Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2020-19

THE PUBLIC RECORDS LAW

In Wisconsin, any material on which information is recorded or preserved by a state or local governmental body, including an elective official, generally is considered an open "record"; and any member of the public has a right to inspect it, unless a provision in the law allows it to be kept confidential. These openness requirements, and the processes for enforcing them, are commonly referred to as the state's "Public Records Law."

This information memorandum provides an overview of the statutory framework of the Public Records Law, as set forth in ss. 19.31 to 19.39, Stats. Several references to court precedents or to the Attorney General's (AG) interpretations of the law are included; however, additional research beyond the scope of the memorandum may be required in order to assess how a court or the AG might apply the law in specific situations.

PURPOSES OF THE PUBLIC RECORDS LAW

The Public Records Law was created in 1982. The purposes of the law are set forth in a statutory declaration of policy, stating that:

- In recognition of the fact that a representative government is dependent upon an informed electorate, 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.
- Providing persons with such information is an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

The declaration of policy directs that the Public Records Law must be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. Also, the denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied. [s. 19.31, Stats.]

DEFINITIONS

The application of the Public Records Law depends in part on whether it is in the custody of an "authority," who is the "legal custodian," and whether the material is considered a "record." The Public Records Law provides specific definitions for these three terms. [s. 19.32, Stats.]

Authority

An "authority" is defined as any of the following having custody of a record:

- A state or local office.

- An elective official.[1]
- An agency, board, commission, committee, council, department, or public body corporate and politic created by the constitution or by any law, ordinance, rule, or order.
- A governmental or quasi-governmental corporation[2] (except for the Bradley Center Sports and Entertainment Corporation).
- A special purpose district.[3]
- Any court of law.
- The Assembly or Senate.
- A nonprofit corporation that receives more than 50 percent of its funds from a county or a municipality to which it provides services related to public health or safety.
- The Marquette University Police Department.

Additionally, an "authority" includes a formally constituted subunit of any of the foregoing having custody of a record. [s. 19.32 (1), Stats.]

In *WIREdata, Inc. v. Village of Sussex ("WIREdata II")*, the Wisconsin Supreme Court interpreted the definition of "authority" to include a public or governmental entity, and not an independent contractor hired by the public or governmental entity. The Court held that only "authorities" are proper recipients of requests, and only communications from authorities should be construed as denials. Therefore, communications with independent contractors may be considered insufficient for purposes of the Public Records Law. [*WIREdata II*, 2008 WI 69.]

Legal Custodian

A "legal custodian" is an individual vested by an authority with full legal power to render decisions and carry out the statutory responsibilities of the authority in relation to the Public Records Law. The statutes specify that an elective official is the legal custodian of the official's records and the records of his or her office. The elective official may, however, designate an employee to act as the legal custodian.

With respect to committee records, the Public Records Law also specifies that the chairperson of a committee of elective officials, or their designee, is the legal custodian of committee records. Similarly, co-chairpersons of a joint committee of elective officials, or their designees, are the legal custodians of joint committee records.

If an authority is not an elective official, the authority must designate one or more positions to be its legal custodian and fulfill its duties under the law. The positions must be occupied by an officer or employee of the authority or the unit of government of which it is a part. The Public Records Law also specifies that if no other designation is made by an authority, then the

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[1] An "elective official" is defined to mean an individual who holds an office that is regularly filled by vote of the people. [s. 19.32 (1bd), Stats.]

[2] The Wisconsin Supreme Court has held that a corporation may be considered "quasi-governmental," and therefore may be an "authority" under the Public Records Law, if it resembles a governmental corporation in function, effect, or status, based on the totality of circumstances, as specified in the case. [*State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90.]

[3] A "special purpose district" is defined to mean a district, other than a state governmental unit or a county, city, village, or town, that is created to perform a particular function and whose geographic jurisdiction is limited to some portion of this state. [s. 19.32 (3m), Stats.]

authority's highest ranking officer, and its chief administrative officer, if any, will be the legal custodian. [s. 19.33, Stats.]

Record

A "record" is defined as 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, that has been created or is being kept by an authority. This includes handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. However, the statutes exclude from this definition any of the following:

- Drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working.
- Materials that are purely the personal property of the custodian and have no relation to his or her office.
- Materials to which access is limited by copyright, patent, or bequest.
- Published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

[s. 19.32 (2), Stats.]

Both courts and the AG have interpreted this definition to mean that the content of a document will determine whether it is a record, as opposed to its medium, format, or location. Also, the definition includes contractors' records, which means that an authority must allow public inspection of any record produced or collected under a contract with a person other than an authority to the same extent as if the record were maintained by the authority. [*John K. MacIver Inst. for Pub. Policy v. Erpenbach*, 2014 WI App 49; *Juneau County Star-Times v. Juneau County*, 2013 WI 4; OAG I-06-09 (Dec. 23, 2009).]

Courts have also determined that a "record" does not include an identical copy of an otherwise available record. However, if a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. [*Stone v. Board of Regents*, 2007 WI App 223.]

PROCEDURES TO ENSURE ACCESS TO RECORDS

The Public Records Law imposes specific requirements on authorities to ensure access to records for members of the public. Certain authorities must provide notice of their records policies, as specified by the Public Records Law. Moreover, all authorities must follow specified procedures for access to records, including a mandatory duty to respond to records requests.

Records Policy Notice Requirements for Certain Authorities

The Public Records Law requires certain authorities to provide public notice of their records policies. These requirements do not apply to members of the Legislature or members of any local governmental body. The Public Records Law provides that every authority, other than

those who are exempted, must adopt and display at the authority's office a notice regarding its records policies, which must include:

- A description of the organization.
- The established times and places at which the public may obtain information and access to records in the organization's custody, or make requests for records, or obtain copies of records.
- The costs for obtaining records.
- The identity of the authority's legal custodian or legal custodians.
- The methods for accessing or obtaining copies of records.
- For authorities that do not have regular office hours, any requirement related to advance notice of intent to inspect or copy records.
- The identification of each position that constitutes a local public office or a state public office, as those terms are defined in the statutes.

[s. 19.34 (1), Stats.]

Hours for Access

Any authority that maintains regular office hours at the location where the records are kept must permit members of the public to have access to the records during those office hours, unless otherwise authorized by law. If there are no regular office hours at the location where the records are kept, an authority must permit members of the public to have access to the records in one of the following ways:

- The authority may permit access to the records upon at least 48 hours' written or oral notice of intent to inspect or copy a record.
- The authority may establish a period of at least two consecutive hours per week during which access to the records will be permitted. In such cases, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

[s. 19.34 (2), Stats.]

Inspection and Copying Upon Request

Regardless of whether an authority provides notice of its records policies as described above, the Public Records Law generally requires every authority to provide access to records upon request. The Public Records Law states that any requester has the right to inspect a record and to make or receive a copy of the record, except as otherwise provided by law. This generally applies to any person who requests inspection or a copy of a record. There are limits on the rights of persons who are incarcerated or committed in a treatment facility to request access to records, as specified in the statutes. [ss. 19.32 (3) and 19.35 (1), Stats.]

An authority must provide a requester with facilities for inspection and copying of records that are comparable to those used by the authority's employees. If a requester appears personally to request a record, the legal custodian may permit the requester to copy the record or they may provide the requester with a copy substantially as readable as the original. In providing access to an audio or a video recording, a legal custodian must produce a copy that is substantially as audible or as good as the original recording. If the record is not in a readily comprehensible

form, the legal custodian must produce a copy of the information contained in the record assembled and reduced to written form on paper. If the record cannot easily be copied, a legal custodian must produce a good quality photograph of the record upon request. [s. 19.35 (1) (b), (c), (d), (e), and (f) and (2), Stats.]

The Public Records Law provides a legal custodian with the ability to impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. [s. 19.35 (1) (k), Stats.] However, courts have determined that a requester has a right to a copy of the original "source" material when receiving access to a record under the law. For example, a request for a copy of a 911 call in its original digital form was not satisfied by an analog copy of the recording. Also, a requester that sought access to emails in electronic form was entitled to receive the emails in such form. [*State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146; *Lueders v. Krug*, 2019 WI App 36.]

Requirements for a Response to a Records Request

Form of Response

The statutes contemplate two potential responses to a records request: (1) provision of the record; or (2) denial of the request, in whole or in part. If a request is made in writing, and access to some or all of the records is denied, the response must be in writing and must include the reasons for the denial. Written responses denying or redacting from requests must inform the requester that the determination is subject to review by mandamus or upon application to the AG or a district attorney. [ss. 19.35 (4) and 19.37 (1), Stats.]

Timeframe

Under the law, an authority must respond to any request for a record "as soon as practicable and without delay. [s. 19.35 (4), Stats.] What constitutes a reasonable time for a response depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and related considerations. The AG has advised that 10 working days generally is a reasonable time for a response to a simple request for a limited number of easily identifiable records, and 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. [*WIREdata II*, 2008 WI 69; *Wisconsin Public Records Law Compliance Guide* (May 2019).]

Breadth of Request

A request may be overly broad if it will impose such a burden that normal functioning of the office would be severely impaired. At some point, an overly broad request may be sufficiently excessive as to warrant rejection of the request. In such cases, a legal custodian may wish to contact a requester to determine how to proceed. However, the AG advises custodians not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the law. The Public Records Law provides that a request is deemed sufficient if it is reasonably specific as to the subject matter and length of time involved. Courts have held a request may not be denied solely because the legal custodian believes it could be narrowed, and the fact that a records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request. [s. 19.35 (1) (h), Stats.; *Schopper v. Gehring*, 210 Wis.2d 208 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238; *Wisconsin Public Records Law Compliance Guide* (May 2019).]

Format of Records

The Public Records Law generally does not require authorities to extract information from records and compile the information in a new format, even if requested to do so. There is an exception for records that are not in a readily comprehensible form — the information from which must be assembled and reduced to written form on paper, as described above. In the case of an audio recording, a transcript of the recording may be provided to the requester if he or she requests. Also, if a portion of a record is denied, the legal custodian must produce the remaining portions of the record and delete the information to which access is denied, prior to the release. [ss. 19.35 (1) (c), (e) and (L) and 19.36 (6), Stats.]

Identification of Requester

Access to records generally may not be denied because the requester is unwilling to be identified or state the reason of the request. However, if a request is made by, or on behalf of, an individual who identifies themselves and states that the purpose of the request is to access a record containing personally identifiable information pertaining to the individual, then there may be additional procedures under the Public Records Law that apply to the authority when responding to that individual's request. Also, in the case of certain records containing information related to an employee, or obtained through a subpoena or search warrant, an authority may be required to provide notice to individuals to whom such records pertain, as specified in the statute, prior to releasing the records to a requester. [ss. 19.35 (1) (am), (i) and (4) (c) and 19.356, Stats.]

Retention of Records

The Public Records Law generally does not dictate whether, or for how long, authorities must retain records. Rather, the retention of records is governed under other statutes. The Public Records Law does, however, prohibit destruction of a record after a request has been received pertaining to the record until after either: (1) the record has been provided; or (2) if access to it is denied, until 60 days after the denial, or the completion of any related litigation, if later. [s. 19.35 (5), Stats.; see also s. 16.61, Stats.]

LIMITATIONS ON ACCESS TO RECORDS

In general, the Public Records Law presumes complete public access to records; however, there are some limitations incorporated into the law, such as records that are exempt under the Public Records Law itself and records deemed confidential by the application of other laws. Also, the Public Records Law authorizes legal custodians to conduct a "balancing test" to determine whether the public interest in disclosure of a record may be outweighed by the public interest favoring nondisclosure, in specific cases.

Exemptions Under the Public Records Law

Records that are exempt from disclosure under the Public Records Law itself include:

- Law enforcement investigative information, in certain cases, and identities of law enforcement informants. [s. 19.36 (2) and (8), Stats.]
- Computer programs and data, except that material used as an input and produced as the product of a computer program generally is subject to disclosure. [s. 19.36 (4), Stats.]
- Trade secrets. [s. 19.36 (5), Stats.]

- Identities of applicants for public positions, in certain cases. [s. 19.36 (7), Stats.]
- Plans or specifications for any state-owned or state-leased building, except as otherwise provided by the Department of Administration by rule. [s. 19.36 (9), Stats.]
- Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an employee, unless authorized by the employee. This exemption does not apply to home addresses of individuals who hold elective public office or who are required to reside in a specific location as a condition of employment. [s. 19.36 (10) and (11), Stats.]
- Other information that is related to an employee (other than an individual holding a local public office[4] or a state public office[5] within the authority to which the request is addressed), as follows:
    - Information pertaining to a current investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation. [ss. 19.32 (1bg) and 19.36 (10) (b), Stats.]
    - Information pertaining to an employment examination other than an examination score to which access is not otherwise prohibited. [ss. 19.32 (1bg) and 19.36 (10) (c), Stats.]
    - Information pertaining to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, as specified in the statutes. [ss. 19.32 (1bg) and 19.36 (10) (d), Stats.]
- Personally identifiable information that contains an individual's account or customer number with a financial institution. [s. 19.36 (13), Stats.]

Application of Other Laws

Any record, or portion of a record, that is specifically exempted from disclosure by state or federal law, or authorized to be exempted from disclosure by state law, is also exempt from disclosure under the Public Records Law. [s. 19.36 (1), Stats.] For example, state law provides that law enforcement, court, and agency records involving children and juveniles are exempt from disclosure. Federal law prevents agencies from releasing Social Security numbers in many cases. Also, patient health care information is deemed confidential under both state and federal law. [ss. 48.396, 938.396, and 146.82, Stats.; 42 U.S.C. ss. 405 (c)(2)(C)(viii) and 1320d-2, and 45 C.F.R. part 164.]

Balancing Test

The Public Records Law authorizes legal custodians to conduct a "balancing test" to determine whether records should be released on a case-by-case basis. The balancing test is derived from common-law principles that predate the enactment of the Public Records Law.

The origin of the balancing test comes from the common law right of the public to consult public records. Wisconsin courts have articulated that under common law, records inspections should be accompanied by a "procedure for a judicial determination of whether, in cases governed by

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[4] "Local public office" has the same meaning as under the code of ethics for public officials and employees; and it also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the unit, other than an office or position filled by a municipal employee. [See ss. 19.32 (1dm), 19.42 (7w), and 111.70 (1) (i), Stats.]

[5] "State public office" has the same meaning as under the code of ethics for public officials and employees; but it does not include certain Legislative Council, Legislative Fiscal Bureau, or Legislative Reference Bureau staff, as specified in the statutes. [See ss. 19.32 (4), 19.42 (13), and 20.923 (6) (f) to (gm), Stats.]

the common law, specific harmful effect upon the public interest outweighed benefits to be obtained by following the general public policy favoring the right of inspection of public documents and records." [*State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297 (1969).] The Public Records Law preserves the balancing test by expressly stating that "substantive common law principles construing the right to inspect, copy, or receive copies of records remain in effect." [s. 19.35 (1) (a), Stats.]

Under the balancing test, the legal custodian must balance the **public interest in disclosure** of the record against the **public interest favoring nondisclosure** in each case. Courts have held that a legal custodian must give specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, in applying the balancing test. Denial of a record based upon a balancing test analysis is an "exceptional case"; it exists when the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, under the circumstances, notwithstanding the strong presumption favoring disclosure. [*Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070 (Ct. App. 1991); *Village of Butler v. Cohen*, 163 Wis. 2d 819 (Ct. App. 1991); *Hempel v. City of Baraboo*, 2005 WI 120.]

The Public Records Law also indicates that, for purposes of the balancing test, exemptions to the requirement of a governmental body to meet in open session under the Open Meetings Law are indicative of public policy. However, the fact that a meeting convened in closed session is not, by itself, grounds for denying access to records of the meeting. The authority or legal custodian must make a specific demonstration that there is a need to restrict public access at the time that the records request is made. [s. 19.35 (1) (a), Stats.; *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480 (Ct. App 1985).]

COSTS AND FEES

Authorities generally may assess reasonable costs and fees in connection with a response to a records request. Costs and fees may include those associated with reproduction of records. Additionally, transcription fees, photographic fees, and mailing and shipping fees may be assessed in appropriate cases. Authorities may also assess costs of locating records, but only if the amount totals $50 or more. In all cases, fees must be limited to the "actual, necessary, and direct costs" incurred by the authority. [s. 19.35 (3), Stats.]

The Public Records Law authorizes an authority to provide requested records for free or at a reduced cost, if it determines this is in the public interest. Also, in some cases, specific statutory fees may create an exception to the general fee provisions, such as with land records recorded by a county register of deeds. [ss. 19.35 (3) (e) and 59.43 (2) (b), Stats.]

Courts have held that an authority may not charge a requester for the costs of redacting nondisclosable information in responsive records. Also, the AG recommends that, if locating costs are based on staff time, generally, the rate should be based on the pay rate of the lowest paid employee capable of performing the task. [*Milwaukee Journal Sentinel v. Milwaukee*, 2012 WI 65; *Wisconsin Public Records Law Compliance Guide* (May 2019).]

ENFORCEMENT AND PENALTIES

Enforcement

The Public Records Law may be enforced through a "mandamus" action, which is a lawsuit to compel an authority to act (in this case, produce records). After a written request for disclosure of records has been made, if an authority withholds or delays granting access to a record, or part

of a record, a requester may bring a mandamus action against the authority. In such an action, the following elements must be proven in court:

- The requester has a clear right to the records sought.
- The authority has a plain legal duty to disclose the records.
- Substantial damage would result if the petition for mandamus was denied.
- The requester has no other adequate remedy at law.

[s. 19.37, Stats.; *Watton v. Hegerty*, 2008 WI 74.]

In addition to bringing an action, a requester may request that the district attorney of the county in which the records are located, or the AG, bring a mandamus action. In all cases, a successful action will result in production of records and an award to the requester of reasonable attorneys' fees, damages (of not less than $100), and actual costs. Actions generally must be commenced within three years after the authority has withheld access to the records. Separate provisions for timing, costs, and damages may apply to actions involving a requester who is incarcerated or committed in a treatment facility, as specified in the statutes. [ss. 19.37 (1) (b), (1m), and (2) and 893.93 (1m) (a), Stats.]

Penalties

In a mandamus action under the Public Records Law, the court may award punitive damages if an authority or legal custodian has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees. An authority or legal custodian may also be required to forfeit not more than $1,000 in addition to, or in lieu of, punitive damages and other costs or awards that may be assessed by the court. [s. 19.37 (3) and (4), Stats.]

Interpretation by Attorney General

The statutes specify that any person may request advice from the AG as to the applicability of the Public Records Law under any circumstances. [s. 19.39, Stats.]

ADDITIONAL REFERENCES

Wisconsin Public Records Law Compliance Guide, Wisconsin Department of Justice (October 2019).

This information memorandum was prepared by Dan Schmidt, Deputy Director, and Melissa Schmidt, and Brian Larson, Senior Staff Attorneys, on November 17, 2020 (revised April 2, 2021).