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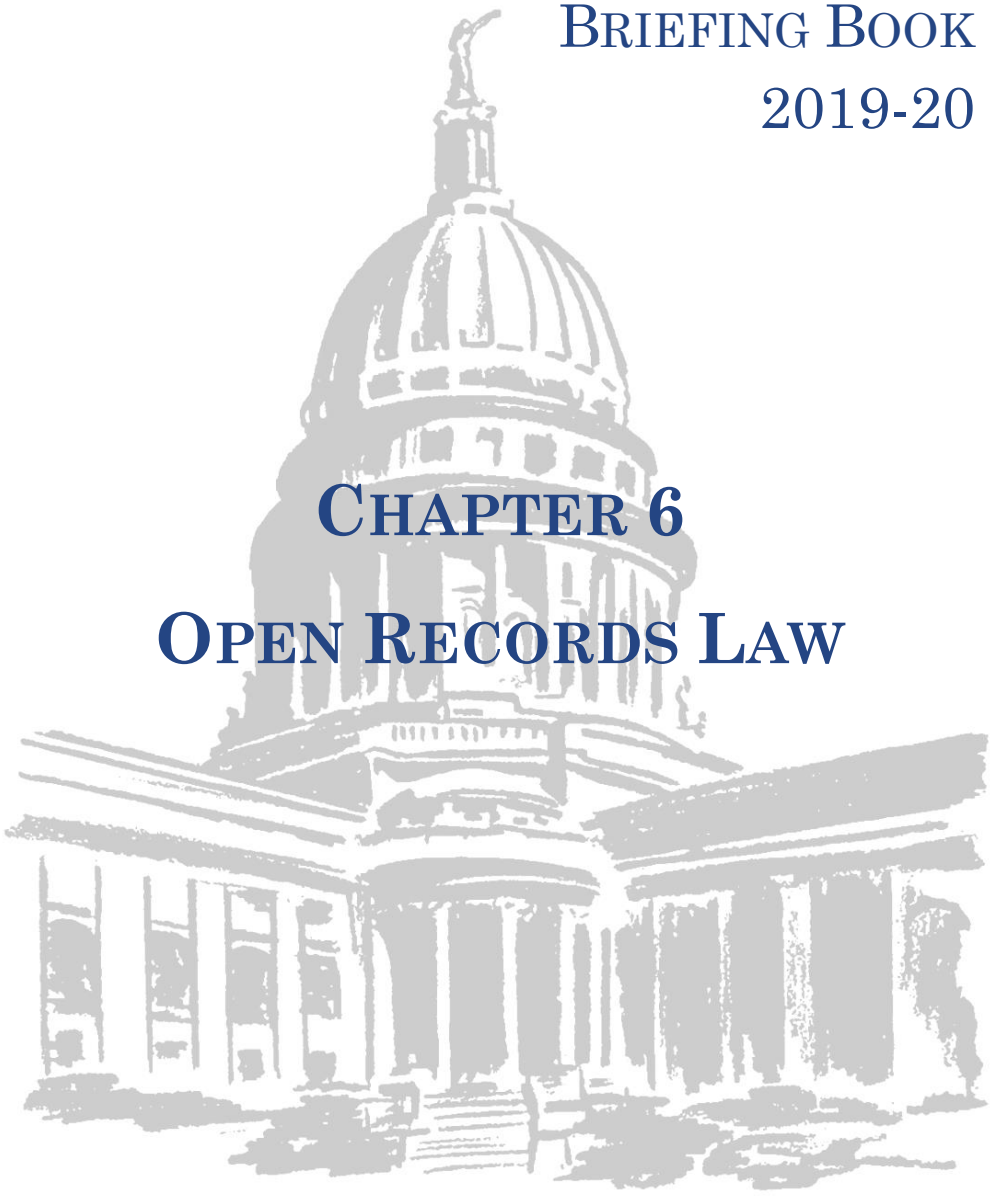

Chapter 6

Open Records Law

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INTRODUCTION

The Wisconsin Open Records Law governs requests for government information. The declared policy of the Open Records Law is to entitle the public to the "greatest extent possible information regarding the affairs of government and the official acts of those officers and employees who represent them" in order to ensure an informed electorate. The Open Records Law further indicates that providing the public with such information is an "essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information." [s. 19.31, Stats.] The Open Records Law is set forth in ss. 19.31 to 19.39, Stats.

The purpose of this chapter is to set forth the steps a legislator may take to respond to an open records request. Although the chapter is specific to legislators, most of the Open Records Law requirements described below also apply to other public officials and entities.

OPEN RECORDS LAW

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. This material is required to be available for inspection and copying by the public, including the news media.

As an example, correspondence from and to a constituent is a public record and generally is open to inspection. Although personal correspondence between individuals is usually thought to be private, legislators are public officials and correspondence with them is public, unless the Open Records Law provides a reason to deny access. For example, in certain very limited circumstances, a legislator may redact from a letter personally identifiable information about a constituent.

Legislators are advised, prior to responding to a request to inspect records, to seek additional advice beyond that set out in this chapter. Legislative leaders can provide pragmatic and political advice. Legislative Council staff can provide procedural advice, as can the Wisconsin Department of Justice (DOJ). DOJ publishes a *Wisconsin Public Records Law Compliance Outline*, available at:

https://www.doj.state.wi.us

The general rule under the Open Records Law is that all records held by a legislator are open to the public unless a specific provision in the law allows the records to be kept confidential. This rule embodies the public policy of the state that all persons should have the greatest possible information about the decisions and activities of state and local government. In practice, very few requests to inspect or copy records are denied.

A decision to deny access to a record should be made very carefully, since it may be challenged—in court, in the news media, or in partisan debate. Not only are decisions to deny access to records legally and politically sensitive, but the law on public records is complex and difficult to apply in specific instances. The Open Records Law is based on elements of the Wisconsin Constitution, statutes, and case law. This chapter summarizes key information from these sources and provides general advice in responding to records requests.

Responding to Open Records Requests

Clarify, in Advance, Who is the "Custodian" of the Office's Records

The custodian is the person in a legislator's office who responds to a request to inspect records.

The custodian is the person who responds to a request to inspect records. Each legislator is automatically the custodian of his or her records, unless an office staff member is designated as custodian. [s. 19.33 (1), Stats.] A legislator and his or her staff should have a clear understanding of who makes the decisions when responding to a request to inspect records.

In most cases, it appears preferable that a legislator retain the role of custodian of his or her records, since the legislator is the person directly affected by an inappropriate release or denial of records. Note, however, that in the event that a request is made during a period of time that a legislator is unavailable (e.g., a vacation), action on the request will be delayed. The law makes no provision for appointment of a temporary custodian under such circumstances.

Respond Reasonably Promptly to a Request

A response to a record request must be made "as soon as practicable and without delay." Simple requests should be answered within 10 working days.

A response to a record request must be made "as soon as practicable and without delay" under the law. [s. 19.35 (4) (a), Stats.] In practical terms, a custodian may need some amount of time to retrieve and inspect the record before formulating a response. The Attorney General has indicated that 10 working days is a reasonable time period for a simple request for easily identifiable records. Complex or extensive requests may take considerably longer. [See, *Wisconsin Public Records Compliance Guide*, p. 15, Wisconsin Department of Justice, Attorney General Brad Schimel, March 2018.]

The response to a request for a record is either: (1) to provide the record; or (2) to deny the request in whole or in part. If a written request is denied, the reasons for the denial must be given in writing. [s. 19.35 (4) (b), Stats.]

Respond to a Request in Kind

If a request is made orally, and is going to be denied, the denial may be made orally. If a requester who was orally denied a request later demands a written statement of denial, and the demand is made within five business days of the oral denial, the written statement must be provided.

An oral request may be responded to orally. A written request must be responded to in writing.

If a request is made in writing, the response must be in writing giving the reasons for the denial. Written responses denying or redacting from requests must include this statement: "This determination is subject to review by mandamus under s. 19.37 (1), Stats., or by application to the Attorney General or a district attorney." [s. 19.35 (4) (b), Stats.]

Demand That a Request be Reasonably Specific

A request must be honored if it "reasonably describes the requested record or the information requested." [s. 19.35 (1) (h), Stats.] However, requests to go through an office's files (sometimes referred to as a "fishing expedition") do not have to be honored.

There is no blanket exemption for constituent mail. In most cases, it is a "record," although in certain very limited circumstances, a legislator may redact from a letter personally identifiable information about a constituent.

For example, requests such as the following must be given a response: "All constituent mail on Assembly Bill 000" and "all correspondence on the Highway XO project in your district."

In addition, there is no blanket exemption for constituent mail. In most cases, constituent mail is a "record," although in certain limited circumstances a legislator may redact from a letter personally identifiable information about a constituent. For example, a legislator may be able to redact medical information or financial identifiers, as well as other items with specific statutory exemptions, like income tax return information.

Seeking Identity of Requester; Purpose of Request

A record request may not be denied because the requester refuses to provide identification or to state the purpose of the request. However, if the record is at a private residence, or valid security reasons exist, a requester may be required to show acceptable identification. [s. 19.35 (1) (i), Stats.]

A request may not be denied because the requester refuses to provide identification or to state the purpose of the request.

In addition, if it is known that a person making a record request is an incarcerated person or a person committed to an inpatient treatment facility, a legislator is under no obligation to respond to the request, unless one of the following applies:

- The record contains specific references to the person or to his or her minor children to whom he or she has not been denied physical placement.
- The record is otherwise accessible to the person by law. [s. 19.32 (3), Stats.]

Decide if the Requested Material is a "Record"

A "record" is any material which bears information, regardless of form ("written, drawn, printed, spoken, visual, or any other medium on which electronic data is stored") and which was created by or is being kept by a custodian, **except** any of the following:

- Personal property of the legislator that has no relation to his or her office.
- Drafts, notes, preliminary computations, and similar material prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working.
- 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.

[s. 19.32 (2), Stats.]

A "record" is any material which bears information, regardless of form, and which was created or is being kept by a custodian.

If the requested material falls into one of the above exceptions, it is not a "record" and the request may be denied for that reason.

Make a Decision on the Request

The "balancing test" seeks to measure harm done to the public interest by disclosure against the right of access to public records.

It is the public policy of the state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. The Open Records Law is to be construed with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest. [s. 19.31, Stats.] Access may be denied only in exceptional cases—that is, under specific statutory or common law exemptions and in cases where it can be demonstrated that the harm done to the public interest by disclosure outweighs the right of access to public records. The measurement of harm done to the public interest by disclosure versus access to public records is commonly called the "balancing test." [s. 19.35, Stats.]

If a record requester appears in person, a legislator may permit the person to photocopy the record or provide the person with a copy substantially as readable as the original. Similar provisions apply to records in an audio, video, photographic, or computer format. [s. 19.35 (1) (b) through (f), Stats.] The legislator must provide a record requester with facilities comparable to those used by employees to inspect, copy, and abstract the record during established office hours. However, the legislator is not required to purchase new equipment or provide a separate room for a record requester. [s. 19.34, Stats.]

If a legislator decides to provide access to a record, a person identified in the record must be given an opportunity to seek judicial review of the decision prior to release of the record if any of the following apply:

- The record is the result of an investigation into an employee disciplinary matter.
- The record is obtained through a subpoena or search warrant.
- The record is prepared by an independent contractor and it contains information relating to an employee of the independent contractor.

See sample letter #1 at the end of this chapter for an example of a letter granting an open records request.

However, in the case of any record containing information identifying a state or local public official, a legislator, prior to the release of the record, must provide the official with an opportunity to augment the record with written comments and documentation. [s. 19.356, Stats.]

Denial of a Request

In some instances, access to records may be denied. However, any written denial must specifically cite a statutory or common law exemption or demonstrate that there is a need to restrict public access at the time the request is made. The exemptions in the Open Meetings Law are used as a guide for denial. [s. 19.85, Stats.] The applicable exemptions in that law are:

- Deliberating about a case that was the subject of any judicial or quasi-judicial trial or hearing before the particular governmental body.
- Considering dismissal, demotion, licensing, or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such a person and taking formal action on any such matter.
- Considering employment, promotion, compensation, or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
- Deliberating or negotiating purchasing of public properties, investing public funds, or conducting other specific public business, if competitive or bargaining reasons require a closed session.
- Considering financial, medical, social or personal histories, or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons, in which public discussion would likely have a substantial adverse effect on the reputation of any person referred to in such histories or data, or involved in the problems or investigations.

Legislative Council staff or the Attorney General's office can advise a legislator of the exemptions in the Open Records Law.

- Conferring with the governmental body's legal counsel who is rendering oral or written advice concerning strategy to be adopted regarding litigation in which the body is or is likely to become involved.
- Considering a request for confidential written advice from the Elections Commission, the Ethics Commission, or from any local government ethics board.
- Considering matters related to acts by businesses under the state's Economic Adjustment Program (where a business is shutting down or laying off employees) in which public discussion could adversely affect the business, its employees, or its former employees.

[s. 19.85, Stats.]

See sample letter #2 at the end of this chapter for an example of a denial of a request.

In addition to the above, meetings can also be closed to discuss probation or parole applications, crime fighting strategy, burial sites, and certain Unemployment Insurance Advisory Council and Worker's Compensation Advisory Council matters. In specific situations, these less-common grounds may be applicable to a record request made to a legislator.

The Wisconsin Supreme Court has stated that access to information collected under a pledge of confidentiality, where the pledge was necessary to obtain the information, may be denied. [See, *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142 (1991).] The Open Records Law also exempts records from access if: (1) federal or state law requires nondisclosure; (2) the record is a computer program; (3) the record is a trade secret; or (4) the record contains specified personal information regarding an employee. [s. 19.36, Stats.] Other statutory and common law exemptions exist—a legislator can be advised of the exemptions in the Open Records Law by Legislative Council staff or the Attorney General's office.

Partial Denial

If a portion of a record qualifies for confidential treatment, the remainder must be released. In those instances, a legislator should either separate the confidential information, or delete it and release the remainder. [s. 19.36 (6), Stats.]

Provide Copies on Request

A fee may be charged for copies based on copying charges established by the chief clerk in each house of the Legislature.

Persons having a right to inspect a record are entitled to a copy, if they ask for it. The custodian should copy the record in order to retain control over the original record. A fee for copying, which does not exceed the actual copying cost, may be charged based on per copy charges established by the chief clerk in each house of the Legislature. A search fee also may be imposed, but only if the cost of the search is $50 or more. [s. 19.35 (3), Stats.]

In 2012, the Wisconsin Supreme Court released a decision that altered the way legislative offices may respond to open records requests. [See, *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65.] Prior to this decision, Legislative Council staff advised that legislative offices could charge open records requesters for costs associated with the redaction of data determined to be closed under the Open Records Law. This recommendation was based on the lower court decision that permitted a record custodian to charge for the costs associated with the time spent redacting nonreleasable data from records. The Supreme Court reversed this decision, concluding that the City of Milwaukee, as record custodian in this case, "may not charge the Newspaper for the costs, including

staff time, of redacting information." [*Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 6.] The Court further clarified that it came to its decision because redaction costs do not fit within the fees permitted to be charged under s. 19.35 (3), Stats. Therefore, it is no longer permissible for record custodians to charge for the cost of redaction.

Additional References

Wisconsin Public Records Law Compliance Guide, Wisconsin Department of Justice (March 2018), https://www.doj.state.wi.us.

Glossary

Balancing test: A test that seeks to weigh the harm done to the public interest by disclosure of records against the right of access to public records.

Custodian: The person in a legislator's office who responds to a request to inspect records.

Record: Any material which bears information, regardless of form, and which was created or is being kept by a custodian.

Sample Letters

1. Granting a Request

Dear ___ _____:

This letter is written in response to your open records request addressed to me, dated ____ __, ____, in which you request:

_____<Insert Request>_____

Your request has produced _____records. At the rate of $.15 per page for copying, the copying cost is $_____. Please make payment in the form of a check to "State of Wisconsin" and send it to:

Wisconsin State Senate
c/o Jeff Renk, Senate Chief Clerk
P.O. Box 7882
State Capitol, Room B20SE
Madison, WI 53707

You may pick up the results of your request at my office following payment. If you have any questions concerning this response, please feel free to contact me.

Sincerely,

Senator _____
___ Senate District

2. Denying a Request on the Basis of Overbreadth

Dear ___ _____:

This letter is written in response to your open records request addressed to me, dated ____ __, ____, in which you request:

> All emails received by my office.

I am denying this request on the basis of s. 19.35 (1) (h), Stats., which requires that a record request must have a "reasonable limitation as to subject matter or length of time represented by the record." Your request specifies neither of these factors and is therefore, in my estimation, overbroad.

If you have any questions concerning this response, please feel free to contact me. Pursuant to s. 19.35 (4) (b), Wis. Stats., this reply is subject to review by mandamus under s. 19.37 (1), Wis. Stats., or by application to the Attorney General or a district attorney.

Sincerely,

Representative _____
___ Assembly District

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Madison, WI 53703-3382
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