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WISCONSIN INSTITUTE FOR LAW & LIBERTY

THE **CITIZEN'S GUIDE** TO **OPEN GOVERNMENT**

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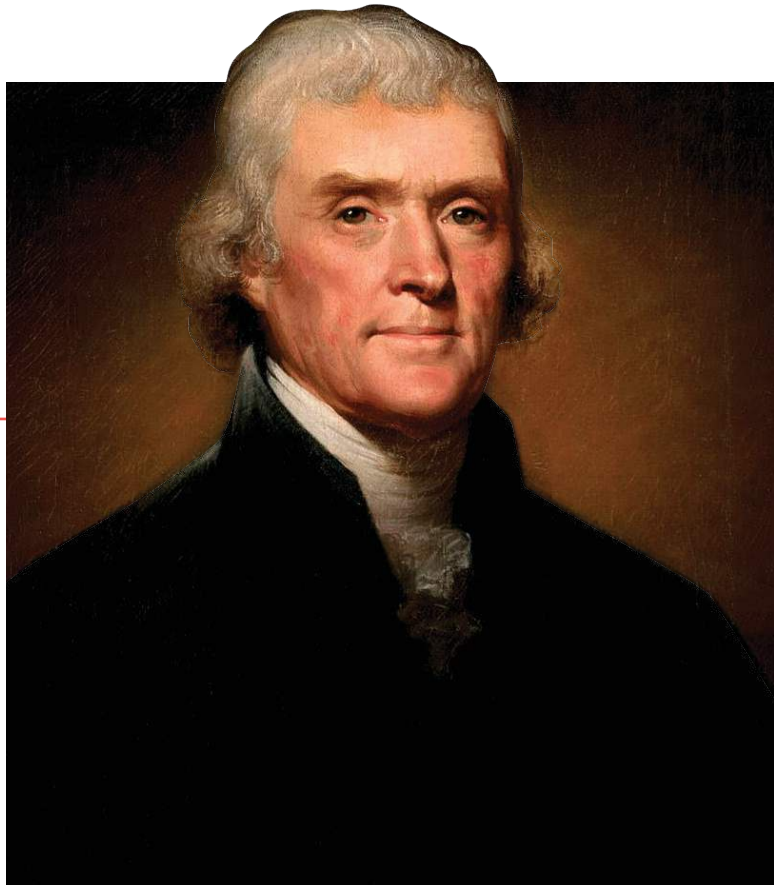
Introduction

The Citizen's Guide series from the Wisconsin Institute for Law & Liberty aims to spur civic engagement and involvement in the processes of government. Like the Citizen's Guide to the Administrative State, this guide has two aims. The first is to educate citizens on the public records and open meetings laws at a general level. The second is to provide citizens with practical tips they can use to ensure that those laws are followed.

Wisconsin has a long history of open and transparent government. A transparent government is a government accountable to its citizens. By utilizing the information contained in this guide we hope to assist you with that accountability.

"Whenever the people are well informed, they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."

- Thomas Jefferson



WISCONSIN INSTITUTE FOR LAW & LIBERTY

The Wisconsin Institute for Law & Liberty ("WILL") exists to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

CHAPTER 1

Public Records

PURPOSE OF LAW AND TEXT

Wisconsin's public records law is an important tool that citizens can use to educate themselves on government action and to hold government bodies and officials accountable for their decisions as publicly-elected officials. The law provides that individuals "are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." The law provides a "presumption of complete public access" to documents and "only in an exceptional case may access be denied."*

WHO IS SUBJECT TO THE LAW (AND WHO ISN'T)

An "authority" is subject to the law. Most governmental bodies, agencies, officials, and committees are considered "authorities" subject to Wisconsin's public records law. For example, a committee of the school board (such as the human growth and development advisory committee) is subject to the law, as is the school board as a whole and its individual members.

The public records law does not generally apply to private companies,† to individuals who are not public employees, or to public employees' documents outside the scope of their work.

WHAT IS A RECORD (AND WHAT IS NOT)

A record is broadly defined in the statute to include any material "on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved" and that was created or is being kept by an authority. A record does not include personal documents unrelated to government business, drafts, notes, and documents that are excluded from the law by statute, such as published works in the possession of an authority.

There is one exemption to the law many Wisconsinites are not aware of—while state legislators are required to abide by the public records law and must turn over any documents in their possession when requested, they are not required to keep or retain the records the way that other state and local agencies or officials must.‡ Legislators are under no obligation to keep their records, but if they do keep their records and a request is made, those records that are available must be turned over. This means that a legislator cannot delete records in response to a request from the public that has already been made.

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* Wis. Stat. § 19.31.

† If a private company is contracting with a government entity, communications related to that work could be public in some instances. *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 52.

‡ Wis. Stat. § 16.61(2)(b)(1) (exempting records and correspondence of legislators from definition of "public records").

PUBLIC POLICY BALANCING TEST

As is the case with most laws, the public records law does not discuss every situation or list every conceivable type of record that may be subject to disclosure. While there is a general presumption of public access to records, courts over the years have carved out exceptions to the law based on the public policy balancing test. Under this test, courts consider on a case-by-case basis whether the public interest in nondisclosure outweighs the public interest in favor of disclosure; courts consider "whether disclosure would cause public harm to the degree that the presumption of openness is overcome."[¶]

Many of Wisconsin's public records cases involve the application of the balancing test. Examples of cases in which courts have applied this test and withheld documents are included in the table below.

On occasion, balancing may require an authority to disclose records but permit the authority to do so in a redacted form. For example, a request for emails may redact those between the village and its attorney as privileged, or information about minor children may be reduced to initials.

HOW TO MAKE A REQUEST

Your request must be limited in time or subject matter. No special or magic words are required to invoke Wisconsin's public records law, and there is no form that a request must take. Requests for records can be made in person, by letter, by email, or communicated in virtually any other manner. While no formula is required, the appendix to this guide contains a suggested format you can use to start your request.

TYPE OF DOCUMENT	REASONING
Law enforcement training video	Release of strategies could allow criminals to get around the law[*]
Internal misconduct investigation documents	Protecting confidentiality of witnesses[†]
Names of voters in union representation election	Ensuring such elections could be conducted free of intimidation and coercion[‡]
Records relating to board employee	Requester had documented history of violence against the employee[§]

* Id., ¶ 19.

† *Hempel v. City of Baraboo*, 2005 WI ¶ 69-71, 284 Wis. 2d 162, 699 N.W.2d 551.

‡ *Madison Teachers, Inc. v. Scott*, 2018 WI 11, ¶ 33, 379 Wis. 2d 439, 906 N.W.2d 436.

§ *State ex rel. Ardell v. Milw. Bd. of Sch. Directors*, 2014 WI App 56, ¶ 14, 354 Wis. 2d 471, 849 N.W.2d 894.

¶ *Dem. Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 11, 372 Wis. 2d 460, 888 N.W.2d 584.

Here are some considerations that may make your request more effective:

- Think about the information you are seeking and why you want it. Doing so can help you craft a request that is more likely to get you a timely and complete response.
- In the same vein, think about the scope of the information you are seeking. Do you really need every email the village administrator's office sent or received in the last year, or will the communications from the three weeks between when you submitted an item for the village's monthly agenda and the meeting when it was voted on suffice?
- Placing a request by email makes it easy to track both the precise language you used in your request and when it was sent. If an official is not responsive, it can be helpful to point out that it has been so many days since the initial request.
- Be respectful. In many cases, the person who is handling public records requests also has other job duties. While this does not justify unreasonable delays or arbitrary denials, most government employees do want to be helpful. Even if you are dealing with the exception, bear in mind that you will not receive a faster or more fulsome response by blowing your top, and that any emails or other communications you exchange with the person will be part of any litigation over your request.

DEALING WITH DELAYS AND DENIALS

The response time for a records request can vary from governmental body to governmental body, and from request to request. While some requests for readily available information may receive a response the same week or even the same day, compiling responsive records (particularly for items like emails) will often take weeks.

Delays

If you submitted a request and more than two weeks have passed without the authority at least acknowledging the request, follow up. If you submitted your request by email, you can simply forward your original message with a polite note requesting an update on when you can expect a response. If you submitted your request some other way, follow up with the person by phone or email, noting that date of your request, and ask when you can expect to receive a response.

The public records law requires authorities subject to it to fulfill or deny requests "as soon as practicable and without delay."* If an authority stops responding to periodic requests for updates and never provides a response, you may eventually reach a point at which you could file a lawsuit alleging unreasonable delay. While there is no definitive marker at which a request has been unanswered for "too long" and each case would necessarily depend upon the nature of the request and the action (if any) by the authority, any cases alleging delay rather than denial would likely need to be so egregious as to warrant punitive

* Wis. Stat. § 19.35(4)(a).

damages.* Courts generally afford government entities reasonable latitude in the time needed to respond, especially if the request is complex.†

EXCLUDED CATEGORIES OF INFORMATION, SCOPE ISSUES, AND REDACTIONS

Wisconsin's public records law is broad, but there are limits. In addition to records that may be withheld under the public policy balancing test, there are certain categories of information that are simply excluded from disclosure under the law. These categories include:

- Drafts and personal notes for the author's personal use
- Materials that are the personal property of the individual that bear no relation to their public work
- Materials subject to patent or copyright‡
- Student records (unless requester is the student or their parent)§
- Medical records¶
- Personal information in DMV records**
- Prosecutor's case file
- Attorney-client communications

In addition to categories of information that are excluded from the public records law, there may be other reasons to either deny or work to narrow a request. Requests must be sufficiently reasonable and specific†† to be fulfilled. Seeking the entire contents of the Governor's email inbox or his calendar, with no limitation on the timeframe or using any search terms, is an example of a request that could be rejected, while a request for his official calendar for the week of June 12, 2023 or a request for all emails to, from, or copying the Governor discussing "Summerfest" for the month of June 2023 is reasonably limited.

In some circumstances, portions of records subject to the public records law may be redacted if only some of a given record falls under one of the exceptions to disclosure. For example, a portion of an arrest record that refers to a minor child should be redacted so that the child is referred to only by initials, or an email string of otherwise public information that ends with an inquiry to an attorney asking about it should only hide the text of the email between the attorney and client. A public official may not redact a document because it contains information he does not like or because it contains irrelevant material in addition to the requested information.

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* *See* Wis. Stat. § 19.37 (contemplating punitive damages in the court's discretion if government "has arbitrarily and capriciously . . . delayed response to a request").

† *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69.

‡ Wis. Stat. § 19.32(2) (definition of "record").

§ 20 U.S.C. § 1232g (commonly known as "FERPA").

¶ 42 U.S.C. § 1320d-2 and associated regulations (commonly known as "HIPAA").

** 18 U.S.C. §§ 2721-25.

†† *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ (request for virtually all emails to or from thirty-four county employees for a two-year period overly broad); Wis. Stat. § 19.35(1)(h) (request "without a reasonable limitation as to subject matter or length of time represented by the record" insufficient).

FEES FOR LOCATION AND COPYING

Wisconsin law permits a public entity to charge reasonable fees for costs associated with locating and copying records. These costs may vary from entity to entity and will typically depend upon the scope of your request and the type of information sought. Fees "may not exceed the actual, necessary, and direct" costs of locating, reproducing, transcribing, photographing, or mailing the record.*

The law allows an authority to charge for location costs for records. It does not allow the authority to charge for time to review those records, or to redact those records if necessary.†

To minimize the likelihood of having to pay high fees, consider the following tips:

- Limit the scope of your request to those records in which you're actually interested. For example, you probably do not need to ask for every email to and from the mayor for all of 2020 if all you're looking for are communications between the mayor's office and an applicant for a permit that you know was sought in November and issued in December. Limiting your request appropriately is also in your interest, as it will save you time you may otherwise spend culling through a large volume of irrelevant information.
- Whenever possible, request records in electronic format to save on costs (such as paper and toner) associated with physical copying. Authorities may charge actual copying costs.‡
- In your request, ask that the records custodian notify you if fulfilling the request is likely to exceed a certain amount, such as $50, to avoid any misunderstandings upfront.

Unfortunately, in some instances we have seen entities claim that it will cost thousands of dollars to fulfill a request that is reasonable and limited in scope on its face. If this occurs, ask the custodian to identify why those costs are so high.

INSPECTION VERSUS COPIES AND COPYRIGHT

The public records law cannot be used to obtain copies of materials subject to copyright. For example, you cannot use the public records law to get a copy of a book available at the public library or to get at material subject to patent or copyright protection that a bidder on a government contract may have submitted.

In recent years, copyright has frequently been raised as a concern for certain curriculum materials in public schools, particularly where national organizations have provided curricula or syllabi to school boards in multiple states. While copyright can be legitimately invoked to prevent the copying of material in some instances, that same material can, in many instances, still be inspected by the requesting member of the public. Additionally, an authority cannot invoke copyright as a defense if the document is

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* Wis. Stat. § 19.35(3).

† *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 22-28.

‡ Wis. Stat. § 19.35(3).

otherwise publicly available to anyone (i.e. the document is made available by the government or others for free on their website).

EXAMPLES OF LEGITIMATE (AND ILLEGITIMATE) RESPONSES TO REQUESTS

As a general matter, the examples below are ways that public entities might respond to open records requests:

WISCONSIN OPEN RECORDS LAW AND FOIA

Many requesters who are denied records under the open records law go back to the same records custodian and say they are now making a FOIA request. Do not do this unless you mistakenly made a request to a federal agency under the state's open records law. Wisconsin's public records law applies to state entities (state agencies or offices like the Governor's office, and local bodies such as school districts). The Freedom of Information Act,

ACCEPTABLE	NOT ACCEPTABLE
Providing a reasonable estimate of the time for compliance	Failing to acknowledge the request within a reasonable timeframe, or ignoring it altogether
Responding to requests other than in the order received (for example, responding to a request for a single document before providing a full response to an earlier request for emails from a broad time period)	Refusing to respond on the basis of the identity of the requester* or why the requester says s/he wants the information
Sending multiple responses, providing easy to locate records first while others are searched or copied (or the remainder of the request is denied)	Providing only a partial response to a request without either a timeline for compliance or a denial for the remaining records
Working with the requester to narrow a broad request by agreement	Unilaterally providing a partial response without also providing a denial for the remainder of the request
Refusing to allow photocopying due to copyright concerns, but allowing inspection of those items that cannot be copied	Refusing all access to documents on basis of copyright, providing a copyright response to some requesters but not others, or falsely claiming copyright over publicly-available materials
Charging a reasonable fee for location and copying costs, particularly on large requests or requests for older or hard to locate records	Demanding hundreds or thousands of dollars upfront for location fees without providing a justification as to why, or charging for impermissible costs such as redaction
Truthfully responding that certain records do not exist or that the entity need not create records in response to an inquiry	Refusing a request because it did not contain certain "magic words" (didn't quote the statute word for word, contained a typographical error, was addressed to the elected official instead of the records custodian, etc.)

* In extremely narrow circumstances, a requester can forfeit his right to records if sought for an improper purpose. *Ardell*, 2014 WI App 66, ¶ 14 (domestic abuser not entitled to records revealing information about public employee he had assaulted and who had obtained a restraining order against him).

or FOIA, applies to federal entities (the President, federal agencies like the Environmental Protection Agency, etc.). There are numerous differences in scope between the state and the federal law that are beyond the purview of this guide, but in most instances making the same request under the state open records law and FOIA will not get the requester a better result.

A sample FOIA request, which may be useful in requesting documents from federal officials and agencies, is included in the Appendix to this guide.

LITIGATION

If your request is denied in whole or in part, the government official or entity must provide the reason(s) for that denial in writing. Generally speaking, except for cases of unreasonable delay, you can only sue to enforce the public records law after you receive a written response denying your request in whole or in part.

If your request has been denied in whole or in part, you may bring a civil suit for writ of mandamus pursuant to Wis. Stat. § 19.37. The court can order the government entity to turn over the records, with or without redactions, and you may have your attorneys' fees paid by the court if you sue and are successful.* A recent Wisconsin Supreme Court decision has made it more difficult to recover attorneys' fees in these lawsuits; bipartisan efforts to change the effect of that decision have not been successful to date.

The government must rely only on the reasons provided in the denial during the litigation. For example, if a school district denies your request for certain curriculum documents because it claims that the information would compromise student privacy under the balancing test and provides no other reasons for the denial, the district cannot come back during the litigation and also say that copyright law prohibits the district from disclosing it. Any reasons not provided in the denial are waived.

The most pertinent records in public records litigation (besides those the requester is suing over) are the communications between the requester and the entity and any internal communications within the entity regarding the request.† Outside of these documents, discovery in public records cases is relatively limited, though in some cases it may be pertinent to ask how other, similar requests have been treated by the entity.

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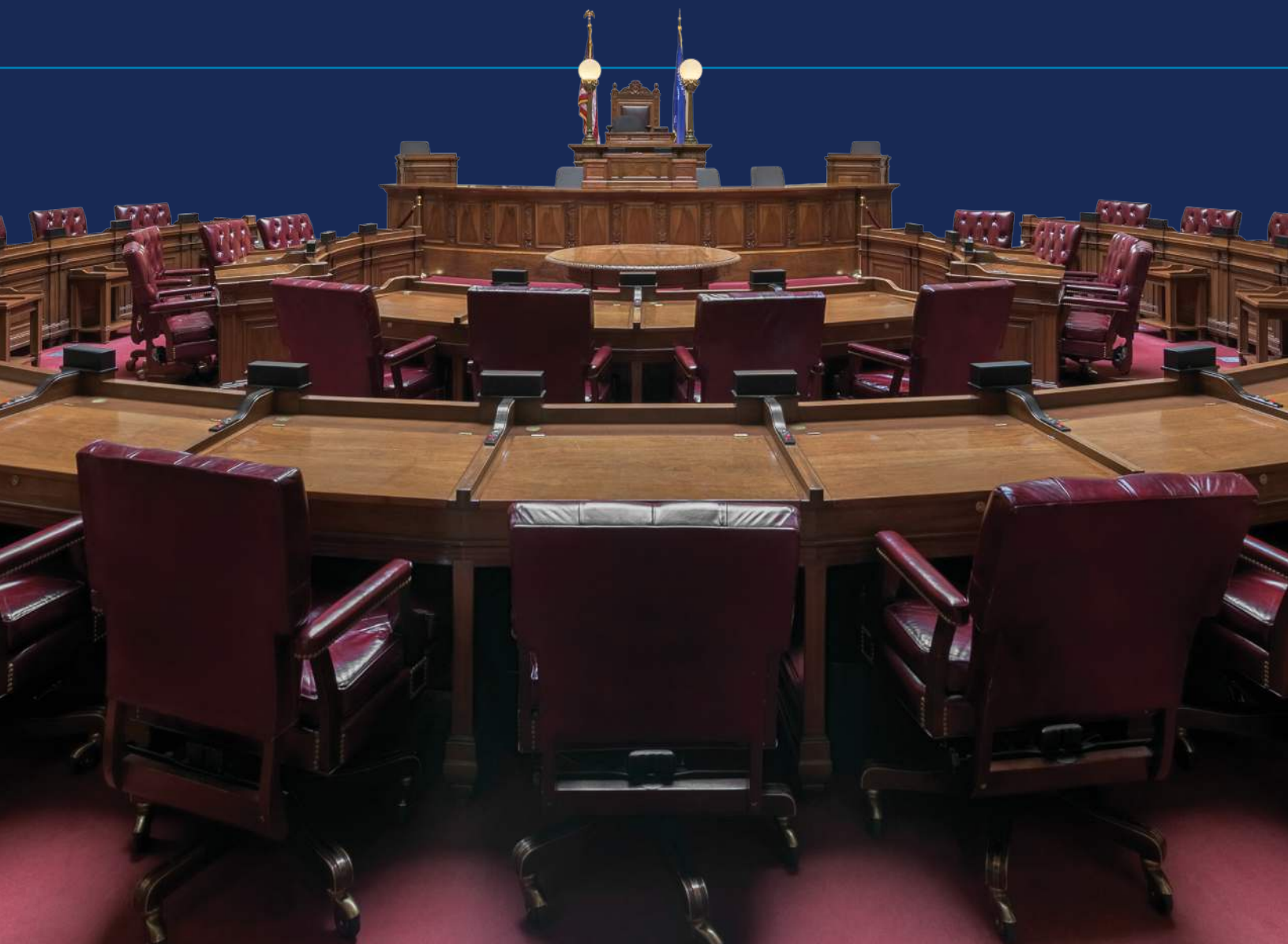
* In *Frame Park*, 2022 WI 57, the Wisconsin Supreme Court concluded that attorneys' fees are only mandatory if the requester's lawsuit results in a mandated change to the parties' legal relationship–in most cases, this means receiving a judgment in his or her favor from the court. It had formerly been the case that a citizen who sued and later received the records after filing suit but without taking the case all the way to judgment would be awarded their attorneys' fees. Citizens and their attorneys can still (and in many cases should) negotiate attorneys' fees as part of settlements short of judgment.

† Frequently, the government entity will consult with a lawyer concerning the request. These communications are generally covered by the attorney-client privilege and will not be turned over to you. However, to the extent that government officials who are not lawyers discuss how to respond to your request, those communications may be made available to you and can shed light on whether the request was denied for an improper reason (e.g., the entity's records custodian knows and does not like your political affiliation, or the official wants to wait until after an election to release potentially damaging information).

CHAPTER 2

Open Meetings



PURPOSE OF LAW

Like the public records law, the open meetings law exists to ensure that government officials conduct their business in the open, providing the public with transparency about important decisions. It is broadly construed by Wisconsin courts.*

WHO IS SUBJECT TO THE LAW

The law generally applies to "governmental bodies," which include state and local agencies, boards, and committees that are created by the constitution, statute, ordinance, rule, or order.† Not every group of public employees is subject to the open meetings law; coworkers at a state agency need not provide notice that they are going out to lunch together, for example. For the open meetings law to apply, there must be a purpose to engage in government business and the number of members present must be sufficient to determine the governmental body's course of action.‡

The law does not apply only to in-person meetings; if the leadership of a state or local agency holds a meeting to engage in public business by phone or videoconference, the open meetings law will generally apply. One can also establish a meeting via a series of emails—with the rationale being that, say, a village board cannot evade its responsibility to vote on important matters in a transparent way by simply exchanging emails out of public view.

WHAT QUALIFIES AS A MEETING?

That said, not everything qualifies as a meeting. If the group is not convening to exercise "the responsibilities, authority, power, or duties delegated to or vested in" that government body, the gathering is not a meeting.§ Public bodies can engage in staff meetings, social gatherings, chance meetings, conferences, and other group activities. So long as the group is not attempting to circumvent the open meetings law by, say, debating whether to vote in favor of a proposal for upcoming development, gatherings of some subset of the government body will not be considered to be an unnoticed public meeting.

REQUIREMENTS FOR OPEN MEETINGS

Notices of public meetings must include:

- Time, date, and place of the meeting
- The meeting's subject matter, including any contemplated closed sessions

Generally speaking, at least 24 hours' notice is required of any meeting subject to the open

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* *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19; Wis. Stat. § 19.81(4).

† Wis. Stat. § 19.82(1).

‡ *Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

§ Wis. Stat. § 19.82(2).

meetings laws, unless the body can demonstrate that "such notice is impossible or impractical." Notice may be provided in one of several ways; by far, the most common method governments now use is to post meeting notices on their official websites.* With the increased availability of videoconferencing, many government bodies now broadcast their proceedings live; the ability to participate (via a public comment period, for example) may vary.

Additionally, during the Covid pandemic, many governmental bodies took to holding meetings via teleconference or Zoom. While this pivoting was necessary early on to keep government functioning during government-mandated shutdowns, and many citizens welcomed the ability to attend a meeting without physically appearing, some governmental entities did not return to in-person meetings for many months afterward, causing some to question whether the motivation was to avoid facing citizens who opposed pandemic policies (including some more controversial local orders, such as mask mandates or limits on gatherings). Though many do, governmental bodies are not required to hold public comment periods during open meetings.†

A governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, so long as it does not interfere with the conduct of the meeting.‡

CLOSED SESSIONS

Not every aspect of every meeting is required to be held publicly. With appropriate notice, a governmental body may close proceedings to engage in discussion of certain topics before reconvening in open session. These topics are listed in Wis. Stat. § 19.85(1) and include, among others:

- Hiring, promotion, performance evaluation, and disciplinary matters for public employees
- Deliberations related to competitive bidding
- Conferring with an attorney who is providing the authority with advice concerning strategy for litigation in which it is or is likely to become involved

When a closed session occurs, the public is excused and the proceedings are not recorded. The body will discuss the subject or subjects that have been noticed for closed session discussion. The body then comes out of closed session and may vote on any actions in an open session.

WALKING QUORUMS AND NEGATIVE QUORUMS

Occasionally, public officials have attempted to conduct government business out of the public eye through the use of "walking" and "negative" quorums. A walking quorum occurs when a series

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* Wis. Stat. § 19.82(1)(b).

† Wis. Stat. § 19.82(2) (public notice "*may* provide for a period of public comment").

‡ Wis. Stat. § 19.90.

of gatherings or communications among separate, small groups of members—that individually comprise less than a quorum, but would do so when combined—discuss government business.

Example: Village A has a governing board made up of 13 members. A quorum is considered to be 7 members. If the chair of the board has coffee with three members to encourage them to vote "yes" on a development project coming up for approval, then has later has lunch with four others to discuss the same topic and discusses their votes, this is a walking quorum.

A negative quorum is a group with the power to defeat a given proposal and can be smaller than a majority in situations where a super-majority is required for something to pass.

Example: Village B has a 7-member board and requires at least a two-thirds majority (5 members) to approve new residential developments. If a board member meets two other board members for drinks and during their discussion they agree to vote down the plans for a development proposal coming up at this month's meeting, they have created a negative quorum because even if the remaining members approve, the two-thirds threshold will not be met.

The aim of the prohibition on walking and negative quorums is to ensure that public business is conducted in the open. Walking and negative quorums could be created in a number of ways—in person, via a series of telephone calls, or via a series of emails, for example. These issues do not create a general prohibition on socializing among members; for example, the open meetings law is not violated if you see two public officials out at a bar watching the Badger game together. Only if the members agree to act uniformly on a matter to be decided by that body are these issues implicated. If there is no such agreement, exchanges among separate groups of members can take place without implicating the open meetings law.*

OPEN MEETINGS LITIGATION

Unlike the public records law, you have to give the district attorney† a chance to sue over an open meetings violation before going to court. If the district attorney either declines to sue or does not take any action for 20 days, you can then sue to enforce the law. All actions alleging an open meetings violation must be brought within two years of the violation.‡ It is possible, in very rare circumstances, that a court could void an action taken in violation of the open meetings law, but this result is not typical.

If you prevail on proving an open meetings violation in court, the court will generally require the government entity that violated the law to pay your attorneys' fees, but you will not receive

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* *State ex rel. Lynch v. Conta*, 71 Wis. 2d 622, 239 N.W.2d 313 (1976) (walking quorum renders public meetings a meaningless formality).

† Alternatively, you can ask the Attorney General to sue, but the 20-day exclusion period does not apply to such requests and the AG's office typically does not have the same access to witnesses and information at the local level as a district attorney would.

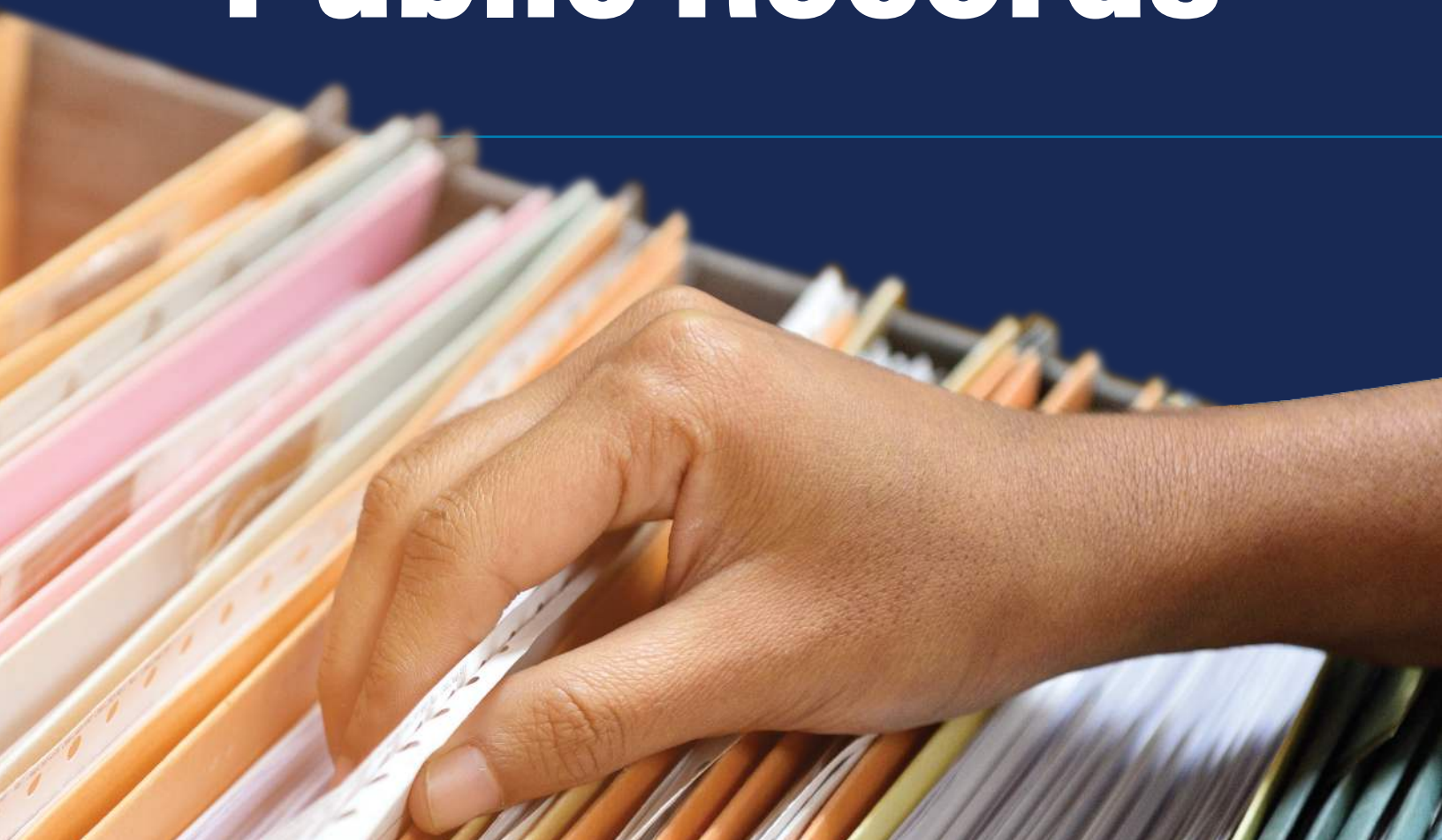
‡ *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6.

damages because the wrong committed is considered a wrong to the public at large and not to you personally.

These public records and open meetings laws provide the public with important tools they can use to get and stay informed and, when necessary, to hold their elected officials accountable.

CHAPTER 3

Considerations & Best Practices: Public Records



CONSIDERATIONS AND BEST PRACTICES FOR PUBLIC OFFICIALS

While the primary focus of this guide has been on ensuring transparency and action for members of the public, that transparency is ultimately only effective when public officials comply with the laws. The public records and open meetings laws present a number of traps for the unwary, and counsel for state agencies, municipalities, school districts, and other government entities and officials play a vital role in advising public officials on compliance. This guide does not purport to provide legal advice on these issues, but some general best practices may prove helpful.

WHAT IS A RECORD?

Many new public officials are unfamiliar with the breadth of what is at least arguably covered by the definition of "record." Not only are hard copy documents and emails included, but text messages, voicemails, social media posts, communications on an intra-office messaging platform (such as Teams or Slack), and other, newer forms of communication are included. There was no need for the Legislature to update the statute to explicitly include these new media because the definition of "record" includes not only a list of examples but a catch-all phrase: "any other medium on which electronically generated or stored data is recorded or preserved."*

Personal and Professional Accounts

Many new public officials are also surprised to learn that sending messages or emails concerning their professional responsibilities from their personal accounts does not shield these communications from public view. Any communication or document to or from the public employee related to her official duties is likely a record unless it falls within one of the statutory exemptions, or should be shielded from the public under the public policy balancing test.

Many public officials find it useful to keep a separate email and/or cell phone account that is used strictly for public business in order to make responding to public records requests easier and to minimize the risk of accidentally sending official messages from a personal account. All state government agencies and most municipal government bodies have official email domains and accounts for their employees to make this delineation easier.

Additionally, it is a best practice for governmental bodies to require a person other than the target of the request to collect and review any communications in response to open records requests. In other words, if a public records request is made for all communications between the mayor and a certain contractor during the month of June, the mayor should provide access to her email account and any devices (such as a cell phone) on which responsive material could be found to an IT person to search and potentially to a third person (such as the city's attorney) to review the records collected for responsiveness. Permitting a public official

* Wis. Stat. § 19.32(2).

to collect and review her own documents creates a risk that the official will, intentionally or unintentionally, fail to disclose responsive records—especially those that could prove embarrassing. Shifting the responsibility for collection and review to another person can reduce the temptation to hide a responsive but damaging document from the public.

Someone made a request. What do I do?

Many larger government bodies have a designated person or persons who are responsible for responding to public records requests as part of their official duties, but smaller governmental bodies in particular may be at a loss as to how to handle a request for an official's information. The following are a few rules of thumb to keep in mind if your governmental body does not have a procedure in place:

- **Train public employees on their obligations.** While employees do not need to know the text of the law word for word, you should at least make them aware that their email, text, and other communications are generally public and subject to open records laws, instruct them on the importance of preserving their records, and tell them who to contact in the event they receive a records request.
- **Acknowledge all requests quickly.** If you receive a request, review it and acknowledge it quickly. If feasible, estimate for the requester the time it will take to collect and produce responsive records and advise of any location costs. If you do not know, provide a time by which you anticipate being able to provide this information.
- **Track the status of requests in a central location.** Knowing the status of pending public records requests to a governmental body can help allocate personnel resources in responding to those requests and to provide more accurate timeframes for response to members of the public. Even a simple spreadsheet can serve this purpose; bear in mind that the spreadsheet would itself be a public record. Ensure that your governmental body has one point of contact for maintaining this spreadsheet or similar document and that all employees know to whom to direct requests.
- **Work with the requester when possible.** Be courteous with the public, even if the request seems onerous or obnoxious. While you do not have the right to unilaterally narrow a request or to demand that the requester narrow the scope, it is sometimes possible to work with the requester to agree to a narrower scope. For example, if you truthfully tell a requester that his request for all emails to, from, or copying all members of the town board for the last six months will cost $1000 to locate and two months to compile, but that searching only for the last month or including some search terms will only cost $50 and could be ready in 10 days, the requester may actually want the narrower option. Always bear in mind that costs must be actual, not hypothetical, and that the member of the public can generally opt to pay for that broader option if he chooses. A public employee may not inflate or invent costs in an effort to pressure the requester to withdraw or modify her request.

- **Yes, compliance is your responsibility.** Compliance with the law is not optional, and it is not a duty that can be exclusively foisted onto a staff member—even if that staff member is primarily responsible for compiling and drafting the actual responses to requests. As an official, you must be cooperative and supply any devices or materials that may have responsive records.
- **There are resources available to help you.** Many governmental bodies have local counsel intimately familiar with the public records and open meetings laws who can advise on particular issues. Additionally, the Wisconsin Department of Justice publishes a public records compliance guide and maintains a dedicated Office of Open Government that provides assistance.

Document Retention Policies and Deletion

Occasionally, public employees or elected officials may attempt to delete their emails or texts to avoid disclosing them to a member of the public. Not only does this violate the law—but even if it were not illegal, as a practical matter deletion often doesn't save the communication from seeing the light of day. The governmental body may have a system that automatically keeps even those emails that the official deletes from his government inbox, or the other individuals copied on an email or text may have preserved it and turned it over. Furthermore, a court could require an official who deletes material for an improper purpose to pay punitive damages.*

With that said, this does not mean that all records must be kept forever. The Wisconsin statutes explicitly contemplate the eventual destruction of public records.† Reasonable document retention policies can be a useful tool to reduce a government body's costs associated with storing electronic and hard copy records while still complying with the letter and spirit of the law. The proliferation of electronic communication necessitates some limit on the retention of the exponentially-increasing volume of data generated by government bodies. If your governmental body does not have such a policy, consider implementing one so that all are aware of their retention obligations.

CONSIDERATIONS AND BEST PRACTICES: OPEN MEETINGS

The aim of the open meetings laws is transparency and providing the public an opportunity to be heard. Many open meetings laws violations seem technical in nature, but the parameters of the law are all in place to preserve public access to the conduct of public business, so public officials should keep the following rules of thumb in mind:

- **The more notice of a meeting, the better.** While the law affords government bodies the ability to notice public meetings on a

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* *See* 72 Atty. Gen. Op. 99 {punitive damages may be assessed against the agency, the custodian, or both).

† *See* Wis. Stat. § 19.21(4) (setting parameters for local governments); (5) (parameters for Milwaukee County); (6) (parameters for school districts). Records retention schedules at the state level can be found *here*.

relatively short timeframe, the greater the notice the better. Many open meetings violations occur when insufficient or inadequate notice is provided.

- **Routine helps.** If the village generally holds its board meeting on the second Monday of every month and posts its notices (including notices of any anticipated closed sessions) the prior Wednesday, there is less chance that the village will accidentally violate the law by failing to notice something than if it simply holds meetings and posts notices on an ad hoc basis. Consistency is also helpful for the public, who can better plan to attend if they so choose.
- **Be wary of speaking about issues up for vote outside of meetings.** If you are a public official, avoid speaking about issues on which you will vote with other officials—even if you are not actively attempting to secure someone's vote. Even if certain discussions that touch on public business are not technically open meetings violations, just the perception that you are discussing matters that are up for vote out of public view is harmful to the public's trust in your leadership.
- **If a violation is occurring, speak up.** Occasionally, a public body or official may attempt to close a meeting for an improper purpose or without having provided proper notice. Even if the official had no specific intent to violate the open meetings law, this could be a violation that costs the government—and individual elected officials—forfeitures and attorneys' fees.* If you prevent the violation, you can save the government body time and money, but even if you fail to stop the action you may relieve yourself from liability under the law if you attempt to prevent it.†
- **There are resources available to help you.** As is the case with the public records law, many governmental bodies have access to attorneys with particular skill in open meetings compliance. The Wisconsin Department of Justice also publishes an open meetings guide, and its Office of Open Government fields questions or concerns about open meetings in addition to public records.

Taped recordings of government meetings may be destroyed 90 days after the minutes have been approved and published "if the purpose of the recording was to make minutes of the meeting."‡ However, as a practical matter, many municipalities will make these recordings available on their website long afterward.

Public records and open meetings laws may seem like traps for public officials, but they provide important safeguards that promote transparent and accountable government and encourage citizens to become actively involved in public affairs. We hope that this guide provides some insight that will help to achieve these goals.

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* *State v. Swanson*, 92 Wis. 2d 310, 319 (1979).

† Wis. Stat. § 19.96 ("No member of a governmental body is liable . . . if he or she makes or votes in favor of a motion to prevent the violation from occurring . . . .").

‡ Wis. Stat. § 19.21(7).

Appendix

SAMPLE PUBLIC RECORDS REQUEST

(State, County, School District or Other Local Public Entity or Official)

Dear **[NAME OF CUSTODIAN]**,

I am making a request for the following records under Wisconsin's Open Records law, Wis. Stats. §§ 19.31-19.39, for the dates of **[DATE RANGE]**. Specifically, I am requesting the following records:

- **[LIST WITH SPECIFICITY THE TYPES OF DOCUMENTS OR CATEGORIES OF INFORMATION SOUGHT]**

Please be aware that the law defines "record" to include information that is maintained on paper as well as electronically, such as data files, social media content, and unprinted emails. The Wisconsin Legislature has stated that the open records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exception case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and to state what part of the law you believe entitles you to deny my request.

I would like the records in **[ELECTRONIC/HARD COPY]** format. The law provides that you may charger for the "actual, necessary and direct cost" of locating records if the cost is $50 or more. Please advise me before processing this request if there will be a cost to locate [and make copies of responsive records] that exceeds **[DOLLAR AMOUNT]**.

As you may know, the law requires you to respond to my request "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). If you are not the records custodian for the records listed above, please forward this request to the appropriate person at **[GOVERNMENT AGENCY]**.

Please contact me by email at **[EMAIL ADDRESS]** if you have questions about this request.

[NAME]

SAMPLE FREEDOM OF INFORMATION ACT (FOIA) REQUEST

(Federal Officials or Agencies)

Dear **[OFFICIAL OR AGENCY]**:

This is a request under the Freedom of Information Act (5 U.S.C. § 552). I request that a copy of the following documents be provided to me:

- **[LIST WITH SPECIFICITY THE TYPES OF DOCUMENTS OR CATEGORIES OF INFORMATION SOUGHT]**

To assist you in determining my status for the purpose of assessing fees, I am **[CHOOSE FROM AMONG THE FOLLOWING DESCRIPTIONS]**:

___ a representative of the news media affiliated with **[NAME OF NEWS OR OTHER MEDIA ORGANIZATION]**, and this request is made as part of news gathering and not for a commercial use.

___ affiliated with an educational or noncommercial scientific institution and this request is made for a scholarly or scientific purpose and not for a commercial use.

___ affiliated with a private business and am seeking information for use in the company's business.

___ an individual seeking information for personal use and not for a commercial use.

I am willing to pay fees for this request up to a maximum of $ **[INSERT AMOUNT]**. If you estimate that the fees will exceed this limit, please inform me first.

Please contact me at **[CONTACT INFO]** if you have questions about this request.

[NAME]

330 East Kilbourn Ave. | Suite 725
Milwaukee, WI 53202

will-law.org
414-727-9455

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