



Public Records for Records Custodians

PRESENTED BY:
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Agenda - Part I

What is the Purpose of the Public Records Law?

Where Can You Find the Public Records Laws

What *Is* a Record?

Responsibilities of Records Custodians

What is the purpose of the Public Records Law?

“It is imperative that we recognize that transparency is the cornerstone of democracy and that citizens cannot hold elected officials accountable in a representative government unless government is performed in the open.” – WI Department of Justice

Wisconsin citizens have the right to know how their government is spending their tax dollars and exercising the powers granted by the people.” – WI Department of Justice

The policy underlying the public records statute is that an informed electorate is essential to the proper functioning of a free and democratic society.



Where can you find the Public Records Law?

Wis. Stats. 19.31-19.39

Declaration of Policy for the Public Records Law

Defines Records Custodians

Notice Requirements

Statutory Limitations to Access/Records that must be withheld

Enforcement and Penalties

MGO 3.70

City's Declaration of Policy

Procedural Information – Form of the Request, Treatment of Data as Records

Access to Records – Fees (Including Reproduction Fees, Locations costs, Prepayment)

When Consultation with the City Attorney is Required

Retention Schedules

Common Law (Case Law)

This is case law created by Courts that binds records custodians.

Example: [John K. McIver Institute for Public Policy v. Erpenbach](#), 2013AP1187 (April 9, 2014)



What is a Record?

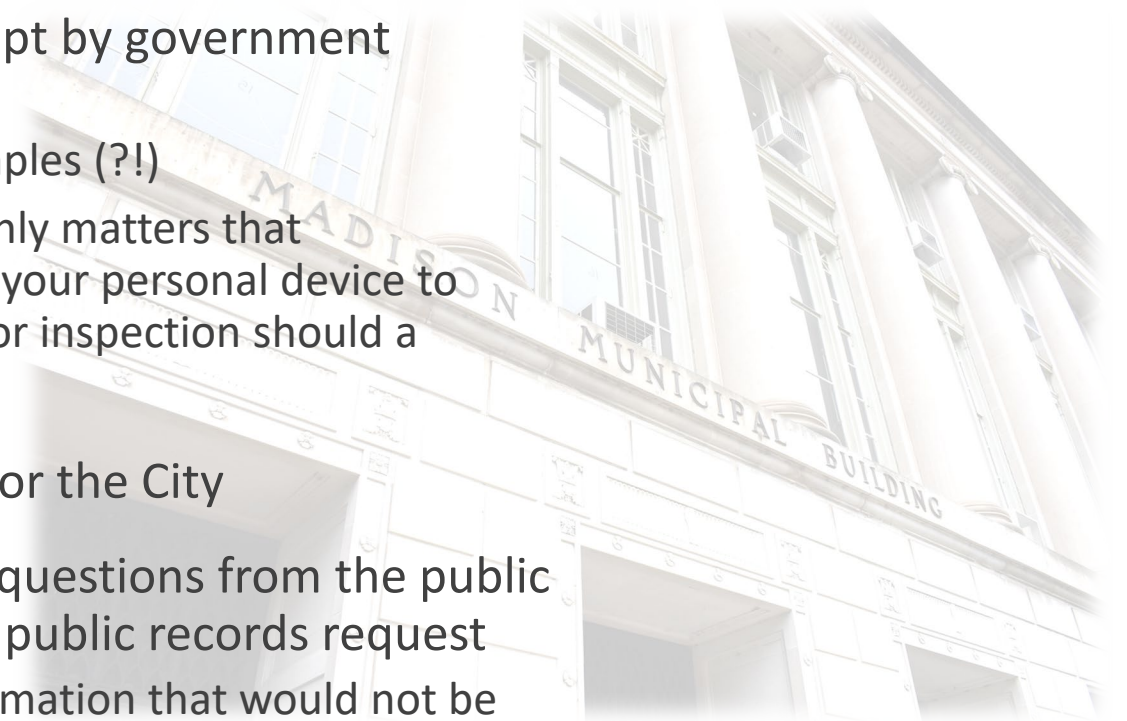
Virtually anything containing information that is kept by government officials/bodies

- ❖ Emails, photographs, maps, recordings, etc. Soil samples (?!)
- ❖ It does not matter where the records are stored, it only matters that governmental business is being discussed. If you use your personal device to conduct governmental business, it leaves that open for inspection should a request for records be received.

Includes records produced by private contractors for the City

A record vs. a request for information – answering questions from the public will sometimes negate a person's need to pursue a public records request

- ❖ However, staff should be careful to not disclose information that would not be disclosed in a public records request.



What is NOT a Record?

Drafts – Are not records if they are not circulated beyond the approving authority (labeling something “draft” does not necessarily make it a draft)

Personal Documents (including emails) – Materials maintained for your own personal use are not public records. This includes your personal notes. This is a very narrow exception.

Computer Programs/Trade Secrets

Copies – Copies of documents which your agency receives from another agency for purely informational purposes and which do not affect the functions of your agency are not public records.

Published/Copyrighted Materials – Materials which are available at the library or available for sale are not public records.

Who is a Records Custodian?

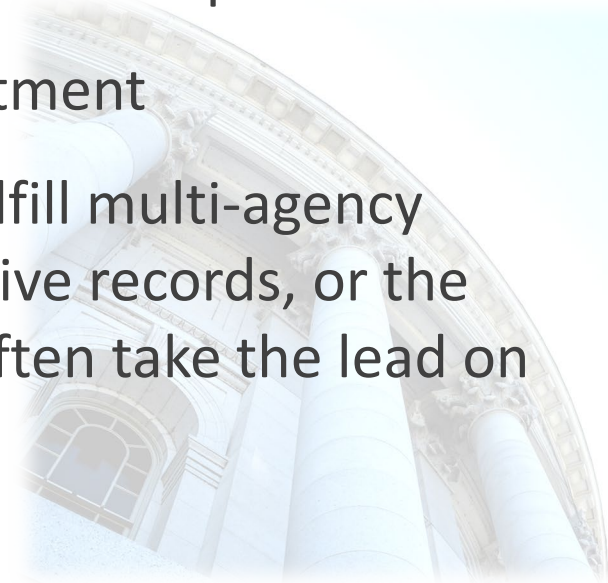
Probably you!

Per MGO 3.70 – “Custodian” means that officer, department head or division head of the City of Madison who is designated by the Mayor or by the terms of this ordinance, to keep and preserve public records. (This responsibility may be delegated to others in the department)

- The City Clerk is the legal custodian of the records of the Common Council as a body politic and for all Common Council boards, committees and commissions.
- Each alderperson is the custodian of their individual official records, such as their correspondence, memorandums and e-mail.
- Every custodian of records shall designate in writing one or more employees to act in his or her absence as an alternate custodian of such records.

Responsibilities of a Records Custodian

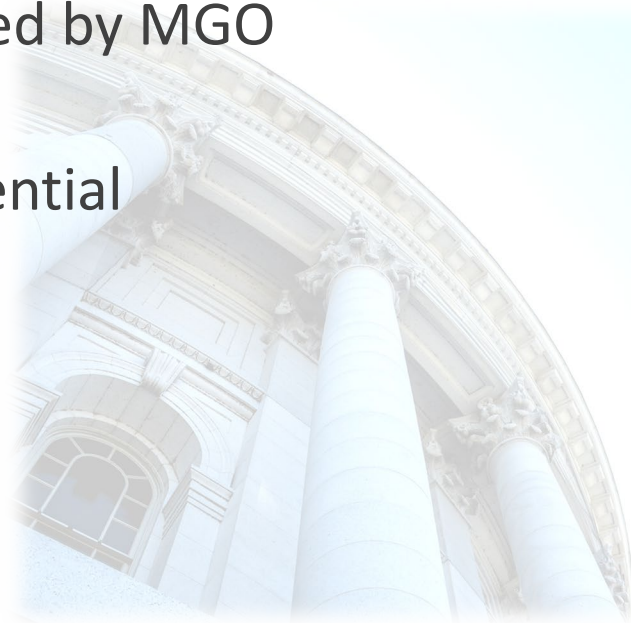
- Must post a Public Records Notice designating the Custodian of Records, and procedures for inspecting public records
- Establish procedures for responding to public records requests
- Fulfill public records requests within their Department
- Communicate with other City Departments to fulfill multi-agency requests. The Department with the most responsive records, or the Department to which the request was made will often take the lead on communicating to the Requestor.



Responsibilities of a Records Custodian (cont.)

➤ Seek guidance from the City Attorney

- When legal questions arise
- When redacting/withholding records (required by MGO 3.70)
- When records are related to litigation or potential litigation
- When you receive a subpoena



Agenda – Part II

The Request for Public Records

- Working With the Requester
- Time Considerations
- Analyzing the Request
- Withholding/Redacting Records and Denials
- Fees (*what you can and cannot charge for*)

Other Considerations

- Notice Rights
- Appeals
- Costs and Fees (*what you can and cannot charge for*)
- Multi-Agency Requests

The Request for Public Records

- How requests can be made – can be written or oral, there are “no magic words necessary” to invoke the public records law
- Requestors may be anonymous
- The requestor has no obligation to provide a reason or motive for the request, nor shall a records custodian consider such factors when responding to a request (very narrow exceptions – when there is a safety threat, purpose of the request can be considered when utilizing the balancing test)
- Requests are to be liberally interpreted to provide the most information possible
- No limit to the number of requests, with a few exceptions (prisoners, committed persons)
 - An incarcerated or committed person is not considered a “requestor” under the public records law unless they are requesting records that contain references to themselves or their minor children

How do I respond to a request?

1. Acknowledge receipt of the request.
 - If the request is simple/straightforward, include in your acknowledgement or shortly after an estimate of how long the request will take/an estimate of costs.
2. If necessary, you may have to ask the requestor to narrow the request, clarify search terms, provide you with a date range, etc.
3. Provide updates to requestor if request takes longer than you originally estimated, or of estimated costs change.
4. WI DOJ guidance suggests **10 days** is sufficient for a simple, straightforward request.
5. Consult with City Attorney if requests are to be denied, records withheld or redacted.
6. Transmit records with a transmittal letter – MUST include appeal language if any records are withheld or redacted. (If request was made in writing)

Let's talk about 10 days!

- This is DOJ *guidance* for a simple, straightforward request with a limited number of easily identifiable records. This is **not** a hard and fast deadline.
- Requestors are not permitted to give you a deadline for processing their request.
- While public records requests should be given high priority, fulfilling them should not interrupt the regular business of the City.
- There is a reasonableness factor to the time it takes to fulfill a request. (If you send a request to the Clerks office the week of an election, you will not likely get the records within 10 days!)
- An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a \$1,000.00 forfeiture.

Analyzing the Request

Access Is Presumed

- The public records law presumes complete public access to public records, but there are some restrictions and exceptions.
- A request is to be liberally interpreted. If a record exists that is close to what the record asks for it is treated as a request for that record.
- Requested records fall into one of three categories:
 - (1) Absolute right of access
 - (2) Absolute denial of access
 - (3) Right of access determined by balancing test



Suggested 4-Step Approach

Step One: Is there such a record?

- If yes, proceed to Step Two.
- If no, analysis stops—no record access.

Step Two: Is the requester entitled to access the record pursuant to statute or court decision?

- If yes, record access is permitted.
- If no, proceed to Step Three.

Step Three: Is the requester prohibited from accessing the record pursuant to statute or court decision

- If yes, analysis stops—no record access.
- If no, proceed to Step Four.

Step Four: Does the balancing test weigh in favor of prohibiting access to the record?

- If yes, analysis stops—no record access.
- If no, record access is permitted.

Creation of Records

- The Public Records Law does not require creation of a record.
- Again, answering questions will sometimes negate a person's need to pursue a public records request.
- While a records custodian is not required to create a record not already in existence, if information can be easily synthesized or compiled, a records custodian should do so.
 - For example, if your department can easily create a spreadsheet of a volume of records requested, it may be easier to do so than to produce every single record.
 - If you are going to fulfill the request in this manner, make sure it is ok with the requestor, *and* get that in writing.

Reasons to Deny a Request - Statutory

- No such records exist (No need for appeal language, but must inform the requestor)
- Request is overly broad and burdensome
- Request is too vague – *A records custodian should not have to guess as to what a requestor is looking for.*
- Item requested is not a public records as defined by Statute
- Material requested is related to a pending investigation (criminal, employment)

Reasons to Deny a Request - Statutory (cont.)

Names of Applicants for Local Public Offices – May be withheld if the applicant has submitted a written request for withholding of their name. However, this does not apply to the final candidates from which the appointment will be made or to the person selected for the position.

Release would Identify Law Enforcement Informants

Statutes Strictly Limit Release to Certain Persons

- Prisoners and Committed Persons

Reasons to Deny a Request – Statutory (cont.)

Request is for a record which contains personally identifiable information that if disclosed would:

- Endanger an individual's life/safety – threat must be specific
- Endanger the security or population of jails, prisons, mental health facilities or centers for the developmentally disabled
- Compromise the rehabilitation of a prisoner, probationer or parolee

Reasons to Deny a Request – Statutory (cont.)

Restrictions on Access to Employee Personnel Records (See Wis. Stat. 103.13 and Chapter 111, Wis. Stats)

- Does not limit an employee's access to *their own* personnel file
- No release of employee's home address, personal email address, home phone #, or SSN w/o the employee's consent
 - This does not apply to elected officials or local public officials with residency requirements
- Information related to current investigation of a possible criminal offense or possible misconduct *connected with employment* prior to the disposition of the investigation
- Employee's employment exam, except if the score is not otherwise prohibited
- Information about employees used by employer for staff management planning, including performance evaluations, judgments, recommendations regarding future salary increases or other wage treatments, bonuses, assignments, references, comments or ratings of employees. Would include commendations, probation reports, etc.

Other Reasons to Deny a Request – Common Law

There are other reasons to deny access to records that are not found in State Statutes. These are created by the courts and are referred to as common law limitations.

- District Attorney Prosecution Files
- Attorney Work Product
- Privileged Attorney/Client Communication – including to the OCA

Analyzing the Request – The Balancing Test

- If neither a statute nor case law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure.
- This “balancing test” determines whether the presumption of openness is overcome by another public policy concern.
- Unless a statutory or court-created exception makes a record confidential, each public records request requires a fact-specific analysis. “The custodian, mindful of the strong presumption of openness, must perform the [public] records analysis on a case-by-case basis.”
- The legislature has entrusted records custodians with substantial discretion.

Denial Letters

What must they contain?

- If the request was in writing, denial must be in writing.
- Reasons for denial must be specific and sufficient.
 - Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
 - If confidentiality of requested records is guaranteed by statute, citation to that statute is sufficient.
 - If further discussion is needed, a records custodian's denial of access to a public record must be accompanied by a statement of the specific public policy reasons for refusal.
 - **The purpose of the specificity requirement is to give adequate notice of the basis for denial, and to ensure that the records custodian has exercised judgment**
- Denial of a written request **must** inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General. This language must be included in any transmittal letter where records are redacted or denied. (Include this exact language in your denial letter!)

Redaction



➤ If part of the record is disclosable, that part must be disclosed.



➤ An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome.



➤ However, an authority does not have to extract information from existing records and compile it in a new format.

Denial of an Oral Request

- If request was made orally, the denial may be made orally.
- If the request is denied orally, the requestor may make a demand for a written explanation within 5 days of the denial.

Notice Rights - Wis. Stat. §19.356

Who is the Subject of the Record?

Public Employee

An individual not appointed, not serving at the pleasure of administration or under contract

- Right to Notice of Custodians Decision to Release a Record
- Right to Pursue Court Action to Stop Release of the Record

Local Public Official

An individual appointed, elected, Department Head

- Right to Notice of Custodians Decision to Release a Record
- No Right to Seek a Court Action to Prevent Release
- May, Within 5 Days of Receipt of Notice, Supplement the Record with Written Submissions

John Q. Public

- No Right of Notice
- No Right of Court Action to Stop Release of the Record
- No Right to Supplement the Record

Notice Rights - Wis. Stat. §19.356 (cont.)

➤ Notice Rights are required when:

1. The records contains information about an employee which is the result of a disciplinary investigation or possible work-related rule, ordinance or statute violation by an employee.

OR

2. The record is obtained by search warrant or subpoena.

OR

3. The record of an employer other than the custodian, related to that employer's employee(s), unless such employee(s) consent to the release.

Who gets these Notices?

- Any "Record Subject" – Defined as "an individual about whom personally identifiable information is contained in a record. (Wis. Stat. 19.356(2g))

Notice Rights - Wis. Stat. §19.356 (cont.)

- Notices must be sent within 3 days of the decision to release the record.
- A Records Custodian must send notice by certified mail or by personal service (consider hiring a professional process server).
- Notices must provide a brief description of the record requested.
- Must inform the person of their rights to:
 - Court review of the decision, or;
 - Written supplement to the record (if local public official).
 - Local Public Official may submit within 5 days of receipt of notice that record is being released, and a Records Custodian MUST include the written supplement with released materials.

Notice Rights - Wis. Stat. §19.356 (cont.)



- Regardless of whom the notice was sent to, the Records Custodian shall not provide access to the record within 12 days of sending such a notice.
- A Records Custodian may not release the record during litigation over whether the record is to be disclosed.
- All employees other than Local Public Officials have the right to ask a court to stop the release of the record.

An Appeal of a Denial of Records

What does the Court examine?

- If denial of a public records request is challenged in a mandamus proceeding, the court will examine the sufficiency of the reasons stated for denying the request. On mandamus review, custodians who are lawmakers are *not entitled to a heightened level of deference* to their application of the balancing test.
- On review, it is *not the court's role to hypothesize or consider reasons not asserted by the records custodian's response*. If the custodian fails to state sufficient reasons for denying the request, the court will issue a writ of mandamus compelling disclosure of the requested records.

If You Receive a Subpoena

- Notify the City Attorney's Office immediately
- Do not lose or ignore the subpoena
- Do not release records just because they have been subpoenaed



Obligation to Preserve Responsive Records

- When a public records request is made, the authority is obligated to preserve responsive records for certain periods of time.
 - After receiving a request for inspection or copying of a record, the authority may not destroy the record until after the request is granted or until at least sixty days after the request is denied (ninety days if the requester is a committed or incarcerated person). These time periods exclude Saturdays, Sundays, and legal holidays.
 - If the authority receives written notice that a mandamus action relating to a record has been commenced under Wis. Stat. § 19.37 (an action to enforce the public records law), the record may not be destroyed until after the order of the court relating to that record is issued and the deadline for appealing that order has passed.
 - If the court order in a mandamus action is appealed, the record may not be destroyed until the court order resolving the appeal is issued.
 - If the court orders production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying has been granted.
 - An authority or custodian does not violate Wis. Stat. § 19.35(5) by destroying an identical copy of an otherwise available record.

Responses are Records

- Responses to public records requests are themselves “records” for purposes of the public records law.
- Public Records Requests must be retained for a period of 3 years.



Providing the Records – Costs & Fees

What can a Records Custodian charge for?

- [Fee Schedule](#) - on EmployeeNet and available to the public on the Clerk's Office website
- Can only charge the actual and necessary costs of reproducing other media
- Can only charge for location costs if they exceed \$50 – Location costs include your time reviewing records for responsiveness. Location costs *do not* include the time it takes to make redactions.
- A Records Custodian may require a prepayment if costs exceed \$5

Special Considerations

Requests for Videos/Photos

- If you encounter video or still photo from video as a part of a public records request where the records may depict criminal acts please reach out to MPD at pdrecords@cityofmadison.com prior to release so the MPD case status can be checked by MPD. This includes crashes of any kind.
- Additionally, MPD has redaction software so if you encounter video records that need redaction, requesting MPD assistance may be beneficial



If you have unredacted police reports as a part of your files, you have two options:

1. Check with MPD regarding what to release/what should be withheld.
2. Inform the requestor they will need to contact MPD for those records.

Special Considerations (cont.)

Personal Email

- Personal email on your City account is not considered a public record (per WI Supreme Court), BUT is subject to inspection or review at any time (APM 3-6).

APM 3-6

While employees are permitted to make limited personal and incidental use of the City's email system, they should be aware that whatever they write in an email may be subject to the Public Records laws or to civil discovery. Employees should not expect any privacy in their email communications as these records are subject to inspection and review at any time; assume the content of every email may be publicly disclosed.

- Also refer to [APM 3-9 Appropriate Use of Computer Network Resources](#) - Personal email can be used for disciplinary purposes if work rules/policies are violated.

Special Considerations (cont.)



Multi-Agency Requests

- Typically, the department with the most records will take the lead on communicating with the requestor and fulfilling the request, with records provided by other departments.
- If you receive a request and are aware another department may have records, please forward the request to that department's records custodian.

Resources

Adriana Peguero, OCA

- Public Records on City Attorney's website
 - [Wisconsin Public Records Law Compliance Guide 2019](#) (PDF)
 - [Madison General Ordinance 3.70](#)
 - [Public Records Requests](#) – City Clerk's website

Leslie Starczewski, IT

- [EmployeeNet/Information Technology/Records Management](#)
- [APM 3-6](#) - Retention Schedules [Appendix A \(General\)](#) & [Appendix B \(MPD\)](#)
- IT [Public Records & Data Requests Policy](#)

