if there is "some judicially sanctioned change in the parties' legal relationship."
- The dissent argued the majority's decision "will chill the public's right to an open government" and continued that "the majority/lead opinion does not stop there ... It also condones the City's patently inapplicable 'competitive or bargaining' excuse to deny Friends timely access to a proposed contract. The result is that Friends are denied the attorney fees to which it is entitled for bringing a claim to enforce its rights when Friends had no other recourse."
- BUT ... has led to 2023 AB 117. Passed Senate 4/19/23

2023 SB 117

- SB 117 supersedes the supreme court's decision in *Friends of Frame Park*. Under the bill, a requester has prevailed in whole or in substantial part if the requester has obtained relief through any of the following means:
 - 1. A judicial order or an enforceable written agreement or consent decree.
 - 2. The authority's voluntary or unilateral release of a record **if the court determines that the filing of the mandamus action was a substantial factor contributing to that voluntary or unilateral release.**

Gierl v. Mequon-
Thiensville School
District
(2023 WI App 5)

- Geirl sought a writ of mandamus, pursuant to the public records law, ordering the District disclose a list of e-mail addresses to which the District had sent an invitation for a webinar on the topic of privilege and race. The Circuit Court granted summary judgment for Gierl.
- On appeal, the Court of Appeals held that the District's interest in keeping e-mail addresses of parents secret did not outweigh public policy presumption of complete openness with regard to public records, thus warranting disclosure of list of parent e-mails under public records request.

Lueders v. Krug
(2019 WI App 36)

- Custodian provided responsive emails in a paper format despite requester's demand "for the records in electronic form, as an email folder, or on a flash drive or CD."
- Custodian argued the paper printouts were "substantially as readable" as the emails themselves pursuant to Wis. Stat. 19.35(1)(b).

Lueders v. Krug (2019 WI App 36)

- Court held “it is undisputed that while electronic copies of the e-mails contain the same information as the e-mails themselves, the paper printouts from those e-mails are missing substantive information. It is undisputed, for example, that the electronic copies and the e-mails themselves, as received and stored on Krug's computer, contain “**metadata,**” **which information was not on the paper printouts from the e-mails.**”
- “[A] Milwaukee Journal Sentinel reporter averred that electronic records include metadata “that **show when documents were created and who created them,**” and that a paper printout from electronic records, unlike an electronic copy, results in a loss of “some information—such as who used a computer or wrote an electronic document—that [reporters] would have no way of knowing.”

Weidner v. City of Racine

(7/6/22 WI App Summary
Disposition Order)

- The City Attorney prepared a power point to present to the City's Executive Committee in a closed session for the purpose of seeking an advisory opinion from the City's Ethics Committee about a potential response to allegations against members of the common council, including Weidner.
- Weidner, who was present for the closed session, requested a copy of the power point and the request was denied by the City.

Weidner v. City of Racine

(7/6/22 WI App Summary Disposition Order)

- The attorney-client privilege is narrowly construed. A “mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged.”
- “[T]he trial court must inquire into the existence of the relationship upon which the privilege is based *and* the nature of the information sought.”
- “In cases involving governmental relationships, the attorney-client privilege is **construed even more narrowly.**”
- “The privilege applies only to confidential communications from the client to the lawyer; it does not protect communications from the lawyer to the client unless disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client’s confidential communications to the lawyer.”
- Court held: “The City argues that the entire power point is privileged. However, we **need not reach that issue** because assuming the entire power point is privileged, the **City waived the privilege by its voluntary actions in showing the power point at the meeting where Weidner was present.**”

Additional Resources

- **Attorney General's Public Records Compliance Guide –**
<https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf>
- **The UW-Extension Local Government Center has many resources on the topics covered in this presentation and contributed content to this presentation.**



Questions? Comments?



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