



Assistant City Attorney Roger Allen City Attorney's Office
Madison, Wisconsin

WISCONSIN'S PUBLIC RECORDS LAW OVERVIEW

Inspection: THE PRESUMPTION

- **Public policy favors the inspection of government records. There is a statutory (legal) presumption in favor of access to government records. The policy underlying this statute is that an informed electorate is essential to the proper functioning of a free and democratic society.**

Who Is A Custodian of Records?

The Person designated by the Mayor to keep and preserve the requested public record or who is required by law to file, deposit, or keep such public records, or who is lawfully in possession or lawfully entitled to possess such records.

Sec. 3.42(2) MGO





Who Is A Custodian of Records

- Custodian may be the Department or Division head, Committee Chairperson, or other designated person
- Most committees have a staff person assigned who will fulfill this role

Responsibilities of a Custodian

- Post a Public Records Notice Designating the Custodian of Records and procedures for inspecting public records
 - New – Notice Must Designate Those persons in the Dept./Div. Who are “Local Public Officials”
- Establish a Procedure For Responding to Public Records Requests
- Process Public Records Requests Within Their Department/Division

The Request for Public Records

- Request may be oral or in writing
- The Requestor may remain anonymous however, there are limitations on public records access for:
 - Incarcerated persons (prisoners)*
 - Committed persons (Resident at an Inpatient Treatment Facility)*

The Request for Public Records

- The Requestor does not need to provide a reason, need or motive for the request NOR can we consider such factors in responding to the request
- The request must be liberally interpreted, in that, if a record exists that is close to what the requestor asks for, it is treated as a request for that record

Information vs. Records

- The Public Records Law does not require creation of a record
- The Public Records Law is not a barrier to discussing non-confidential information. Just answering questions will sometimes negate a person's need to pursue a public records request

Determining the Existence of a Record

- A record is virtually everything containing information, if it has been created or is being kept by government officials/bodies (including email)
- Records produced or collected by a private contractor for the City are public records

Records: Exceptions to the Rule

- Drafts - are not records if they are not circulated beyond the approving authority
- Personal Documents – materials maintained for your own personal use are not public records (very narrow exception)

Records: Exceptions to the Rule

- Personal Notes – used solely to refresh your recollection at a later date BUT ONLY IF THEY ARE NOT SHARED WITH OTHERS OR MAINTAINED TO MEMORIALIZE AGENCY ACTION
- Computer Programs/Trade Secrets – are not public records



Records: Exceptions to the Rule

- 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



Records: Exceptions to the Rule

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

Inspection: Statutory Basis for Denial

- REQUEST IS TOO VAGUE
- REQUEST IS TOO BROAD



Inspection: Statutory Basis for Denial

- NO SUCH RECORD EXISTS
- ITEM REQUESTED IS NOT A PUBLIC RECORD AS DEFINED BY STATUTE
- MATERIAL REQUESTED IS RELATED TO A PENDING INVESTIGATION

Inspection: Statutory Basis for Denial

- 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 to fill a position.

Inspection: Statutory Basis for Denial

- RELEASE WOULD IDENTIFY LAW ENFORCEMENT INFORMANTS
- STATUTES STRICTLY LIMIT RELEASE TO CERTAIN PERSONS

Inspection: Statutory Basis for Denial

- Request is for a record which contains personally identifiable information that if disclosed would:
 - Endanger an individual's life/safety
 - Endanger the security or population of jails, prisons, mental health facilities or centers for developmentally disabled
 - Compromise the rehabilitation of a prisoner, probationer or parolee

Inspection: Statutory Basis for Denial

- Restrictions on Access to Employee Personnel records – Does not limit an employee's access to their own personnel file – See Wis. Stat. 103.13 And Chapter 111, Wis. Stats.
 - No release of home address, personal email address, home phone #, or SSN w/o employee's consent
 - Does not apply to elected officials or local public officials w/ residency requirements



Inspection: Statutory Basis for Denial

- Information related to current investigation of a possible criminal offense or possible misconduct *connected with employment* prior to disposition of investigation
- Employee's employment exam, except the score if access to score is not otherwise prohibited



Inspection: Statutory Basis for Denial

- Information about employee(s) used by employer for staff management planning, including performance evaluations, judgments, recommendations re: future salary increases or other wage treatments, bonuses, assignments, references, comments or ratings of employees. Would include commendations, probation reports, etc.



Inspection: Statutory Basis for Denial

- No access to records with employee names/personally identifiable information of a contractor required to pay prevailing wage rate unless otherwise authorized by the specific employee or by state statutes. May release employee's work classification, hours, wages/benefits while working on such a project.



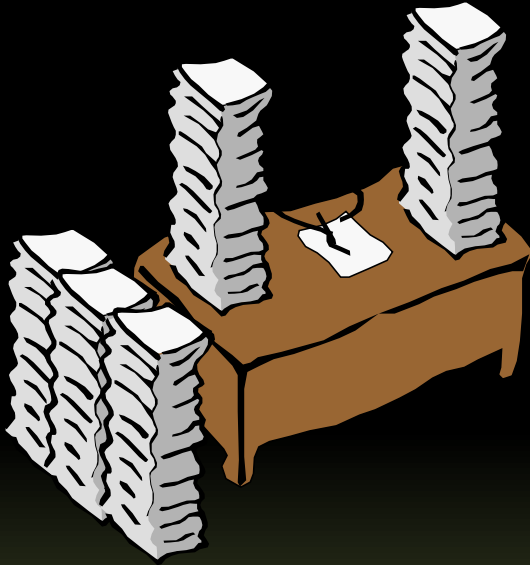
Inspection: Common Law (case law) Limits

- These are limitations which are not found in the statutes. They are created by the courts of this state and are based upon various public policies.

Inspection: Common Law (case law) Limits

- DISTRICT ATTORNEY PROSECUTION FILES
- ATTORNEY WORK PRODUCT
- RELEASE WOULD IDENTIFY CONFIDENTIAL (Non-Law Enforcement) INFORMANTS

Inspection: Redactions



- Often it is possible to black out (redact) portions of records which cannot be released and release the edited version of the record
- Generally speaking, the record copy should be provided to the requestor in the same format as the original record

Inspection: The Balancing Test



When there is no specific statute or common law principle forbidding disclosure the custodian performs the following balancing test:

Inspection: The Balancing Test

Whether the harm to public interest from inspection of the records outweighs the public interest favoring inspection of such records.

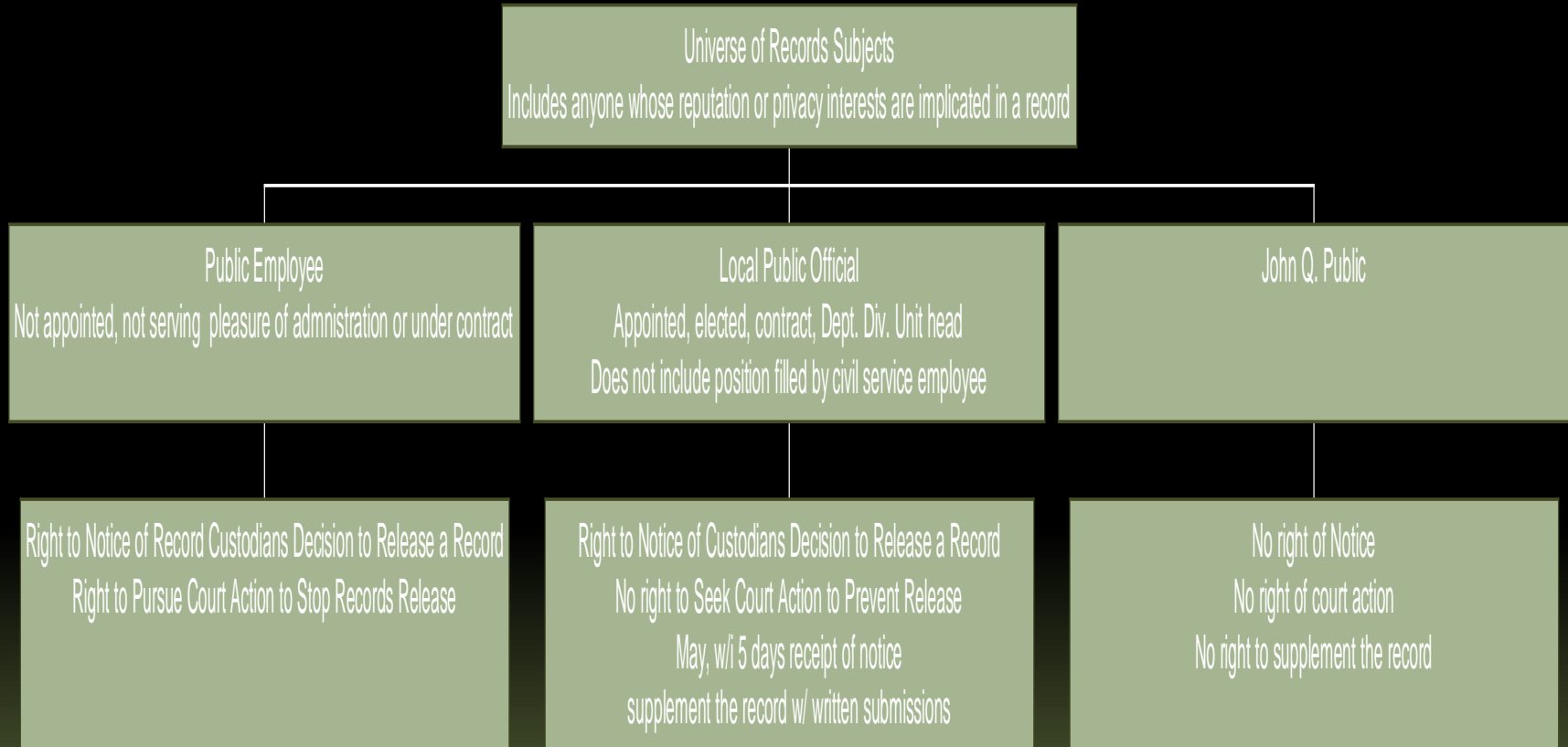


Inspection: Woznicki Notices



- The *Woznicki* decision is no longer good law. It required a custodian to notify the subject of a record that was about to be released so that person could pursue court action to stop release

§19.356 Notice Rights



§19.356 Notice Rights

- Notice only required when:
 1. Record contains info about an employee which is the result of disciplinary investigation or possible work related rule, ordinance or statute violation by employee;
 2. Record obtained by search warrant or subpoena;
 3. 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 and all records subjects identified in the record –
 - 19.32(2g), Wis. Stats. Defines “record subject” as “an individual about whom personally identifiable information is contained in a record.”

When must these notices be sent?

- Within 3 days of the decision to release the record
- Send notice by certified mail or by personal service (consider hiring a professional process server)

What do these notices have to say?

- Must provide a brief description of the record
- Must inform the person of their rights to
 - court review of the decision, or;
 - Written supplement of record (if local public official)

Supplementing Record

- Local Public Officials may submit written supplement within 5 days of receipt of notice that record is being released. CUSTODIAN MUST INCLUDE WRITTEN SUPPLEMENT WITH RELEASED MATERIALS
- Local Public Official – intended to cover high profile officials with policy making authority. Includes all Dept./Div. Heads and more, see §19.32(1dm), Wis. Stats.
 - *Note : The Comm. Which drafted change recognized its term is vague and may result in litigation*

Waiting Period

- Regardless of whether the notice was sent to a local public official or other employee, the records custodian shall not provide access to the record within 12 days of the sending of such a notice
- May not release the record during litigation over whether the record will be disclosed

Court Review

- All Employees other than Local Public Officials have the right to ask a court to stop the release of the record
 - May provide notice of intent to seek court action w/i 5 days receipt of notice
 - Must commence court action w/i 10 days of receipt of notice

Providing the Records: Costs & Fees



- Photocopying fees set forth in MGO
- Actual & Necessary costs of reproducing other media
- No charge for locating a record unless such costs exceed \$50.00
- May require prepayment if costs exceed \$5.00
- Milwaukee passes along costs of serving §19.356(2)(a) Notices to records subjects

Denial of Request

- If request was made orally – denial may be made orally
- Requestor may make a demand for a written explanation within 5 days of the denial

Denial of Request

- If request was written – denial must be in writing and state specific reasons supporting the denial

Court Review

- The requestor may ask a court to review a denial (or partial denial), or they may request the Attorney General or the local District Attorney to review the denial
- They will only consider those reasons for denial that were set forth in the written denial

Destruction of Records

- No record may be destroyed while a request is pending or at anytime within 60 days after a request has been denied

If You Receive a Subpoena

- Do Not Lose nor Ignore the Subpoena
- Do Not Release Records Just Because They Have Been Subpoenaed
- Immediately Inform Your Assigned Staff and Contact the City Attorney's Office



CONTACTS :

- ACA Roger Allen 261-9156
- CA Michael P. May 266-4511



**WE HAVE REACHED THE END.
THANK YOU FOR YOUR ATTENTION
AND PARTICIPATION.**