



I'm Not the Records Custodian, So What Do I need to Know About Public Records?



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Conference



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Embracing Challenge. Delivering Opportunity

AGENDA |

Current Landscape

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Current Landscape


- COVID-19
- Hot Button Issues – CRT, masks, LGBTQ+
- Highly engaged (and misinformed) public
- Political landscape
- Social Landscape
- Advocacy






Wisconsin's Public Records Law – Wis. Stat. § 19.31, *et seq.*

- Statement of Policy – Wis. Stat. § 19.31
 - [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.
- “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



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).



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 Records 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. *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶17, 306 Wis.2d 247, 742 N.W.2d 530.



The Request: Specificity

- However, a records custodian may not deny a request solely because the records custodian believes that the request could be narrowed. *Gehl v.*, ¶20.
- 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. *Gehl*, ¶ 23.
- 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 v. City of Baraboo*, 2005 WI 120, ¶¶ 25-26, 284 Wis.2d 162, 699 N.W.2d 551.
- 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

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- 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*, ¶ 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, Inc. v. Vill. of Sussex* (“*WIREData I*”), 2007 WI App 22, ¶36, 298 Wis.2d 743, 729 N.W.2d 757.
 - Authorities cannot charge a fee for redaction costs. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, 341 Wis.2d 607, 815 N.W.2d 367.



Limited Duty to Notify Record Subject

- 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

- 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).




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

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- 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.



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

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- *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.




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

- *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.




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

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- *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.



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

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- Best Practice:
 - 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.



Fees

- School district may charge fees as provided by state statute. Wis. Stat. § 19.35(3)
 - Copy Fees: limited to “actual, necessary and direct cost” or reproduction.
 - Costs of a computer run may be imposed on a requester
 - Location Costs: Costs associated with “locating” records if total is \$50.00 or more.
 - “Locating” a record means to find it by searching, examining, or experimenting.
 - Subsequent review and redaction of the record are separate processes, not included in location of the record, for which a requester may not be charged.
 - Mailing Fees: limited to “actual, necessary and direct cost” or reproduction.



Requiring Prepayment

- School district may require prepayment of any fees if the total amount exceeds \$5.00
 - School district may refuse to make copies until payment is received.
 - School district has discretion to provide requested records for free or at a reduced charge.
 - Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task



Enforcement and Penalties



- Mandamus
 - Ask court to release the record
 - Written request to the district attorney of the county where record is located or to the Attorney General requesting that an action for mandamus be brought
 - Exclusive remedy to enforce public records law.
- Penalties
 - Attorneys' fees
 - Damages not less than \$100.00
 - Other actual costs
 - Punitive damages
 - Civil forfeiture of not more than \$1,000.00

Step-by-Step Mini-Guide





A Step-by-Step Analysis for Handling Records

1. All records requests should be directed to the district's records custodian
2. Acknowledge receipt of request in writing to the requester.
3. Analysis of the request:
 - a. Is it a request for records or merely a general inquiry?
 - Need not respond to only a general inquiry
 - b. Does the request have an unreasonable limitation as to subject matter or length of time?
 - Request clarification by requester
 - c. Are there records responsive to the request?
 - d. Is there a large volume of records that will be generated by the request?
 - Determine whether prepayment of location costs should be charged.
 - e. Does a statutory or common law exception apply?
 - f. Balancing Test. Does the public's interest in not disclosing the record outweigh the public's interest in disclosure?
 - g. Is notice required under Wis. Stat. § 19.356 prior to release of the record?



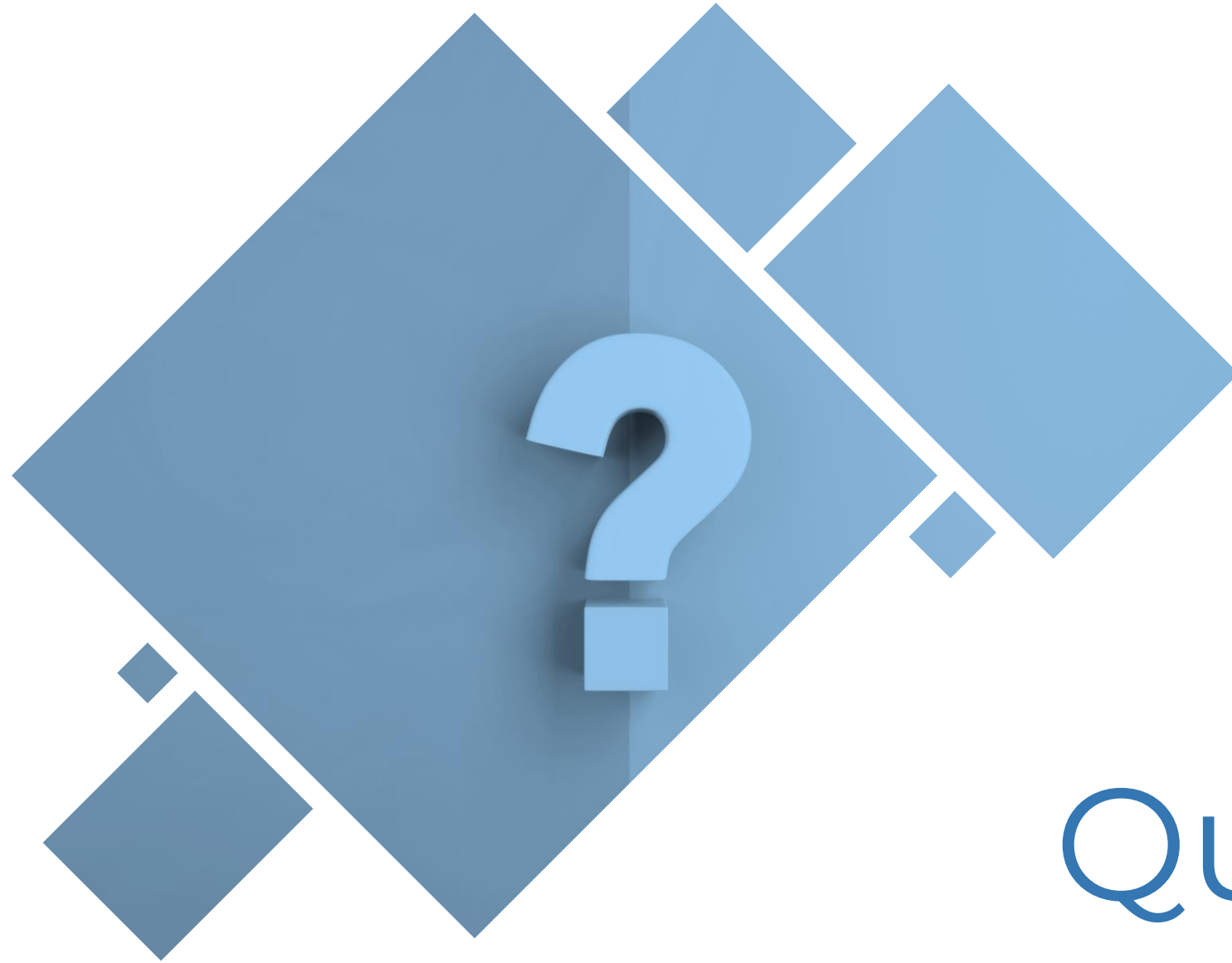
A Step-by-Step Analysis for Handling Records

4. If no records, issue formal response letter indicating no records.
5. Once responsive records are located, analyze the records to determine redaction or withholding
 - a. Does a statutory or common law exception apply?
 - b. Is there a court decision that is applicable?
6. Conduct the balancing test
 - a. Does the public's interest in not disclosing the record outweigh the public's interest in disclosure?
7. Is notice required under Wis. Stat. § 19.356 prior to release of the record?
 - a. If yes, comply with statutory requirements for provision of notice.




A Step-by-Step Analysis for Handling Records

8. Draft response letter indicating legal authority supporting such redactions and withholding.
9. Prior to release, determine whether prepayment of actual and direct copying costs will be required if costs exceed \$5.00.
10. Release the records.




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Questions |