



## Wisconsin Public Records Law

§§ 19.21-19.39, *Wisconsin Statutes*

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### Policy of Access (Wis. Stat. § 19.31)

Local governments keep a variety of records dealing with citizens, businesses, and government activities. To further the goal of having an informed public, Wisconsin's policy is to give the public "the greatest possible information regarding the affairs of government...." <sup>1</sup> Accordingly, the public records law (*Wis. Stat.* §§ 19.32-19.37) must "be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." The statute further provides that "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." <sup>2</sup>

### What Is a Public Record?

A public record is a "record" of an "authority."

**Items covered.** A "record" is defined as "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*" (defined *below*). The term "record" includes, "but is not limited to, written materials, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks." *Wis. Stat.* § 19.32(2). A web site maintained by a public official about government business is also a public record, and access cannot be restricted.<sup>3</sup>

**Items not covered.** The term "record" "does not include 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..." This exception is narrowly interpreted. If a draft or other preliminary document is used as if it were a final document, it is not excluded from the definition of record.<sup>4</sup> Therefore, a "draft" report used to determine policy and notes circulated outside the chain of the originator's supervision, as well as notes used to memorialize a governmental body's activity, are records under the law.

“Record” does not include materials that are the personal property of the custodian and do not relate to the custodian’s office. Thus, the Wisconsin Supreme Court has determined that purely personal emails of public employees are not public records, unless the email evinces a violation of public law or policy.<sup>5</sup> The State Attorney General advises that if any part of an email sheds light on governmental functioning, then it is subject to disclosure.<sup>6</sup>

Materials to which access is limited by copyright, patent or bequest are not public records, although in certain situations copyrighted material may, under the fair use doctrine, be considered a public record.<sup>7</sup> Likewise, published materials of an authority available for sale and published materials available for inspection in a public library are not records. *Wis. Stat.* § 19.32(2).

**“Authority.”** This term is broadly defined in the law to include state and local offices, elected officials, agencies, boards, commissions, committees, councils, departments and public bodies created by the constitution, statutes, ordinances, rules or orders. *Wis. Stat.* § 19.32(1).

Local governing bodies, offices, elected officials and their committees, boards, and commissions are covered. However, when a public official leaves office they are no longer an “authority.”<sup>8</sup> “Authority” also includes governmental corporations; quasi-governmental corporations; a local exposition district; a long-term care district; any court of law; and nonprofit corporations that receive more than 50 percent of their funds from a county, city, village or town and provide services related to public health or safety to those units. Other factors are applied on a case-by-case basis when determining if an organization is a quasi-governmental entity, such as whether it performs a governmental function, degree of government access to its records, express or implied representations of government affiliation, and extent of government control of the organization.<sup>9</sup> Finally, subunits of the above are also authorities. *Wis. Stat.* § 19.32(1).

## Management & Destruction of Records; Requested Records

Every public officer is the legal custodian of the records of his or her office. *Wis. Stat.* § 19.21. The statutes provide standards for retaining records and also provide procedures and timetables for transferring obsolete records to the Wisconsin Historical Society or destroying them. Tape recordings of meetings of local governmental bodies made solely for the purpose of making minutes may not be destroyed sooner than 90 days after the minutes of the meeting have been approved and published (if the body publishes its minutes). *Wis. Stat.* § 19.21(7).

The otherwise legal destruction of records cannot be used to undermine a person’s public records request. No record may be destroyed until after a request to copy or inspect has been granted or until at least 60 days after the date of denial of such request (90 days in the case of a request by a committed or incarcerated person). *Wis. Stat.* § 19.35(5). The right to destroy a record is also stayed if access to the record is being litigated. However, the records retention law, *Wis. Stat.* § 19.21, is not a part of the public records law and that law therefore provides no remedy for a requester seeking destroyed records, such as deleted emails.<sup>10</sup> Also, it is not a prohibited destruction of a requested public record if an identical copy is destroyed.<sup>11</sup>

## What Is a Local Public Office?

This term is used in public records law provisions concerning an authority's posting requirement and a requester's right of access to job applications and to other records with personally identifiable information. "Local public office" covers elected officers of local governmental units; a county administrator or administrative coordinator or a city or village manager; appointed local officers and employees who serve for a specified term; and officers and employees appointed by the local governing body or executive or administrative head who serve at the pleasure of the appointing authority. *Wis. Stat.* § 19.32(1dm). The term also includes appointed offices or positions in which an individual serves as head of a department, agency or division of the local governmental unit.

The term does not include independent contractors; persons who perform only ministerial (i.e., nondiscretionary) tasks, such as clerical workers; and persons appointed for indefinite terms who are removable for cause. Contracted municipal assessors are independent contractors and are therefore not subject to the law.<sup>12</sup> However, local governments may not avoid responsibilities under the Public Records Law by contracting for collection, maintenance and custody of public records and directing document requesters to that contractor.<sup>13</sup> Also, the term "local public office" does not include any "municipal employee" as defined under the municipal employment relations law. *Wis. Stat.* § 111.70(1)(i).

The public records provisions on posting and personally identifiable information also apply to a "state public official." *Wis. Stat.* § 19.32(4). This term includes a municipal judge.

## Legal Custodians

***In general.*** The legal custodian maintains public records and has the duty to make decisions regarding access to the records. *Wis. Stat.* §§ 19.21 and 19.33. Specific statutes outside of the Public Records Law may establish record-keeping duties. For example, local clerks are designated as records custodians.

***Elected officials.*** The Public Records Law provides in general that elected officials are the custodians of the records of their offices, unless they have designated an employee of their staff to act as custodian. Chairpersons and co-chairpersons of committees and joint committees of elected officials, or their designees, are the custodians.

***Other custodians; designation.*** If one authority (other than an elected official, or committee or joint committee of elected officials, above) appoints another authority or provides administrative services for the other authority, the "parent" authority may designate the legal custodian for such other authority.

State and local authorities (other than elected officials and their committees and joint committees, above) under the public records law must designate custodians in writing and provide their names and a description of their duties to employees entrusted with records under the custodian. If the statutes do not designate a custodian and the authority has not designated one, the highest ranking officer and the chief administrative officer, if any, are the authority's custodian. An authority or legal custodian (other than members of local governmental bodies)

must designate a deputy legal custodian to respond to requests for records maintained in a public building.

**Records in a public building.** The legal custodian of records kept in a public building must designate one or more deputies to act in his or her absence. This requirement does not apply to members of any local governmental body.

## Office Hours & Facilities

**Posted notice required – Wis. Stat. § 19.34(1).** Each authority must adopt and prominently display a notice describing its organization, the times and locations at which records may be inspected, the identity of the legal custodian, the methods to request access to or copies of records and the costs for copies. Wis. Stat. § 19.34(1). If the authority does not have regular office hours at the location where records are kept, its notice must state what advance notice is required, if any, to inspect or copy a record. Wis. Stat. § 19.34(2)(c). The posted notice must also “identify each position of the authority that constitutes a local public office or a state public office” (see definition *above*).<sup>14</sup>

The posting requirement, however, does not apply to members of the legislature or to members of any local governmental body.

**Hours – Wis. Stat. § 19.34(2).** An authority with regular office hours must, during those hours, permit access to its records kept at that office, unless otherwise specified by law. If the authority does not have regular office hours at the location where the records are kept, it must permit access upon 48 hours’ written or oral notice. Alternatively, an authority without regular hours at the location where records are kept may establish a period of at least two consecutive hours per week for public access to records, and may require 24 hours’ advance written or oral notice of intent to inspect or copy a record within the established access period.

If a record is sometimes taken from the location where it is regularly kept, and inspection is allowed at the location where the record is regularly kept upon one business day’s notice, inspection does not have to be allowed at the occasional location.

**Computation of time – Wis. Stat. § 19.345.** Under the public records provisions (Wis. Stat. §§ 19.33-19.39) when the time in which to do an act (e.g., provide a notice) is specified in hours or days, Saturdays, Sundays and legal holidays are excluded from the computation.

**Facilities – Wis. Stat. § 19.35(2).** The authority must provide a person who is allowed to inspect or copy a record with facilities comparable to those used by its employees to inspect, copy and abstract records during established office hours. The authority is not required to provide extra equipment or a separate room for public access. The authority has the choice of allowing the requester to photocopy the record or providing a copy itself. Wis. Stat. § 19.35(1)(b). In order to protect the original the custodian may refuse to allow the requester to use his or her own photocopier to copy the record.<sup>15</sup>

## Priority & Sufficiency of Request

Response to a public record request is a part of the regular work of the office. An authority must “as soon as practicable and without delay” fill a public records request or notify the requester of the decision to deny the request in whole or in part, and the reasons for that decision. *Wis. Stat.* § 19.35(4). In some cases, the custodian may delay the release of records to consult legal counsel. Specified time periods apply for giving notice of the intended release of certain records containing personally identifiable information on employees and on individuals who hold public office (*see below*).

A request must reasonably describe the record or information requested. *Wis. Stat.* § 19.35(1)(h). A request is insufficient if it has no reasonable limitation as to subject matter or length of time represented by the request. For example, a request for a copy of 180 hours of audio tape of 911 calls with a transcription of the tape and log for each transmission was a request without reasonable limitation that may be denied.<sup>16</sup> Although filling a request may involve a large volume of records, at some point a broad request becomes so excessive that it may be rejected.<sup>17</sup>

## Form of Request & Response; Separation of Information

A request may be either oral or written. *Wis. Stat.* § 19.35(1)(h). If a mailed request asks that records be sent by mail, the authority cannot require the requester to come in and inspect the records, but must mail a copy of the requested record, assuming that it must be released and any required prepayment of fees (*see below*) has been made. *Wis. Stat.* § 19.35(1)(h). Also, a response that requires unauthorized costs or conditions is considered a denial even though the response does not use words like “deny” or “refuse.”<sup>18</sup>

A request that is granted seldom presents a problem. Denials of requests, however, must be made in accordance with legal requirements. An oral request may be denied orally, unless a demand for a written reply is made by the requester within five business days of the oral denial. *Wis. Stat.* § 19.35(4)(b).

The request must be in writing before an action to seek a court order or a forfeiture may be started. A written request must receive a written denial stating the reasons for the denial and informing the requester that he or she may file a “mandamus” action (or request the district attorney or attorney general to file such action) in the local circuit court seeking review of the custodian’s determination and an order to release the record (*see* “Enforcement and Penalties” *below*). *Wis. Stat.* § 19.35(4)(b).

If a record contains both information that is subject to disclosure and information that is not, the information that may be disclosed must be provided and the confidential information deleted. *Wis. Stat.* § 19.36(6).

## Form of Record

**Photocopies.** Many requested records can be photocopied. The authority may either provide a photocopy of such record to the requester or allow the requester to make the copy (as noted above under “Facilities”). *Wis. Stat.* § 19.35(1)(b). If the form of the record does not permit

photocopying, the requester may inspect the record and the authority may permit the requester to photograph the record. *Wis. Stat. § 19.35(1)(f)*. If requested, the authority must provide a photograph.

**Tapes.** For audiotapes, the authority may provide a tape copy or a transcript, if the requester so requests. *Wis. Stat. § 19.35(1)(c)*. When an audiotape or handwritten record would reveal a confidential informant's identity, the authority must provide a transcript, if the record is otherwise subject to inspection. *Wis. Stat. § 19.35(1)(em)*. A requester has a right to a videotape copy of a record that is as substantially as good as the original. *Wis. Stat. § 19.35(1)(d)*.

**Digital records.** An authority must provide relevant data from digital records in "an appropriate format." It is not necessary for a requester to examine the exact information in an authority's electronic database. This is because the data may be at risk of damage or unwitting exposure of confidential information by complete access to the data base. For example, providing property assessment information for all properties in the data base as PDF documents satisfied a request for all property data from the digital record.<sup>19</sup>

**Putting records in comprehensible forms.** If the record is in a form not readily comprehensible, the requester has the right to information assembled and reduced to written form, unless otherwise provided by law. *Wis. Stat. § 19.35(1)(e)*. Except to put an existing record in comprehensible form, the authority has no duty to create a new record by extracting and compiling information. *Wis. Stat. § 19.35(1)(L)*. However, the custodian does have to separate information that may be disclosed from that which is being withheld. *Wis. Stat. § 19.36(6)*.

**Published records; restrictions on access.** A record (other than a videotape) that has been published or will be promptly published and available for sale or distribution need not be otherwise offered for public access. *Wis. Stat. § 19.35(1)(g)*. Note that the definition of "record," above, does not include published materials of an authority available for sale and published materials available for inspection at a public library. *Wis. Stat. § 19.32(2)*

**Protecting records from damage.** Reasonable restrictions on access may be placed to protect irreplaceable or easily damaged original records. *Wis. Stat. § 19.35(1)(k)*.

## What Fees May Be Charged?

Fees that do not exceed the "actual, necessary and direct" cost of copying, photographing or transcribing a record and mailing or shipping it may be charged to a requester of public records, unless another fee is set or authorized by law. *Wis. Stat. § 19.35(3)*. The authority may reduce or waive fees if that is in the public interest. The Department of Justice recommends a copy charge of about 15¢ per page and cautions against charges exceeding 25¢ per page, unless a statute provides otherwise or higher costs can be justified.<sup>20</sup> As an example of a statute providing for a different fee, the register of deeds may charge \$2 for the first page and \$1 for additional pages for copies of records under *Wis. Stat. § 59.43(2)(b)*. Also, the register, with the approval of the county board, may enter into a contract for the provision of records in electronic format at a price set as provided under *Wis. Stat. § 59.43(2)(c)*.<sup>21</sup>



A copy fee may include a charge for the necessary and direct time it takes a clerical worker to copy the records on a copy machine.<sup>22</sup> Costs associated with locating a record may be passed on to the requester only if the location costs are \$50 or more. Computer programming expense required to respond to a request may be charged.<sup>23</sup>

Prepayment of fees may be required only if the fee exceeds \$5. However, if the requester is a prisoner who has failed to pay any fee for a previous request, the authority may require prepayment of both the previous and current fee. The cost of a computer run may be imposed as a copying fee, but not as a location fee.<sup>24</sup> An authority may not charge the cost of separating confidential parts of a record from the parts to be released.<sup>25</sup>

## Inspection of Public Records

Any requester has a right to examine a public record, unless access is withheld according to law. As noted above, the presumption is that public records are open. Access to a public record, in accordance with *Wis. Stat. §§ 19.35(1)(a)* and *19.36(1)*, may be denied when:

- a state or federal law exempts the record from disclosure.
- a limitation on access has been established by case law or published court decisions. This is known as a common law exemption.
- the harm to the public interest from disclosure outweighs the public interest in inspection. This requires the custodian to perform the “balancing test” (below), often with the advice of legal counsel. The balancing test is also a common law doctrine.

## Limitations on Access under the Common Law; the Balancing Test

The statute provides that common law principles (i.e., the law developed in published court decisions) on the right of access to records remain in effect. *Wis. Stat. § 19.35(1)(a)*. For example, the common law provides an exception to public access to a district attorney’s prosecution files.<sup>26</sup> Most importantly, the common law has created the concept of the balancing test (below) to weigh the competing public interests in making the disclosure decision. In one case, the court ruled that the above common law exception for records in the custody of the district attorney’s office does not allow another custodian, in this case the sheriff’s department, to withhold the same record held by the district attorney’s office, although the sheriff’s department may withhold the record for a sufficient policy reason after applying the balancing test.<sup>27</sup>

**The balancing test.** Often no statutory provision or common law ruling answers the question of whether access to a public record may be denied. When the custodian has some doubt about whether to release the record, the balancing test must be performed. Under the common law, public records may be withheld only when the public interest in nondisclosure outweighs the public interest in disclosure.<sup>28</sup> The reasons for nondisclosure must be strong enough to outweigh the strong presumption of access.<sup>29</sup> The custodian must state specific policy reasons for denying access; a mere statement of legal conclusion is inadequate.<sup>30</sup> In explaining the denial, it may be helpful to cite statutory provisions (such as the following, if applicable) that indicate a public policy to deny access, even if these provisions may not specifically answer the access question.

Before refusing a request in an unclear situation, or granting a request that may invade a person's privacy or damage a person's reputation, the custodian should consult the county corporation counsel or municipal attorney. The office of the attorney general may also be consulted (*see final heading*). With the enactment of legislation on personally identifiable information in 2003 (*below*), the law is clearer than it had been before on these matters.

***Using open meetings law exemptions in the balancing test.*** The statutory exemptions under which a governmental body may meet in closed session under *Wis. Stat. § 19.85(1)* of the open meetings law indicate public policy, but the custodian must still engage in the balancing test and may not merely cite such an exemption to justify nondisclosure.<sup>31</sup>

These open meeting exemptions include the following: deliberating concerning a quasi-judicial case; considering dismissal, demotion, licensing or discipline of a public employee; considering employment, promotion, compensation or performance evaluation of a public employee; considering crime prevention or crime detection strategies; engaging in public business when competitive or bargaining reasons require closure; considering financial, medical, social or personal histories or disciplinary information on specific persons which would be likely to have a substantially adverse effect on the person's reputation if disclosed; and conferring with legal counsel for a governmental body on strategy for current or likely litigation.

## Examples of Statutory Limitations on Access

***Records requested by prisoners & committed persons – Wis. Stat. § 19.32.*** The definition of “requester” itself results limits access. “Requester” does not include any person who is “committed” or “incarcerated” unless the person requests inspection or copies of a record that contains specific references to that person or to his or her minor children if the physical placement of the children has not been denied to the person. Release of records to a committed or incarcerated person is, of course, subject to records that are otherwise accessible under the law.

***Certain law enforcement investigative records – Wis. Stat. § 19.36(2).*** Access to these records is limited where federal law, as a condition for receipt of aid, provides limitations.

***Computer programs; trade secrets – Wis. Stat. §§ 19.35(4) & (5).*** The computer program itself is not subject to inspection and copying, although the information used as input is subject to any other applicable limitations. See also “Digital Records” above under the heading “Form of Records.”

***Identities of applicants for public positions – Wis. Stat. § 19.36(7).*** Records that would reveal the identities of job applicants must be kept confidential if the applicants so request in writing. However, the identities of “final candidates” to “local public office” may not be withheld. A final candidate is one who is one of the 5 most qualified applicants, or a member of the final pool if that is larger than 5. If there are fewer than 5 candidates, each one is a final candidate.



***Identities of law enforcement informants – Wis. Stat. § 19.36(8).*** Information that would identify a confidential informant must be deleted before a requester may have access to the record.

***Employee personnel records & records of public officers (see below) – Wis. Stat. § 19.36(10)-(12).***

***Financial identifying information – Wis. Stat. § 19.36(13).*** Personally identifiable data that contains an individual's account or customer number with a financial institution (such as credit card numbers, debit card numbers and checking account numbers) may not be released, unless specifically required by law.

***Ambulance records. – Wis. Stat. § 256.15(12).*** Records made by emergency medical technicians and ambulance service providers are confidential patient health care records, although certain information on the run is open to inspection.

***Patient health care records.– Wis. Stat. §§ 146.81-146.84.***

***Law enforcement officers' records of children & adult expectant mothers. Wis. Stat. §§ 48.396 & 938.396.***

***Public library user records. Wis. Stat. § 43.30(1).***

***Certain assessment records.*** *Personal property tax returns* are confidential, except that they are available for use before the board of review. *Wis. Stat. § 70.35(3).* *Property tax income and expense information*, used in property valuation under the income method, are confidential. *Wis. Stat. § 70.47(7)(af).* *Real estate transfer returns* are also confidential, with specified exceptions. *Wis. Stat. § 77.265.*

***Personnel files. Wis. Stat. § 103.13.*** An employer (whether a government or non-government employer) must allow an employee to inspect his or her personnel documents, at least twice a year, within seven working days after making the request. The employee may submit a statement for the file that disputes information in it, if the employee and employer cannot agree to a correction. The statement must be attached to the disputed portion of the record and included with the record when released to a third party. Exceptions to the employee's right to inspect include the following records: investigations of possible criminal offenses; letters of reference; test documents, other than section or total scores; staff management planning materials, including recommendations for future salary increases and other wage treatments, management bonus plans, promotions and job assignments, and other comments and ratings; personal information that would be a "clearly unwarranted invasion" of another person's privacy; and records relevant to a pending claim in a judicial proceeding between the employee and employer.

## Personally Identifiable Information

### Introduction

In 1991 the legislature created provisions in the public records law to help preserve the privacy of individuals. Generally, a person who is the subject of a record with personally identifiable information has greater access to that record than is otherwise available under the public records law and may seek corrections to the information contained in the record. The 1991 legislation also created a subchapter on “personal information practices.”

The section following this one covers this important legislation designed to provide clarification on access to certain records containing personally identifiable information, primarily in the records of employees and local public officers.

### Definitions

*Wis. Stat. § 19.32.* “Personally identifiable information” means “information that can be associated with a particular individual through one or more identifiers or other information or circumstances.” *Wis. Stat. §§ 19.32(1r) and 19.62(5).* (See the following exceptions for what this term does *not* include.) A “person authorized by the individual” means a person authorized in writing by the individual to exercise the rights to access records with personally identifiable information; the individual’s parent, guardian or legal custodian, if the individual is a child; the guardian of an individual adjudicated incompetent in this state; or the personal representative or spouse of a deceased individual. *Wis. Stat. § 19.32(1m).*

### Right to inspect; exceptions

*Wis. Stat. § 19.35(1)(am).* In addition to a requester’s general right to inspect public records under *Wis. Stat. § 19.35(1)(a)*(above), a requester, or a person authorized by that individual, has the right to inspect and copy any record containing personally identifiable information pertaining to the individual that is maintained by an authority. However, this right of access does *not* include the following records:

1. **Investigations, etc.** Any record with information collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any record collected or maintained in connection with any such action or proceeding.<sup>32</sup>
2. **Security issues.** Any record with personally identifiable information that, if disclosed, would
  - a. endanger an individual’s life or safety;
  - b. identify a confidential informant;
  - c. endanger the security of specified facilities and institutions, including correctional, mental health and other secured facilities, a center for the developmentally disabled and a facility for the care of sexually violent persons; or
  - d. compromise the rehabilitation of a person incarcerated or detained in one of the facilities in c.

3. **Record series.** Any record which is part of a record series, as defined in *Wis. Stat.* § 19.62(7), that is not indexed or arranged so that the authority can retrieve it by use of an individual's name, address or other identifier.

### Contractors' records

*Wis. Stat.* §§ 19.36(3) and (12). The general right to access records of a contractor produced under a contract with an authority under *Wis. Stat.* § 19.36(3) does not apply to personally identifiable information. Such information on an employee of a contracting employer subject to the prevailing wage law cannot generally be accessed, except information on employee work classification, hours of work and wage or benefit payment information may be released.

### Responding to requests

*Wis. Stat.* § 19.35(4)(c). The authority must follow a specific procedure when it receives a request from an individual or a person authorized by the individual to inspect or copy a record with personally identifiable information on the individual. In these cases the requester generally has a right to inspect and copy a record. §19.35(1)(am). However, this right does not extend to a number of situations and records (see “Applicability” and “Contractors’ records” *above*).

The authority must first determine whether the requester has a right, under the general public records law, to inspect or copy the record with personally identifiable information. If the requester has such a right, the authority must grant the request. This determination may involve the balancing test (*above*). If the authority determines that the requester does not have the right to inspect or copy the record under the general public records law, then the authority must determine whether the requester has the right to inspect or copy the record under the specific provisions of the law applicable to personally identifiable information, and grant or deny the request accordingly.

(If the requested record contains information pertaining to a record subject other than the requester, or other than the record subject in a situation where the request is by a person authorized by that record subject, the provisions of *Wis. Stat.* § 19.356 on notice to a record subject apply. See the section *below* on “Personally Identifiable Information on Employees, Local Public Officers & Other Records Subjects.”)

### Correction of personally identifiable information

*Wis. Stat.* § 19.365. An individual or person authorized by the individual may challenge the accuracy of personally identifiable information pertaining to the individual in records to which they have access by notifying the authority in writing of the challenge. The authority must then either correct the information or deny the challenge. If the challenge is denied, the authority must notify the challenger of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the challenge to the information with the reasons for disputing that portion of the record. Only a state authority is required to give reasons for a denial of a challenge. The challenge provision does not apply to records transferred to an archival depository or when a specific state or federal law governs challenges to the accuracy of the record.

## Personal information practices

*Wis. Stat. §§ 19.62-19.80.* *Wis. Stat. § 19.65*, provides that an authority must develop rules of conduct for employees who collect, maintain, use, provide access to or archive personally identifiable information and must ensure that these persons know their duties relating to protecting personal privacy.

*Wis. Stat. §§ 19.65-19.80*, also has provisions concerning the accuracy of data collection and the sales of names or addresses. An authority that maintains personally identifiable information which may result in an adverse determination against an individual's rights, benefits or privileges must, to the greatest extent possible, collect the information directly from the individual, or verify the information, if obtained from another person. *Wis. Stat. § 19.67*. Also, an authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. *Wis. Stat. § 19.71*.

## Personally Identifiable Information on Employees, Local Public Officers & Other Record Subjects (2003 Wisconsin Act 47)

### Introduction

The release of records affecting the privacy or reputational interests of public employees has involved a good deal of legal uncertainty. Under Wisconsin Supreme Court decisions, custodians have been required to notify the subject when such records were requested, and proposed to be released to give the record subject an opportunity to seek judicial review.<sup>33</sup> However, as explained in the prefatory note to 2003 Wis. Act 47, those cases did not establish criteria for determining when privacy and reputational interests are affected or for giving notice to affected parties. Nor did these cases address the issue of whether the same analysis applies to records of private employees.

The Legislature in *Wis. Stat. § 19.356*, codified these cases in part, but under this act the rights apply only to a limited set of records. The statute's procedure for notice and review now applies to four categories of records relating to employees, local public officers and other records subjects:

- Records of "record subjects" (i.e., persons who are the subject of personally identifiable information in public records) which, as a general rule, do not require notice prior to allowing access.
- Records of employees and other record subjects that may be released under the balancing test only after providing the record subject with notice of impending release of the record and the right to judicial review prior to release of the record.
- Records of local public officers that may be released under the balancing test only after providing notice to the record subject of the impending release of the record and the right to augment the record.
- Records of employees and local public officers that are generally closed to access.

## General rule regarding notice & judicial review – *Wis. Stat. § 19.356(1)*

An authority is not required to notify a record subject prior to allowing access to a record containing information on the person, except as authorized in *Wis. Stat. § 19.356* (*see following*) or as otherwise provided by statute. Nor is the record subject entitled to judicial review prior to release of the record. (Of course, a specific statute concerning access may apply and the authority may need to conduct the balancing test.) The statute goes on to provide when notice and an opportunity for judicial review are required prior to release of records.

## When notice to employee/record subject required; opportunity for judicial review – *Wis. Stat. § 19.356(2)-(8)*

The authority must provide written notice to the record subject, as specified in the statute, prior to releasing any of the three following types of records containing personally identifiable information pertaining to the record subject if the authority decides to allow access to the record. The authority in its notice must specify the requested records and inform the record subject of the opportunity for judicial review. The notice must be served on the record subject within three days of deciding to allow access; service is accomplished by certified mail or by personal delivery. The records requiring notice prior to release are:

- ***Disciplinary matters.*** A record containing information relating to an employee that is created or kept by the authority and is the result of an investigation into a disciplinary matter involving the employee or the possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer. The attorney general interprets this provision to be limited to disciplinary matters or possible employment-related violations by an employee of the employer in which the record was prepared by the employer, rather than by another entity.<sup>34</sup> In addition, if a private employer is involved, the attorney general reasons that the private employee may block access to the record, as noted below under "Records of other employers."
- ***Subpoenas; search warrants.*** A record obtained by the authority through a subpoena or search warrant. Note that this provision does not limit its applicability to employees; it applies in general to any record subject to whom the record pertains.<sup>35</sup>
- ***Records of other employers.*** A record prepared by an employer other than an authority if the record contains information relating to an employee of that employer, "unless the employee authorizes the authority to provide access to that information." The attorney general interprets this provision to mean that an authority may not release personally identifiable information pertaining to the employee of a private employer unless the employee consents.<sup>36</sup>

The requirement of notice prior to release of the above information does not apply to the release of the information to the employee or to the employee's representative under the statute relating to an employee's access to his or her own personnel records (*Wis. Stat. § 103.13*); nor does the notice requirement apply to release of the information to a collective bargaining representative.

Within 10 days of service of the notice of the intended release of the records, the record subject may start a court action to have the access to the records blocked. The statute provides a

procedure for expedited judicial review of the authority's decision to release records and also provides that the records may not be released within 12 days of sending a notice or during judicial review periods.

### **When notice required to person holding local public office; opportunity for comments – *Wis. Stat. § 19.356(9)***

A different approach applies to the release of records with personally identifiable information pertaining to a person who holds a “local public office” (e.g., a governing body member, elected or appointed officer or department head) or a “state public office” (e.g., a municipal judge). Under this procedure, the authority must inform the record subject within 3 days of the decision to release the records to the requester. This notice is served on the officer by certified mail or personal delivery and must describe the records intended for release and the officer's right to augment the record. *Note* that the officer (unlike an employee under the previous heading) who is the record subject does not have the right of judicial review. Instead, the officer who is the record subject has the right to augment the record that will be released to the requester with his or her written comments and documentation. This augmentation of the record must be done within 5 days of receipt of the notice.

### **Employee/officer records generally closed to public access**

***Employee records closed to public access.*** *Wis. Stat. § 19.36(10)*, generally prohibits an authority from releasing the records listed in a-d below. However, this general prohibition on release does not apply if another statute specifically authorizes or requires release. Nor does the prohibition on release apply to an employee or his or her representative accessing the employee's personnel records under *Wis. Stat. § 103.13*, or to a collective bargaining representative for bargaining purposes or pursuant to a collective bargaining agreement. The employee records which are not generally open to public access are as follows:

- a) *Addresses; telephone number; social security number.* Information concerning an employee's home address, home email address, home telephone number and social security number, unless the employee authorizes the authority to provide access to such information.
- b) *Current criminal/misconduct investigations.* Information relating to the current investigation of a possible criminal offense or possible misconduct connected with an employee's employment, prior to disposition of the investigation.<sup>37</sup>
- c) *Employment examinations.* Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
- d) *Employee evaluations.* Information relating to one or more specific employees used by an authority or the employer for staff management planning, including performance evaluations, recommendations for future salary adjustments or other wage treatments, management bonus plans, promotions, job assignment, letters of reference, or other comments or ratings relating to employees.



**Local public officers' records closed to public access.** *Wis. Stat. § 19.36(11).* As with employees, certain records on individuals holding a local public office, as broadly defined, may not generally be released to the public. However, this general prohibition on release does not apply if another statute specifically authorizes or requires release. Nor does the prohibition on release apply to a local public officer who is an employee accessing his or her personnel records under *Wis. Stat. § 103.13*. The records on local public officers which are not generally open to public access are as follows:

- e) *Addresses; telephone number; social security number.* Information concerning the individual's home address, home email address, home telephone number and social security number, unless the individual authorizes the authority to provide access to such information.
- f) *Exceptions.* This prohibition on release, however, does not apply to the release of the home address of an individual who holds an *elective* public office or who, as a condition of employment as a local public officer, is required to reside in a specific location. This exception allows the public to verify that its elected officials and other officers or high-level employees (who fill a position that falls under the definition of "local public office") subject to residency requirements actually live in the community or meet the applicable requirement.

**Employee records under public works contracts.** *Wis. Stat. § 19.36(12).* Unless access is specifically authorized or required by a statute, an authority may not provide access to a record prepared or provided by an employer performing work on a project in which the employer must pay prevailing wages, if the record contains the name or other personally identifiable information relating to an employee of the employer, unless the employee authorizes access. *Wis. Stat. § 19.36(12).* However, as previously noted, information concerning an employee's work classification, hours of work, and wage and benefit payments received for work on the project may be released.

## Enforcement & Penalties

The public records law provides for forfeitures and court orders to enforce the law. *Wis. Stat. § 19.37.*

**Court order to allow access.** A person who has made a written request for access to a public record may bring an action for a writ of mandamus asking the court to order release of withheld information. This procedure does not require following the notice-of-claim law applicable to many suits against the government. In contrast to the procedure under the open meetings law, a person seeking release of a public record does *not* have to initially refer the matter to the district attorney. However, the person may request the district attorney or the attorney general to seek mandamus. A committed or incarcerated person has no more than 90 days after denial of a record request to begin an action in court challenging the denial.

A requester who prevails in whole or substantial part may receive reasonable attorney fees, actual costs, and damages of at least \$100. The costs and fees must be paid by the authority or

the governmental unit of which it is a part and are not the personal liability of the custodian or any other public official. A committed or incarcerated person, however, is not entitled to the minimum \$100 damages, although the court may award damages. Also, in a request for personally identifiable information under *Wis. Stat. § 19.35(1)(am)*, (*above*) there is no minimum recovery of \$100 in damages. Instead, actual damages may be recovered if the court finds that the authority acted in a willful or intentional manner.

The law also provides for the award of punitive damages to the requester if the court finds that the authority or legal custodian arbitrarily and capriciously denied or delayed their response or charged excessive fees. However, punitive damages may only be awarded as part of a mandamus action to compel delivery of records, not as a separate claim for violation of the Public Records Law after documents were released.<sup>38</sup>

**Forfeiture.** The district attorney or the attorney general may seek a forfeiture against an authority or custodian who arbitrarily and capriciously denies or delays response to a records request or charges excessive fees. The statute provides for a forfeiture of not more than \$1,000 along with the reasonable costs of prosecution.

## Reference and Advice

Local officials who have questions on the public records law should contact their unit's legal counsel. Also, any person may contact the attorney general (the Wisconsin Department of Justice) to request advice on the public records law. *Wis. Stat. § 19.39*.

Refer to §§ 19.31-19.39 of the *Wisconsin Statutes* for the specific wording of the law; the statutes may be accessed on the internet at <http://folio.legis.state.wi.us/>. There is a *Wisconsin Public Records Law, Compliance Outline (2010)*, by the Wisconsin Department of Justice, which may be found on the Internet at <http://www.doj.state.wi.us/site/ompr.asp>.

The Local Government Center has CDs of its Open Government *WisLine Series* program on the Public Records Law. Check the University of Wisconsin-Extension Local Government Center web site - For new developments in Open Meetings Law, follow the Local Government Center's "Local Call" blog at <http://fyi.uwex.edu/localgovcenter/>, or go to the Local Government center web page and click on the "Local Call" link.

Information on public records management and destruction may be found on the Web sites of the Wisconsin Historical Society and the Public Records Board of the Department of Administration. Go to [www.wisconsinhistory.org](http://www.wisconsinhistory.org) and enter "Local Government Records Program" in the search box. This links to the [Wisconsin Municipal Records Manual](#) and other information of interest. At [www.doa.state.wi.us](http://www.doa.state.wi.us), enter "Public Records Board" (search without quotation marks).

## Acknowledgments

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<sup>1</sup>Wis. Stat. §19.31.

<sup>2</sup>*Ibid.*

<sup>3</sup> See the *Compliance Outline*, p. 3, cited above under “Reference & Advice”. Opinion of Att’y Gen. to Gail Peckler-Dziki, OAG 6-09 (December 22, 2009).

<sup>4</sup>*Fox v. Bock*, 149 Wis. 2d 403 (1989); 77 *Op. Att’y Gen.* 100, 102-03 (1988).

<sup>5</sup>*Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶137; ¶172.

<sup>6</sup> Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at [http://www.doj.state.wi.us/news/files/Memo\\_InterestedParties-Schill.pdf](http://www.doj.state.wi.us/news/files/Memo_InterestedParties-Schill.pdf)

<sup>7</sup>*Zellner v. Cedarburg School District*, 2007 WI 53, ¶¶ 25-31, 56.

<sup>8</sup>*AG-Seiser and Bunge Informal Correspondence, October 4, 2010.*

<sup>9</sup>*State v. Beaver Dam Area Development Corp.*, 2008 WI 90, ¶¶44-45, 66, 72-75, 78.

<sup>10</sup>*Gehl v. Connors*, 2007 WI App 238, ¶¶ 12-15.

<sup>11</sup>*Stone v. Board of Regents of the University of Wisconsin*, 2007 WI App 223, ¶¶ 11-27.

<sup>12</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶178.

<sup>13</sup>*WIREData, Inc.* at ¶89.

<sup>14</sup>Wis. Stat. §19.34(1).

<sup>15</sup>*Grebner v. Schiebel*, 240 Wis. 2d 551 (Ct. App. 2001).

<sup>16</sup>*Schopper v. Gehring*, 210 Wis. 2d 209 (Ct. App. 1997).

<sup>17</sup>*Gehl v. Connors*, 2007 WI App 238, ¶¶ 17-24.

<sup>18</sup>*WIREData, Inc. v. Village of Sussex*, 2007 WI App 22 ¶157; *application distinguished by WIREData, Inc. v. Village of Sussex*, 2008 WI 69 ¶155 (*WIREData II*).

<sup>19</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶¶ 97-98.

<sup>20</sup> See the *Compliance Outline*, p. 50, cited above under “Reference and Advice”

<sup>21</sup>*Opinion of Att’y Gen. to John Muench, Barron County Corp. Counsel*, 1-03 (October 2, 2003).

<sup>22</sup>72 *Op. Att’y Gen.* 150 (1983).

<sup>23</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶107.

<sup>24</sup>72 *Op. Att’y Gen.* 68 (1983).

<sup>25</sup>*Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65.

<sup>26</sup>*State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991).

<sup>27</sup>*Portage Daily Register v. Columbia Co. Sheriff’s Department*, 2008 WI App 30, ¶¶ 15-22.

<sup>28</sup>Wis. Stat. § 19.35(1)(a); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 683 (1965).

<sup>29</sup>*Matter of Estates v. Zimmer*, 151 Wis. 2d 122 (Ct. App. 1989).

<sup>30</sup>*Village of Butler v. Cohen*, 163 Wis. 2d 819 (Ct. App. 1991).

<sup>31</sup>Wis. Stat. § 19.35(1)(a); *Zellner v. Cedarburg School District*, 2007 WI 53, ¶¶ 47-58.

<sup>32</sup>*Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, ¶¶ 35-36.

<sup>33</sup>*Woznicki v. Erickson*, 202 Wis. 2d 178 (1996); and *Milwaukee Teachers’ Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779 (1999).

<sup>34</sup>*Opinion of Att’y Gen. to James R. Warren*, OAG1-06 (August 3, 2006).

<sup>35</sup>*Ibid.*

<sup>36</sup>*Ibid.*

<sup>37</sup>*Zellner v. Cedarburg School District*, at ¶ 32-39.

<sup>38</sup>*The Capital Times Co. v. Doyle*, 2011 WI App 137.