



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Public Records and Personal Electronic Devices

Much of the material in a legislator's office or kept by a legislator qualifies as a "public record" under Wisconsin's Open Records Law. [ss. 19.31 to 19.39, Stats.] With certain exceptions, this material is required to be available for inspection and copying by the public, including the news media. Whether a given piece of information is a "public record" and open to inspection depends upon its content, not its form or location. This presents some interesting issues regarding Wisconsin's Open Records Law and its relationship to personal electronic devices.

#### **PUBLIC RECORDS LAW**

Wisconsin law favors disclosure of public records to the greatest extent practicable. "[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." [s. 19.31, Stats.] Public records law shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. [s. 19.31, Stats.] In reality, few requests to inspect or copy records are denied. Due to the legal complexity and political sensitivity of public records requests, a decision to refuse a request should not be made lightly.

#### **DEFINITION OF "RECORD"**

"Record" means 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. [s. 19.32 (2), Stats.] Records are those created or kept in connection with an authority's official purpose or function. [72 Op. Att'y Gen. 99, 101 (1983).] A record does *not*, according to the Attorney General, include the following:

- Personal property of the legislator that has no relation to his or her office of legislator.
- Drafts, notes, preliminary computations, and similar material prepared for the originator's personal use or prepared in the name of a legislator by a member of his or her staff.
- Material to which access is limited by copyright, patent, or bequest.
- Published materials that are available for sale or are available at a public library.

## **INFORMATION ON PERSONAL ELECTRONIC DEVICES**

People store an increasing amount of information on personal electronic devices, such as cell phones, Personal Digital Assistants (PDAs), and handheld computers. These devices possess an incredible capacity to create and store documents, correspondence, contacts, calendars, and the myriad of other forms of information vital to our personal and professional lives. For public officials subject to the Wisconsin Open Records Law, special consideration must be given to the use of these devices for any activity related to that individual's office.

Though there is little guidance available on the interaction of public records law and personal electronic devices, some guidance can be gleaned from similar cases involving the use of private technology. A recent informal Attorney General Opinion addressed the issue of a town chair maintaining a social networking website on which town business was discussed. [Informal Wisconsin Attorney General Opinion I-06-09, December 23, 2009.] The Attorney General opined that the information was likely a public record to which the requester was entitled access. The public official claimed that it was a personal website, but the determining factor for the Attorney General was the content of the record, not an examination of the nature of the record at the time of its creation.

## **CONSIDERATIONS FOR RESPONDING TO REQUESTS FOR RECORDS**

Though the 2009 Attorney General Opinion does not definitively determine the treatment of information on personal electronic devices, it supports the following propositions:

1. Information being kept by a public official will be examined for its content, rather than for its form or the medium in which it is stored, or the ownership of the device on which it is stored.
2. Information on an electronic device belonging to a public official that is purely personal, such as vacation photos or private appointments, would likely not constitute a record that would require disclosure. When matters relating to the public office are presented and received, however, the likelihood that the record is one to which the public is entitled access increases.
3. Determination of the public nature of any particular record is fact-specific, and there are a number of factors that need to be considered (some of which are outlined in Informal Opinion I-06-09). Denial of a request can have serious consequences, both legal and political.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Chadwick Brown, Staff Attorney, on February 9, 2011.

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