



**Wisconsin
Public Records Law
Wis. Stat. §§ 19.31-19.39**

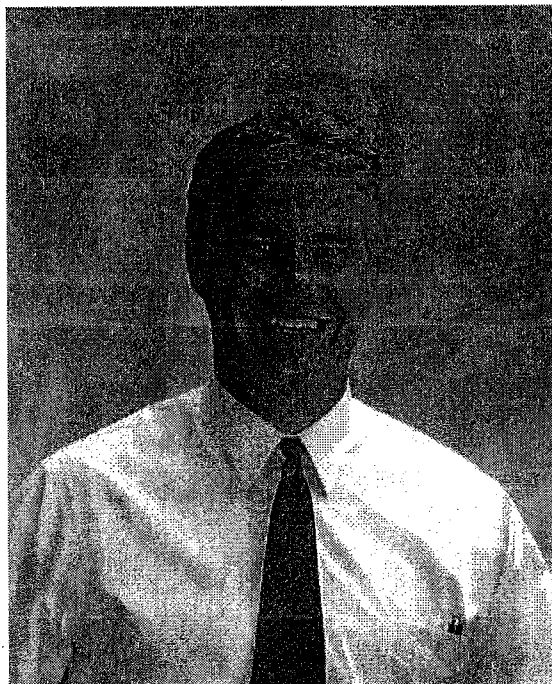
COMPLIANCE OUTLINE

August 2010

DEPARTMENT OF JUSTICE
ATTORNEY GENERAL J.B. VAN HOLLEN

Attorney General's Message

By Attorney General J.B. Van Hollen



Effective citizen oversight of the workings of government and government employees is essential to democratic government and confidence in that government. Access to public records by citizens is a vital aspect of this principle. Raising awareness, sharing information, and promoting compliance with Wisconsin public records laws is an ongoing part of the mission of the Wisconsin Department of Justice.

This Public Records Compliance Outline is not a comprehensive interpretation of the public records law. Its aim is to provide a workable understanding of the law by explaining fundamental principles and addressing recurring questions. Record authorities, record custodians, record requesters, and others seeking legal advice about application of the public records law to specific factual situations should direct questions to their legal advisors.

The Public Records Compliance Outline also is available on the DOJ website, at www.doj.state.wi.us, to download, copy, and share.

As Attorney General, I cannot overstate the importance of fully complying with the public records law, and fostering a policy of open government for all Wisconsin citizens. To that end I invite all government entities to contact the Department of Justice whenever our legal services in offering advice in this area can be of help to you.

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Wisconsin Public Records Law

Wis. Stat. §§ 19.31 - 19.39

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I. Introduction.

The Wisconsin public records law authorizes requesters to inspect or obtain copies of “records” maintained by government “authorities.” The identity of the requester or the reason why the requester wants particular records generally do not matter for purposes of the public records law. Records are presumed to be open to inspection and copying, but there are some exceptions. Requirements of the public records law apply to records that exist at the time a public records request is made. The public records law does not require authorities to provide requested information if no responsive record exists, and generally does not require authorities to create new records in order to fulfill public records requests. This outline is intended to provide helpful information about these and other public records topics.

II. Public Policy and Purpose.

- A. “[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.” Wis. Stat. § 19.31. This is one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist.* (“*Zellner I*”), 2007 WI 53, ¶ 49, 300 Wis. 2d 290, ¶ 49, 731 N.W.2d 240, ¶ 49.

- B. Providing citizens with information on the affairs of government is:

[A]n 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. To that end, ss. 19.32 to 19.37 shall be construed in every instance 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, and only in an exceptional case may access be denied.

Wis. Stat. § 19.31.

¹The assistance of Deputy Attorney General Raymond P. Taffora, and Assistant Attorneys General Carrie M. Benedon, Steven P. Means, Kevin C. Potter, Kevin M. St. John, and Sandra L. Tarver is gratefully acknowledged. This 2010 Outline also reflects the contributions of former Assistant Attorneys General Maureen McGlynn Flanagan, Jennifer Sloan Lattis, and Alan Lee to earlier editions of the Outline, and the technical and administrative support of Connie L. Anderson, Bill Cosh, Amanda J. Welte, and Sara J. Paul.

- C. The purpose of the Wisconsin public records law is to shed light on the workings of government and the acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726, 729 (Ct. App. 1998). It serves as a basic tenet of our democratic system by providing opportunity for public oversight of government. *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428, 430 (1996); *Linzmeier v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, ¶ 15, 646 N.W.2d 811, ¶ 15. Wisconsin legislative policy favors the broadest practical access to government. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 22, 284 Wis. 2d 162, ¶ 22, 699 N.W.2d 551, ¶ 22; *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 15, 305 Wis. 2d 582, ¶ 15, 740 N.W.2d 177, ¶ 15.
- D. The presumption favoring disclosure is strong, but not absolute. *Hempel*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, ¶ 28, 699 N.W.2d 551, ¶ 28.
- E. The general rule is that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a). Any record specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of the record containing public information is open to public inspection. Wis. Stat. § 19.36(1).

III. Sources of Wisconsin Public Records Law.

- A. Wisconsin Stat. §§ 19.31-19.39 (the public records statutes). The public records statutes and related Wisconsin statutes can be accessed on the Legislature's website: www.legis.state.wi.us/rsb.
- B. Wisconsin Stat. § 19.85(1) (exemptions to the open meetings law, referred to in the public records law), also accessible at www.legis.state.wi.us/rsb.
- C. Court decisions.
- D. Attorney General opinions and correspondence. Volumes 71-81 of the Attorney General opinions, as well as opinions from 1995-present, can be accessed at www.legis.state.wi.us/rsb. Certain opinions and correspondence also can be accessed at www.doj.state.wi.us.
- E. Other sources described below in this outline.
- F. *Note:* The United States Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, does not apply to states. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428 n.6, 538 N.W.2d 608, 612 n.6 (Ct. App. 1995). Nonetheless, the public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test discussed in Section VIII.F., below. *Linzmeier*, 2002 WI 84, ¶¶ 32-33, 254 Wis. 2d 306, ¶¶ 32-33, 646 N.W.2d 811, ¶¶ 32-33.

IV. Key Definitions.

- A. **"Record."** 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. Wis. Stat. § 19.32(2).

1. Must be created or kept in connection with official purpose or function of the agency. 72 Op. Att'y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965). Content determines whether a document is a "record," not medium, format, or location. OAG I-06-09 (December 23, 2009), at 2.
2. Not everything a public official or employee creates is a public record. *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, ¶ 45, 680 N.W.2d 792, ¶ 45; OAG I-06-09, at 3 n.1. *But see Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 152, ___ Wis. 2d ___, ___ N.W.2d ___ (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting) (personal e-mail sent or received on an authority's computer system is a record).
3. "Record" includes:
 - a. Handwritten, typed, or printed documents.
 - b. Maps and charts.
 - c. Photographs, films, and tape recordings.
 - d. Computer tapes and printouts, CDs and optical discs.
 - e. Electronic records and communications.
 - i. Information regarding government business kept or received by an elected official on her website, "Making Salem Better," more likely than not constituted a record. OAG I-06-09, at 2-3.
 - ii. E-mail sent or received on an authority's computer system is a record. This includes personal e-mail sent by officers or employees of the authority. *Schill*, 2010 WI 86, ¶ 152, ___ Wis. 2d ___, ___ N.W.2d ___ (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting).
 - iii. E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record.
4. "Record" also includes contractors' records. Each authority must make available for inspection and copying any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. Wis. Stat. § 19.36(3).
 - a. Access to contractors' records does not extend to information produced or collected under a subcontract to which the authority is not a party, *unless* the information is required by or provided to the authority under the general contract to which the authority is a party. *Bldg. & Constr. Trades Council*, 221 Wis. 2d at 585, 585 N.W.2d at 730.
 - b. A governmental entity cannot evade its public records responsibilities by shifting a record's creation or custody to an agent. *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 453, 521 N.W.2d 165, 170 (Ct. App. 1994); *WIREData, Inc. v. Vill. of Sussex ("WIREData II")*, 2008 WI 69, ¶ 89, 310 Wis. 2d 397, ¶ 89, 751 N.W.2d 736, ¶ 89 (contract assessor records).

5. "Record" does not include:

- a. Drafts, notes, preliminary documents, and similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working. Wis. Stat. § 19.32(2); *State v. Panknin*, 217 Wis. 2d 200, 209-10, 579 N.W.2d 52, 56-57 (Ct. App. 1998) (personal notes of sentencing judge are not public records).
 - i. This exception is generally limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority. 77 Op. Att'y Gen. 100, 102-03 (1988).
 - ii. A document is not a draft if it is used for the purposes for which it was commissioned. *Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589, 594 (1989); *Journal/Sentinel*, 186 Wis. 2d at 455-56, 521 N.W.2d at 171.
 - iii. Preventing "final" corrections from being made does not indefinitely qualify a document as a draft. *Fox*, 149 Wis. 2d at 417, 438 N.W.2d at 595.
 - iv. Nor does labeling each page of the document "draft" indefinitely qualify a document as a draft for public records purposes. *Fox*, 149 Wis. 2d at 417, 438 N.W.2d at 595.
 - v. This exclusion will be narrowly construed; the burden of proof is on the records custodian. *Fox*, 149 Wis. 2d at 411, 417, 438 N.W.2d at 592-93, 595.
- b. Published material available for sale or at the library. Wis. Stat. § 19.32(2).
- c. Purely personal property of the custodian with no relation to his or her office. Wis. Stat. § 19.32(2). Personal e-mail sent or received on an authority's computer system is a record. *Schill*, 2010 WI 86, ¶ 152, ___ Wis. 2d ___, ¶ 152, ___ N.W.2d ___, ¶ 152 (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting). Consequently, the definition of "record" does not exempt purely personal e-mail if it is sent or received on an authority's computer system. This exemption should be narrowly construed. See 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.
- d. Material with access limited due to copyright, patent, or bequest. Wis. Stat. § 19.32(2).

The copyright exception may not apply when the "fair use" exception to copyright protection can be asserted. Whether use of a particular copyrighted work is a "fair use" depends on: (1) The purpose and character of the use, including whether the use is for commercial or nonprofit educational purposes; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work. *Zellner I*, 2007 WI 53, ¶ 28, 300 Wis. 2d 290, ¶ 28, 731 N.W.2d 240, ¶ 28.
- e. *Note*: Statutory exceptions are instances in derogation of legislative intent and should be narrowly construed. *Zellner I*, 2007 WI 53, ¶ 31, 300 Wis. 2d 290, ¶ 31, 731 N.W.2d 240, ¶ 31.

f. "Record" does not include an identical copy of an otherwise available record. *Stone v. Bd. of Regents*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20. An identical copy, for this purpose, is not meaningfully different from an original for purposes of responding to a specific public records request. *Stone*, 2007 WI App 223, ¶ 18, 305 Wis. 2d 679, ¶ 18, 741 N.W.2d 774, ¶ 18. Cf. Wis. Stat. § 16.61(2)(b)5.

6. Public records requests and responses are themselves "records" for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.

B. "Requester."

1. Generally, any person who requests inspection or a copy of a record. Wis. Stat. § 19.32(3).

2. *Exception:* Any of the following persons are defined as "requesters" only to the extent that the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom the person has not been denied physical placement under Wis. Stat. ch. 767:

a. A person committed under the mental health law, sex crimes law, sex predator law, or found not guilty by reasons of disease or defect, while that person is placed in an inpatient treatment facility. Wis. Stat. § 19.32(1b), (1d), and (3).

b. A person incarcerated in a state prison, county jail, county house of correction or other state, county or municipal correctional detention facility, or who is confined as a condition of probation. Wis. Stat. § 19.32(1c), (1e), and (3).

3. *Note:* There is generally a greater right to obtain records containing personally identifiable information about the requester himself or herself, subject to exceptions specified in Wis. Stat. § 19.35(1)(am). See Section VIII.G.7., below.

C. "Authority." Defined in Wis. Stat. § 19.32(1) as any of the following having custody of a record, and some others:

1. A state or local office.

a. A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the "authority" for purposes of the public records law. *WIREDATA II*, 2008 WI 69, ¶ 75, 310 Wis. 2d 397, ¶ 75, 751 N.W.2d 736, ¶ 75 (municipality's independent contractor assessor not an authority for public records purposes).

b. Only "authorities" are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests. *WIREDATA II*, 2008 WI 69, ¶¶ 77-78, 310 Wis. 2d 397, ¶¶ 77-78, 751 N.W.2d 736, ¶¶ 77-78.

2. An elected official.

3. An agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule, or order.

4. A governmental or quasi-governmental corporation.

- a. A corporation is a quasi-governmental corporation for purposes of the public records law "if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 9, 312 Wis. 2d 84, ¶ 9, 752 N.W.2d 295, ¶ 9.
- b. Quasi-governmental corporations are not limited to corporations created by acts of government. *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 44, 312 Wis. 2d 84, ¶ 44, 752 N.W.2d 295, ¶ 44.
- c. Determining whether a corporation is a quasi-governmental corporation requires a case by case analysis. *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶¶ 8-9, 312 Wis. 2d 84, ¶¶ 8-9, 752 N.W.2d 295, ¶¶ 8-9. No one factor is conclusive. The non-exclusive list of factors considered in *Beaver Dam Area Dev. Corp.* fall into five basic categories:
 - i. The extent to which the private corporation is supported by public funds;
 - ii. Whether the private corporation serves a public function and, if so, whether it also has other, private functions;
 - iii. Whether the private corporation appears in its public presentations to be a governmental entity;
 - iv. The extent to which the private corporation is subject to governmental control; and
 - v. The degree of access that government bodies have to the private corporation's records.

OAG I-02-09 (March 19, 2009).

5. Any court of law.

6. The state assembly or senate.

7. A nonprofit corporation that receives more than 50% of its funds from a county or municipality and which provides services related to public health or safety to the county or municipality.

8. A formally constituted sub-unit of any of the above.

D. "Legal custodian."

1. The legal custodian is vested by the authority with full legal power to render decisions and carry out the authority's statutory public records responsibilities. Wis. Stat. § 19.33(4).
2. Identified in Wis. Stat. § 19.33(1)-(5):
 - a. An elected official is the legal custodian of his or her records and the records of his or her office. An elected official may designate an employee to act as the legal custodian.
 - b. The chairperson of a committee of elected officials, or the chairperson's designee, is the legal custodian of the records of the committee. Similarly, the co-chairpersons of a joint

committee of elected officials, or their designees, are the legal custodians of the records of the committee.

- c. For every other authority, the authority must designate one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part to be its legal custodian and fulfill its duties under Chapter 19. If no designation is made, the default is the authority's highest ranking officer and its chief administrative officer, if there is such a person.
 - d. There are special provisions in Wis. Stat. § 19.33(5) if the members of an authority are appointed by another authority.
3. No elected official is responsible for the records of any other elected official unless he or she has possession of the records of that other elected official. Wis. Stat. § 19.35(6).
4. Special custodial rules apply to the following shared law enforcement records.
- a. Law enforcement investigation information provided by a local law enforcement agency to the Office of Justice Assistance ("OJA") for sharing with other law enforcement agencies and prosecutors.
 - i. Applicable definitions.
 - (a) "Law enforcement agency" means one of the following:
 - (1) A governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority. Wis. Stat. § 16.964(18)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).
 - (2) An agency of a tribe that is established for the purpose of preventing and detecting crime on the reservation or trust lands of the tribe and enforcing the tribe's laws or ordinances, that employs full time one or more persons who are granted law enforcement and arrest powers under Wis. Stat. § 165.92(2)(a), and that was created by a tribe that agrees that its law enforcement agency will perform the duties required of the agency under Wis. Stat. §§ 165.83 and 165.84; or the Great Lakes Indian Fish and Wildlife Commission, if that commission agrees to perform the duties required under Wis. Stat. §§ 165.83 and 165.84. Wis. Stat. § 16.964(18)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(e).
 - (b) "Law enforcement investigation information" means information that is collected by OJA under Wis. Stat. § 16.964(1m) consisting of arrest reports, incident reports, and other information relating to persons suspected of committing crimes that was created by a law enforcement agency and provided to OJA by that agency for the purpose of sharing with other law enforcement agencies and prosecutors. Wis. Stat. § 16.964(18)(a)2.

- ii. Designation of the legal custodian of this law enforcement investigation information, for purposes of response to public records requests:
 - (a) If OJA has custody of a record containing law enforcement investigation information contained in the record, OJA and any other law enforcement agency with which OJA shares the information are not the legal custodians of the record as it relates to that information. Wis. Stat. § 16.964(18)(b).
 - (b) The legal custodian of the record as it relates to the law enforcement investigation information is the law enforcement agency that provided the law enforcement information to OJA. Wis. Stat. § 16.964(18)(b).
- iii. Denial of misdirected requests. If OJA or another law enforcement agency receives a public records request for access to information in a record containing law enforcement investigation information, OJA or that agency must deny any portion of the request that relates to the law enforcement investigation information. Wis. Stat. § 16.964(18)(b).
- b. Law enforcement records in the custody of local information technology authorities for purposes of information storage, information technology processing, or other information technology usage.
 - i. Applicable definitions.
 - (a) "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority. Wis. Stat. § 19.35(7)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).
 - (b) "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services. Wis. Stat. § 19.35(7)(a)2.
 - (c) "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage. Wis. Stat. § 19.35(7)(a)3.
 - ii. Legal custodian of these law enforcement records, for purposes of public records requests:
 - (a) The legal custodian is not the local information technology authority having custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology. Wis. Stat. § 19.35(7)(b).
 - (b) The legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used. Wis. Stat. § 19.35(7)(b).

- iii. Denial of misdirected requests. A local information technology authority that receives a request for access to information in a law enforcement record must deny any portion of the request that relates to information in a local law enforcement record. Wis. Stat. § 16.964(18)(b).
- E. **“Record subject.”** An individual about whom personally identifiable information is contained in a record. Wis. Stat. § 19.32(2g).
- F. **“Personally identifiable information.”** 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).
- G. **“Local public office.”** Defined in Wis. Stat. §§ 19.32(1dm) and 19.42(7w). Includes, among others, the following (excluding any office that is a state public office):
 - 1. An elective office of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)).
 - 2. A county administrator or administrative coordinator, or a city or village manager.
 - 3. An appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.
 - 4. An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.
 - 5. Any appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee (as defined in Wis. Stat. § 111.70(1)(i)).
 - 6. The statutory definition of “local public office” does not include any position filled by an independent contractor. *WIREDATA II*, 2008 WI 69, ¶ 75, 310 Wis. 2d 397, ¶ 75, 751 N.W.2d 736, ¶ 75 (contract assessors).
- H. **“State public office.”** Defined in Wis. Stat. §§ 19.32(4) and 19.42(13). Includes, among others, the following:
 - 1. State constitutional officers and other elected state officials identified in Wis. Stat. § 20.923(2).
 - 2. Most positions to which individuals are regularly appointed by the Governor.
 - 3. State agency positions identified in Wis. Stat. § 20.923(4).
 - 4. State agency deputies and executive assistants, and Office of Governor staff identified in Wis. Stat. § 20.923(8)-(10).

5. Division administrators of offices created under Wis. Stat. ch. 14, or departments or independent agencies created under Wis. Stat. ch. 15.
6. Legislative staff identified in Wis. Stat. § 20.923(6)(h).
7. Specified University of Wisconsin System executives, and senior executive positions identified in Wis. Stat. § 20.923(4g).
8. Specified technical college district executives and Wisconsin Technical College System senior executive positions identified in Wis. Stat. § 20.923(7).
9. Municipal judges.

V. Before any Request: Procedures for Authorities.

A. Records policies. An authority (except members of the Legislature and members of any local governmental body) must adopt, display, and make available for inspection and copying at its offices information about its public records policies. Wis. Stat. § 19.34(1). The authority's policy must include:

1. A description of the organization.
2. The established times and places at which the public may obtain information and access to records in the organization's custody, or make requests for records, or obtain copies of records.
3. The costs for obtaining records.
4. The identity of the legal custodian(s).
5. The methods for accessing or obtaining copies of records.
6. For authorities that do not have regular office hours, any notice requirement of intent to inspect or copy records.
7. Each position that constitutes a local public office or a state public office.

B. Hours for access. There are specific statutory requirements regarding hours of access. Wis. Stat. § 19.34(2).

1. If the authority maintains regular office hours at the location where the records are kept, public access to the records is permitted during those office hours unless otherwise specifically authorized by law.
2. If there are no regular office hours at the location where the records are kept, the authority must:
 - a. Provide access upon at least 48 hours written or oral notice of intent to inspect or copy a record, or

- b. Establish a period of at least 2 consecutive hours per week during which access to records of the authority is permitted. The authority may require 24 hours advance written or oral notice of intent to inspect or copy a record.
- C. **Facilities for requesters.** An authority must provide facilities comparable to those used by its employees to inspect, copy, and abstract records. The authority is not required to purchase or lease photocopying or other equipment or provide a separate room. Wis. Stat. § 19.35(2).
- D. **Fees for responding.** Wis. Stat. § 19.35(3). For detailed information about permissible fees, see Section XI.C., below.
- E. **Records retention policies.** Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. See Wis. Stat. § 16.61 for retention requirements applicable to state authorities and Wis. Stat. § 19.21 for retention requirements applicable to local authorities. *Caution:* Under the public records law, an authority may not destroy a record after receipt of a request for that record until at least sixty days after denial or until related litigation is completed. Wis. Stat. § 19.35(5).
 - 1. The records retention provisions of Wis. Stat. § 19.21 are not part of the public records law. *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, ¶ 13, 742 N.W.2d 530, ¶ 13.
 - 2. An authority's alleged failure to keep requested records may not be attacked under the public records law. *Gehl*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, ¶ 13, 742 N.W.2d 530, ¶ 13.

VI. The Request.

- A. **Written or oral.** Requests do not have to be in writing. Wis. Stat. § 19.35(1)(h).
- B. **Requester identification.** The requester generally does not have to identify himself or herself. Wis. Stat. § 19.35(1)(i). *Caution:* Certain substantive statutes, such as those concerning student records and health records, may restrict record access to specified persons. When records of that nature are the subject of a public records request, the records custodian should confirm before releasing the records that the requester is someone statutorily authorized to obtain the requested records. See Wis. Stat. § 19.35(1)(i) for other limited circumstances in which a requester may be required to show identification.
- C. **Purpose.** The requester does not need to state the purpose of the request. Wis. Stat. § 19.35(1)(h) and (i).
- D. **Reasonable specificity.** The request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h). *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187, 189-90 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific).
 - 1. The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request. *Schopper*, 210 Wis. 2d at 213, 565 N.W.2d at 190; *Gehl*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, ¶ 17, 742 N.W.2d 530, ¶ 17.

2. The public records law will not be interpreted to impose such a burden upon a records custodian that normal functioning of the office would be severely impaired. *Schopper*, 210 Wis. 2d at 213, 565 N.W.2d at 190.
3. A records custodian should not have to guess at what records a requester desires. *Seifert*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, ¶ 42, 740 N.W.2d 177, ¶ 42.
4. A records custodian may not deny a request solely because the records custodian believes that the request could be narrowed. *Gehl*, 2007 WI App 238, ¶ 20, 306 Wis. 2d 247, ¶ 20, 742 N.W.2d 530, ¶ 20.
5. The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited. *Gehl*, 2007 WI App 238, ¶ 23, 306 Wis. 2d 247, ¶ 23, 742 N.W.2d 530, ¶ 23.
 - a. At some point, an overly broad request becomes sufficiently excessive to warrant rejection pursuant to Wis. Stat. § 19.35(1)(h). *Gehl*, 2007 WI App 238, ¶ 24, 306 Wis. 2d 247, ¶ 24, 742 N.W.2d 530, ¶ 24.
 - b. The public records law does not impose unlimited burdens on authorities and records custodians. *Gehl*, 2007 WI App 238, ¶ 23, 306 Wis. 2d 247, ¶ 23, 742 N.W.2d 530, ¶ 23 (request too burdensome when it would have required production of voluminous records relating to virtually all county zoning matters over a two-year period, without regard to the parties involved or whether the matters implicated requester's interests in any way).
6. A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request. These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed. Records custodians making these courtesy contacts should take care not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the public records law.

E. Format.

1. "Magic words" are not required. A request which reasonably describes the information or record requested is sufficient. Wis. Stat. § 19.35(1)(h).
2. A request, reasonably construed, triggers the statutory requirement to respond. For example, a request made under the "Freedom of Information Act" should be interpreted as being made under the Wisconsin public records law. *See ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 23, 259 Wis. 2d 276, ¶ 23, 655 N.W.2d 510, ¶ 23.
3. A request is sufficient if it is directed at an authority and reasonably describes the records or information requested. *Seifert*, 2007 WI App 207, ¶ 39, 305 Wis. 2d 582, ¶ 39, 740 N.W.2d 177, ¶ 39 (request for records created during investigation or relate to disposition of investigation not construed to include billing records of attorneys involved in investigation).
4. No specific form is required by the public records law.

F. **Ongoing requests.** "Continuing" requests are not contemplated by the public records law. "The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made." 73 Op. Att'y Gen. 37, 44 (1984).

G. **Requests are records.** Public records requests received by an authority are themselves "records" for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.

VII. The Response to the Request.

A. **Mandatory.** The records custodian must respond to a public records request. *ECO, Inc.*, 2002 WI App 302, ¶¶ 13-14, 259 Wis. 2d 276, ¶¶ 13-14, 655 N.W.2d 510, ¶¶ 13-14.

B. **Timing.** Response must be provided "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

1. The public records law does not require response within any specific time, such as "two weeks" or "48 hours."
2. DOJ policy is that ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location, review or redaction of many documents, a reasonable time for responding may be longer. However, if a response cannot be provided within ten working days, it is DOJ's practice to send a communication indicating that a response is being prepared.
3. An authority is not obligated to respond within a timeframe unilaterally identified by a requester, such as: "I will consider my request denied if no response is received by Friday and will seek all available legal relief." To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.
4. What constitutes a reasonable time for a response to any specific request depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and related considerations. Whether an authority is acting with reasonable diligence in responding to a particular request will depend on the totality of circumstances surrounding that request. *WIREDATA II*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, ¶ 56, 751 N.W.2d 736, ¶ 56.
5. Requests for public records should be given high priority.
6. Compliance at some unspecified future time is not authorized by the public records law. The records custodian has two choices: comply or deny. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457-58, 555 N.W.2d 140, 142 (Ct. App. 1996).
7. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request. *WIREDATA II*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, ¶ 56, 751 N.W.2d 736, ¶ 56.

8. An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a \$1,000.00 forfeiture. Wis. Stat. § 19.37. See Section XIII., below.
- C. **Format.** If the request is in writing, a denial or partial denial of access also must be in writing. Wis. Stat. § 19.35(4)(b).
- D. **Content of denials.** Reasons for denial must be *specific* and *sufficient*. Cf. *Hempel*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, ¶¶ 25-26, 699 N.W.2d 551, ¶¶ 25-26.
 1. A records custodian need not provide facts supporting the reasons it identifies for denying a public records request, but must provide specific reasons for the denial. *Hempel*, 2005 WI 120, ¶ 79, 284 Wis. 2d 162, ¶ 79, 699 N.W.2d 551, ¶ 79.
 2. Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
 - a. If confidentiality of requested records is guaranteed by statute, citation to that statute is sufficient.
 - b. 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. *Chvala v. Bubolz*, 204 Wis. 2d 82, 86-87, 552 N.W.2d 892, 894 (Ct. App. 1996).
 - i. The records custodian must give a public policy reason why the record warrants confidentiality, but need not provide a detailed analysis of the record and why public policy directs that it be withheld. *Portage Daily Register v. Columbia County Sheriff's Dep't*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.
 - ii. The specificity requirement is not met by mere citation to the open meetings exemption statute, or bald assertion that release is not in the public interest. *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772, 774 (Ct. App. 1988). But see *State ex rel. Blum v. Bd. of Educ.*, 209 Wis. 2d 377, 386-88, 565 N.W.2d 140, 144-45 (Ct. App. 1997) (failure to cite statutory section that warrants withholding requested records does not mandate that court order access). For further information about how public policies underlying open meetings law exemptions may be considered in the public records balancing test, see Section VIII.F.2.b., below.
 - c. Need to restrict access must still exist at the time the request is made for the record. Reason to close a meeting under Wis. Stat. § 19.85 is not sufficient reason alone to subsequently deny access to a record of the meeting. Wis. Stat. § 19.35(1)(a).
 3. 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. *Journal/Sentinel*, 145 Wis. 2d at 824, 429 N.W.2d at 774.
 4. The specificity requirement provides a means of preventing records custodians from arbitrarily denying access to public records without weighing the relative harm of non-disclosure against the public interest in disclosure. *Portage Daily Register*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.

5. The sufficiency requirement provides the requester with sufficient notice of the reasons for denial to enable him or her to prepare a challenge, and provides a basis for review in the event of a court action. *Portage Daily Register*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, ¶ 14, 746 N.W.2d 525, ¶ 14.
 6. An offer of compliance, but conditioned on unauthorized costs and terms, constitutes a denial. *WIREData, Inc. v. Vill. of Sussex* (“WIREData P”), 2007 WI App 22, ¶ 57, 298 Wis. 2d 743, ¶ 57, 729 N.W.2d 757, ¶ 57.
 7. If no responsive records exist, the authority should say so in its response. An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test. Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as “social security numbers” or “purely personal e-mails sent or received by employees that evince no violation of law or policy.”
 8. 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. Wis. Stat. § 19.35(4)(b).
 9. The adequacy of a custodian’s asserted reasons for withholding requested records, or redacting portions of the records before release, may be challenged by filing a court action called a petition for writ of mandamus. See Section XIII.A., below, for more information about filing a mandamus action.
 10. 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.
 - a. 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. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, ¶ 16, 647 N.W.2d 158, ¶ 16; accord *Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501, 503 (1967) (court may order mandamus even if sound, but unstated, reasons exist or can be conceived of by the court); *Kroeplin v. Wis. Dep’t of Natural Res.*, 2006 WI App 227, ¶ 45, 297 Wis. 2d 254, ¶ 45, 725 N.W.2d 286, ¶ 45. Cf. *Blum*, 209 Wis. 2d at 388-91, 565 N.W.2d at 145-46 (an authority’s failure to cite specific statutory exemption justifying nondisclosure does not preclude the court from considering statutory exemption).
 - b. The reviewing court is free to evaluate the strength of the records custodian’s reasoning, in the absence of facts. But factual support for the records custodian’s reasoning in the statement of denial likely will strengthen the custodian’s case before the reviewing court. *Hempel*, 2005 WI 120, ¶ 80, 284 Wis. 2d 162, ¶ 80, 699 N.W.2d 551, ¶ 80.
- E. Redaction.** If part of the record is disclosable, that part must be disclosed. Wis. Stat. § 19.36(6).
1. An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome. *Osborn*, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, ¶ 46, 647 N.W.2d 158, ¶ 46.

2. However, an authority does not have to extract information from existing records and compile it in a new format. Wis. Stat. § 19.35(1)(L); *WIREData I*, 2007 WI App 22, ¶ 36, 298 Wis. 2d 743, ¶ 36, 729 N.W.2d 757, ¶ 36.
- F. **Motive and context.** A requester need not state or provide a reason for his or her request. Wis. Stat. § 19.35(1)(i). When performing the balancing test described below in Section VIII.F., however, a record custodian “almost inevitably must evaluate context to some degree.” *Hempel*, 2005 WI 120, ¶ 66, 284 Wis. 2d 162, ¶ 66, 699 N.W.2d 557, ¶ 66.
- G. **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.
1. 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). Wis. Stat. § 19.35(5).
 2. 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. Wis. Stat. § 19.35(5).
 3. 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. Wis. Stat. § 19.35(5).
 4. 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. Wis. Stat. § 19.35(5).
 5. An authority or custodian does not violate Wis. Stat. § 19.35(5) by destroying an identical copy of an otherwise available record. *Stone*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20.
- H. **Responses are records.** Responses to public records requests are themselves “records” for purposes of the public records law. *Nichols*, 199 Wis. 2d at 275, 544 N.W.2d at 431.
- I. **Access to information vs. participation in electronic forum.** The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself. OAG I-06-09, at 3-4.
- J. **Certain shared law enforcement records.** See Section IV.D.4., above, for special rules governing response to requests for certain shared law enforcement records.

VIII. Analyzing the Request.

- A. **Access presumed.** The public records law presumes complete public access to public records, but there are some restrictions and exceptions. Wis. Stat. § 19.31; *Youmans*, 28 Wis. 2d at 683, 137 N.W.2d at 475.

1. Requested records will fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by balancing test. *Hathaway v. Joint Sch. Dist. No. 1, Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682, 686-87 (1984).
 2. 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,” described more fully in Section VIII.F., below, is used to determine whether the presumption of openness is overcome by another public policy concern. *Hempel*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, ¶ 4, 699 N.W.2d 551, ¶ 4.
 3. Unless a record is confidential based on a statutory or court-created exception, 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.” *Hempel*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, ¶ 62, 699 N.W.2d 551, ¶ 62.
 4. The Legislature has entrusted records custodians with substantial discretion. *Hempel*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, ¶ 62, 699 N.W.2d 551, ¶ 62.
 5. However, an authority or a records custodian cannot unilaterally implement a policy creating a “blanket exemption” from the public records law. *Hempel*, 2005 WI 120, ¶ 69, 284 Wis. 2d 162, ¶ 69, 699 N.W.2d 551, ¶ 69.
 6. *Caution:* Wisconsin Stat. § 19.35(1)(am) gives a person greater rights of access than the general public to records containing personally identifiable information about that person. See Section VIII.G.7., below.
 7. *Caution:* An agreement to keep certain records confidential will not necessarily override disclosure requirements of the public records law. See Section VIII.G.5., below.
- B. Suggested four-step approach.** Additional information about each step is explained in Sections VIII.C.-F., below.
1. *Step One:* Is there such a record?
 - a. If yes, proceed to Step Two.
 - b. If no, analysis stops—no record access.
 2. *Step Two:* Is the requester entitled to access the record pursuant to statute or court decision?
 - a. If yes, record access is permitted.
 - b. If no, proceed to Step Three.
 3. *Step Three:* Is the requester prohibited from accessing the record pursuant to statute or court decision?
 - a. If yes, analysis stops—no record access.
 - b. If no, proceed to Step Four.

4. *Step Four*: Does the balancing test compel access to the record?

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

C. *Step One*: Is there such a record?

- 1. The public records law provides access to existing records maintained by authorities.
- 2. The public records law does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.
- 3. An authority is not required to create a new record by extracting and compiling information from existing records in a new format. *See* Wis. Stat. § 19.35(1)(L). *See also* *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460, 462 (Ct. App. 1992).
- 4. If no responsive record exists, the records custodian should inform the requester. *Cf. State ex rel. Zimgrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988).
- 5. The purpose of the public records law is to provide access to recorded information in records. Granting access to just one of two or more identical records fulfills this purpose. *Stone*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, ¶ 20, 741 N.W.2d 774, ¶ 20.

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

- 1. By statute expressly requiring access. *Youmans*, 28 Wis. 2d at 685, 137 N.W.2d at 476-77. For example:
 - a. Uniform traffic accident reports. Wis. Stat. § 346.70(4)(f); *see also* *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 290-91, 477 N.W.2d 340, 346 (Ct. App. 1991).
 - b. Books and papers that are “required to be kept” by the sheriff, clerk of circuit court, register of deeds, county treasurer, register of probate, county clerk, and county surveyor. Wis. Stat. § 59.20(3)(a).
 - i. The burden is on the requester to show that the requested record is one that is “required to be kept.” *See State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 110, 483 N.W.2d 238, 242 (Ct. App. 1992) (discusses when records are “required to be kept” under predecessor statute, Wis. Stat. § 59.14); *see also* *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 307, 168 N.W.2d 836, 840 (1969) (statute compels court clerk to disclose memorandum decision impounded by judge because it is a paper “required to be kept in his office”).
 - ii. *Caution*: Even absolute statutory rights to access can be limited if another statute allows the records to be sealed, if disclosure infringes on a constitutional right, or if the administration of justice requires limiting access to judicial records. *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 554-56, 334 N.W.2d 252, 260-61 (1983); *Schultz*, 168 Wis. 2d at 108, 483 N.W.2d at 240; *In re John Doe Proceeding*, 2003 WI 30, ¶¶ 59-72, 260 Wis. 2d 653, ¶¶ 59-72, 660 N.W.2d 260, ¶¶ 59-72.

2. By court decision expressly requiring access. For example:

- a. Daily arrest logs or police "blotters" at police departments. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179, 190 (1979).
- b. Faculty outside income reports. *Capital Times v. Bock*, Case No. 164-312 (Dane Co., April 12, 1983).
- c. In these cases, the courts concluded that case-by-case determination of public access would pose excessive and unwarranted administrative burdens.

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

1. Wisconsin Stat. § 19.36(2)-(13) lists records specifically exempt from disclosure pursuant to the public records statute itself. Other state and federal statutes, and court decisions, also require that certain types of records remain confidential.
 - a. "Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure [under the public records law]." Wis. Stat. § 19.36(1).
 - b. Many of these exceptions are discussed elsewhere in this outline, but some key examples are set forth below in Sections VIII.E.2.-5.
 - c. An agency cannot create an exception to Wis. Stat. §§ 19.31 and 19.35 by adopting an administrative rule inconsistent with the public records law. *Chvala*, 204 Wis. 2d at 91, 552 N.W.2d at 896.
 - d. Legislative ratification of a collective bargaining agreement, without enacting companion legislation expressly amending the public records law, cannot create an exception to the public records law. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 3, 319 Wis. 2d 439, ¶ 3, 768 N.W.2d 700, ¶ 3. The public's rights under the public records law may not be contracted away through the collective bargaining process. *Id.*, ¶ 53.
 - e. *Caution:* Statutory exemptions are to be narrowly construed. *Chvala*, 204 Wis. 2d at 88, 552 N.W.2d at 895; *Hathaway*, 116 Wis. 2d at 397, 342 N.W.2d at 686-87.
2. Exempt from disclosure by the public records statutes. For example:
 - a. Information maintained, prepared, or provided by an employer concerning the home address, home e-mail address, home telephone number, or social security number of an employee. Wis. Stat. § 19.36(10)(a).
 - b. Information maintained, prepared, or provided by an employer concerning the home address, home e-mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office.

Exception: The home address of an individual holding an elective public office or the home address of an individual who, as a condition of employment, is required to live in a specific location may be disclosed. Wis. Stat. § 19.36(11).

- c. Information related to a current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to the disposition of the investigation. Wis. Stat. § 19.36(10)(b).
 - i. *Caution:* This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. See Wis. Stat. § 19.32(1bg).
 - ii. An “investigation” reaches its final “disposition” when the public employer has completed the investigation, and acts to impose discipline. A post-investigation grievance filed pursuant to a collective bargaining agreement does not extend the “investigation” for purposes of the statute. See *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶¶ 12, 15, 277 Wis. 2d 208, ¶¶ 12, 15, 689 N.W.2d 644, ¶¶ 12, 15; *Zellner I*, 2007 WI 53, ¶¶ 33-38, 300 Wis. 2d 290, ¶¶ 33-38, 731 N.W.2d 240, ¶¶ 33-38.
 - iii. This exception codifies common law standards and continues the tradition of keeping records related to misconduct investigations closed while those investigations are ongoing, but providing public oversight over the investigations after they have concluded. *Kroeplin*, 2006 WI App 227, ¶ 31, 297 Wis. 2d 254, ¶ 31, 725 N.W.2d 286, ¶ 31.
- d. Information pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited. Wis. Stat. § 19.36(10)(c).
 - i. *Caution:* This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. See Wis. Stat. § 19.32(1bg).
 - ii. See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are or may be closed to the public).
- e. Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees. Wis. Stat. § 19.36(10)(d).
 - i. *Caution:* This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed. See Wis. Stat. § 19.32(1bg).
 - ii. Wisconsin Stat. § 19.36(10)(d) does not apply to records of investigations into alleged employee misconduct, and does not create a blanket exemption for disciplinary and misconduct investigation records. *Kroeplin*, 2006 WI App 227, ¶¶ 20, 32, 297 Wis. 2d 254, ¶¶ 20, 32, 725 N.W.2d 286, ¶¶ 20, 32.
 - iii. See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are closed to the public).

- f. Investigative information obtained for law enforcement purposes, when required by federal law or regulation to be kept as confidential, or when confidentiality is required as a condition to receipt of state aids. Wis. Stat. § 19.36(2).
 - g. Computer programs (but the material input and the material produced as the product of a computer program is subject to the right of inspection and copying). Wis. Stat. § 19.36(4).
 - h. Trade secrets. Wis. Stat. § 19.36(5); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 83, 308 Wis. 2d 357, ¶ 83, 752 N.W.2d 295, ¶ 83.
 - i. Identities of certain applicants for public positions. See Wis. Stat. § 19.36(7) for further information.
 - j. Identities of law enforcement informants. See Wis. Stat. § 19.36(8) and Section VIII.G.3.d., below, for further information.
 - k. Plans or specifications for state buildings. Wis. Stat. § 19.36(9).
 - l. Prevailing wage information. Wis. Stat. § 19.36(12).
 - m. An individual's account or customer numbers with a financial institution. Wis. Stat. § 19.36(13).
3. Exempt from disclosure by other state statutes (unless authorized by an exception or other provision in the statutes themselves). For example:
- a. Pupil records. Wis. Stat. § 118.125.
 - b. Patient health care records. Wis. Stat. § 146.82.
 - i. "Patient health care records" means, with certain statutory exceptions, all records related to the health of a patient prepared by or under the supervision of a health care provider; and records made by ambulance service providers, EMTs, or first responders in administering emergency care, handling, and transporting sick, disabled, or injured individuals. Wis. Stat. §§ 146.81(4) and 256.15(2)(a).
 - ii. Various statutory provisions allow disclosure to specified persons with or without the patient's consent. See Wis. Stat. § 146.82.
 - iii. Wisconsin Stat. § 256.15(12)(b) provides a limited disclosure exception for ambulance service providers who also are "authorities" under the public records law: information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call, dispatch and response times; reason for the dispatch; location to which the ambulance was dispatched; destination of any transport by the ambulance; and name, age, and gender of the patient. Disclosure of this information is subject to the usual case-by-case, totality of circumstances public records balancing test. 78 Op. Att'y Gen. 71, 76 (1989); OAG I-03-07 (September 27, 2007), at 6-8.
 - c. Mental health registration and treatment records. Wis. Stat. § 51.30(1)(am), (1)(b), and (4). These include duplicate copies of statements of emergency detention in the possession of a

police department, absent written informed consent or a court order for disclosure. *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, ¶ 30, 751 N.W.2d 369, ¶ 30.

- d. Law enforcement, court, and agency records involving children and juveniles.
 - i. Law enforcement officers' records of children and juveniles. Wis. Stat. §§ 48.396(1)-(1d), (5)-(6) and 938.396(1), (1j), and (10). *See also* Section VIII.G.4.a.
 - (a) Exceptions include news reporters who wish to obtain information for the purpose of reporting news without revealing the identity of the child or juvenile. Wis. Stat. §§ 48.396(1) and 938.396(1)(b)1.
 - (b) Certain exceptions also apply to motor vehicle operation records and operating privilege records. Wis. Stat. § 938.396(3)-(4).
 - ii. Records of the court exercising jurisdiction over children and juveniles pursuant to Wis. Stat. chs. 48 and 938. Wis. Stat. §§ 48.396(2), (6) and 938.396(2), (2g), and (10). Certain exceptions apply to motor vehicle operation records and operating privilege records. Wis. Stat. § 938.396(3)-(4).
 - iii. Agency records regarding a child in the agency's care or legal custody pursuant to Wis. Stat. ch. 48, the Children's Code. Wis. Stat. § 48.78. *See* Section VIII.G.4.c.i. Agency records regarding a juvenile who is or was in the agency's care or legal custody pursuant to Wis. Stat. ch. 938, the Juvenile Justice Code. Wis. Stat. § 938.78. *See* Section VIII.G.4.c.ii.
- e. There are dozens of additional exemptions imbedded in various substantive provisions of the Wisconsin Statutes. A comprehensive list of those exemptions is beyond the scope of this outline, but some representative examples include:
 - i. Plans and specifications of state-owned or state-leased buildings. Wis. Stat. § 16.851.
 - ii. Information which likely would result in the disturbance of an archaeological site. Wis. Stat. § 44.02(23).
 - iii. Estate tax returns and related documents. Wis. Stat. § 72.06.
 - iv. Information concerning livestock infected with paratuberculosis. Wis. Stat. § 95.232.
 - v. Except to telephone solicitors, the state's "no-call" list. Wis. Stat. § 100.52(2)(c).
 - vi. Records of a publicly supported library or library system indicating the identity of any individual who borrows or uses the library's documents, materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in administration of the library or library system, persons authorized by the individual to inspect the records, custodial parents or guardians of children under the age of 16, specified other libraries, or to law enforcement officers under limited circumstances pursuant to Wis. Stat. § 43.30(1m)-(5).
- f. Records custodians, officers, and employees of public records authorities should learn the exemption statutes applicable to their own agencies.

- g. Additional exemptions can be located by reviewing the index to the Wisconsin Statutes under both "public records" and the specific subject.
4. Exempt from disclosure by federal statutes (unless authorized by an exception or other provision in the statutes themselves). For example:
 - a. Social security numbers obtained or maintained by an authority pursuant to a provision of law enacted after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I).
 - b. Personally identifiable information contained in student records (applicable to school districts receiving federal funds, with certain exceptions). *See* the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.

But note: Students and parents (unless parental rights have been legally revoked) are allowed access to the student's own records and may allow access to third parties by written consent. *Osborn*, 2002 WI 83, ¶ 27, 254 Wis. 2d 266, ¶ 27, 647 N.W.2d 158, ¶ 27.
 - c. Many patient health care records, pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* 42 U.S.C. § 1320d-2, 45 C.F.R. pts. 160 and 164.
 - d. The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, provides that any public official or employee served with a search warrant under the Act "shall [not] disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section." 50 U.S.C. § 1861(d). Further, the Act provides that "information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply . . ." 6 U.S.C. § 482.
 - e. Personal information in state motor vehicle ("DMV") records. *See* the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-25.
 - i. It is a permissible use under the DPPA for a DMV to disclose personal information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1).
 - ii. In the course of carrying out its functions, including responding to public records requests, an authority may disclose personal information obtained from a DMV that is held by the authority. Depending on the totality of circumstances related to a particular public records request, non-DPPA statutory, common law, or balancing test considerations may warrant redaction of certain personal information pursuant to the usual public records law analysis. OAG I-02-08 (April 29, 2008), at 2.
 5. Exempt from disclosure by state court decisions. "Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." Wis. Stat. § 19.35(1)(a). For example:
 - a. District attorney prosecution files. *See State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608, 611 (1991) ("common law limitation does exist against access to prosecutor's files under the public records law").

- i. *Caution:* When a requester asked to inspect all public records requests received by the district attorney's office since a certain date, the Wisconsin Supreme Court held that *Foust* did not apply. It is the nature of the documents and not their location that determines their status under the public records statute. *Nichols*, 199 Wis. 2d at 274, 544 N.W.2d at 430-31.
 - ii. When a public records request is directed to a law enforcement agency, rather than a district attorney, the *Foust* exception does not apply. The law enforcement agency and the police agency are separate authorities for purposes of the public records law. If the police agency has forwarded a copy of its investigative report to the district attorney, the district attorney may decline access to the report in its possession if the district attorney receives a public records request for the report. If a public records request is received by the police agency for a copy of the same report remaining in the possession of the police agency, the police agency may not rely on *Foust* to deny access to the report but instead must perform the usual public records analysis. *Portage Daily Register*, 2008 WI App 30, ¶¶ 15-22, 308 Wis. 2d 357, ¶¶ 15-22, 746 N.W.2d 525, ¶¶ 15-22. See Section VIII.G.3. for further information about requests to law enforcement agencies.
- b. Executive privilege. 63 Op. Att'y Gen. 400, 410-14 (1974) (origins and scope discussed).
 - c. Records rendered confidential by the attorney-client privilege. See *George*, 169 Wis. 2d at 582, 485 N.W.2d at 464; *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143, 148-49 (1996); see also Section VIII.F.2.a.iv., below.
 - d. Records consisting of attorney work product, including the material, information, mental impressions, and strategies an attorney compiles in preparation for litigation. *Seifert*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, ¶ 28, 740 N.W.2d 177, ¶ 28.
 - e. Purely personal e-mails sent or received by employees or officers on an authority's computer system that evince no violation of law or policy. *Schill*, 2010 WI 86, ¶ 9 & n.4, ___ Wis. 2d ___, ¶ 9 & n.4, ___ N.W.2d ___, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).
 - i. The authority—not the employee or officer who sent or received a particular e-mail—is responsible for determining whether e-mails on its computer system are purely personal, and applying the regular public records analysis to those that are not.
 - ii. The authority's records custodian therefore should identify and screen all e-mails claimed to be purely personal, and that evince no violation of law or policy.
 - iii. Whether an e-mail is "purely personal" should be narrowly construed. Any content related to official duties, the affairs of government, and the official acts of the authority's officers and employees is not purely personal.
 - iv. Some e-mails may contain some content that is purely personal, such as family news, and other content that relates to official functions and responsibilities. The purely personal content should be redacted; the remaining content should be subject to regular public records analysis.

- v. For additional information, see 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.
6. *Note:* There is no blanket exemption for all personnel records of public employees. *Wis. Newspress*, 199 Wis. 2d at 775-82, 546 N.W.2d at 145-48. As discussed above, certain types of personnel records may be exempt from disclosure by specific statutory provisions. The balancing test, in certain circumstances, also may weigh against disclosure of other personnel records. See Section VIII.G.6.

F. Step Four: Does the balancing test compel access to the record?

- 1. The balancing test explained.
 - a. The records custodian must balance the strong *public interest in disclosure of the record against the public interest favoring nondisclosure*. *Journal Co.*, 43 Wis. 2d at 305, 168 N.W.2d at 839.
 - i. The custodian must identify potential reasons for denial, based on public policy considerations indicating that denying access is or may be appropriate.
 - ii. Those factors must be weighed against public interest in disclosure.
 - iii. Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538, 543-44 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579, 581 (Ct. App. 1991).
 - iv. Generally, there are no blanket exemptions from release and the balancing test must be applied with respect to each individual record. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, ¶ 56, 768 N.W.2d 700, ¶ 56.
 - v. The records custodian must consider all relevant factors to determine whether permitting record access would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing access. Wis. Stat. § 19.35(1)(a).
 - vi. The balancing test is a fact-intensive inquiry that must be performed on a case-by-case basis. *Kroeplin*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, ¶ 37, 725 N.W.2d 286, ¶ 37.
 - vii. A records custodian is not expected to examine a public records request “in a vacuum.” *Seifert*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, ¶ 31, 740 N.W.2d 177, ¶ 31. The public records law contemplates examination of all relevant factors, considered in the context of the particular circumstances. *Id.*
 - b. In other words, the records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness. *Hempel*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, ¶ 63, 699 N.W.2d 551, ¶ 63.

An “exceptional case” exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure,

notwithstanding the strong presumption favoring disclosure. Hempel, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, ¶ 63, 699 N.W.2d 551, ¶ 63.

- c. The identity of the requester and the purpose of the request are *not* part of the balancing test. *See Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75, 83 (Ct. App. 1999).
 - d. The *private interest* of a person mentioned or identified in the record is not a proper element of the balancing test, except indirectly.
 - i. If there is a *public interest* in protecting an individual's privacy or reputational interest as a general matter (for example, to insure that citizens will be willing to take jobs as police, fire, or correctional officers), there is a *public interest* favoring the protection of the individual's privacy interest. *See Linzmeyer*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, ¶ 31, 646 N.W.2d 811, ¶ 31.
 - ii. Without more, potential for embarrassment is not a sufficient basis for withholding a record. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, ¶ 62, 768 N.W.2d 700, ¶ 62.
 - e. Existing public availability of the information contained in a record weakens any argument for withholding the same information pursuant to the balancing test. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 61, 319 Wis. 2d 439, ¶ 61, 768 N.W.2d 700, ¶ 61 (union member names sought to be withheld were already publicly available in a staff directory).
2. Public policies that may be weighed in the balancing test can be identified through their expression in other areas of the law. Relevant public policies also may be practical or common sense reasons applicable in the totality of circumstances presented by a particular public records request. For example:
- a. Policies expressed through recognized evidentiary privileges.
 - i. Wisconsin Stat. ch. 905 enumerates a dozen different evidentiary privileges, such as lawyer-client, health care provider-patient, husband-wife, clergy-penitent, and others.
 - ii. Evidentiary privileges do not by themselves provide sufficient justification for denying access. *See, e.g.*, 1975 Judicial Council note to Wis. Stat. § 905.09. However, they may be considered to reflect public policies in favor of protecting the confidentiality of certain kinds of information.
 - iii. The balancing test weight accorded to public policies expressed in evidentiary privileges should be greater where other expressions of the same public policy also support denial of access. For example, weight of the physician-patient privilege is reinforced by Wis. Stat. § 146.82 (Wisconsin patient health care records confidentiality statute), HIPAA, and Wis. Admin. Code § Med 10.02(2)(n) ("unprofessional conduct" includes divulging patient confidences).
 - iv. *Caution:* Unlike the other privileges, the attorney-client privilege (Wis. Stat. § 905.03) does provide sufficient grounds to deny access without resort to the

balancing test. *George*, 169 Wis. 2d at 582, 485 N.W.2d at 464; *Wis. Newspress*, 199 Wis. 2d at 782-83, 546 N.W.2d at 148-49.

This is because the attorney-client privilege “is no mere evidentiary rule. It restricts professional conduct.” *Armada Broad., Inc. v. Stirn*, 177 Wis. 2d 272, 279 n.3, 501 N.W.2d 889, 893 n.3 (Ct. App. 1993), *rev'd on other grounds*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994); *see also* SCR 20:1.6(a).

b. Policies expressed through exemptions to the open meetings law (Wis. Stat. § 19.85). *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82, 312 Wis. 2d 84, ¶ 82, 752 N.W.2d 295, ¶ 82.

i. Exemptions to the open meetings law that allow an authority to meet in closed session, “are indicative of public policy” and can be considered as balancing factors favoring non-disclosure. Wis. Stat. § 19.35(1)(a); 73 Op. Att’y Gen. 20, 22 (1984).

ii. *Caution:* If a records custodian relies upon the public policy expressed in an open meetings exception to withhold a record, the custodian must make “a specific demonstration that there was a need to restrict public access *at the time that the request to inspect or copy the record was made.*” Wis. Stat. § 19.35(1)(a).

(a) A records custodian denying access to records on the basis of public policy expressed by one of the Wis. Stat. § 19.85(1) open meetings exceptions must do more than identify the exception under which the meeting was closed and assert that the reasons for closing the meeting still exist and therefore justify denying access to the requested records. *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 463 (Ct. App. 1985).

(b) The records custodian instead must state specific public policy reasons for the denial, as evidenced by existence of the related open meetings exception. *Oshkosh Nw.*, 125 Wis. 2d at 485, 373 N.W.2d at 463.

iii. Examples of exemptions from the open meetings law:

(a) Quasi-judicial deliberations. Wis. Stat. § 19.85(1)(a).

(b) Personnel matters. Wis. Stat. § 19.85(1)(b), (c), and (f).

In the employment context, reliance on public policies expressed in various Wis. Stat. § 19.85 exceptions has been examined in many cases. *See, e.g., Wis. Newspress*, 199 Wis. 2d at 784-88, 546 N.W.2d at 149-51 (balancing test weighed in favor of disclosure of completed disciplinary investigation); *Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 40-42, 465 N.W.2d 266, 269-70 (Ct. App. 1990) (same).

(c) Considering specific applications of probation, extended supervision or parole, or considering strategies for crime detection or prevention. Wis. Stat. § 19.85(1)(d).

- (d) Public business involving investments, competitive factors, or negotiations. Wis. Stat. § 19.85(1)(e). *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 81 n.18, 312 Wis. 2d 84, ¶ 81 n.18, 752 N.W.2d 295, ¶ 81 n.18.
 - (e) Consideration or investigation into sensitive or private matters, “which, if discussed in public, would be likely to have a *substantial* adverse effect upon the reputation of any person referred to.” See Wis. Stat. § 19.85(1)(f).
 - (f) Legal advice as to pending or probable litigation. Wis. Stat. § 19.85(1)(g).
 - (g) Proper closing of a meeting under one of the Wis. Stat. § 19.85(1) exemptions is not in and of itself sufficient reason to deny access to records considered or distributed during the closed session, or to minutes of the closed session. See *Oshkosh Nw.*, 125 Wis. 2d at 485, 373 N.W.2d at 462-63.
- d. Policies reflected in exceptions to disclosure under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. See *Linzmeyer*, 2002 WI 84, ¶ 32, 254 Wis. 2d 306, ¶ 32, 646 N.W.2d 811, ¶ 32.
 - f. Various other policies that, depending on the circumstances of an individual request, would be relevant in performing the balancing test. For example,
 - i. Evidence of official cover-up is a potent reason for disclosing records. Citizens have a very strong public interest in being informed about public officials who have been derelict in their duties. *Hempel*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, ¶ 68, 699 N.W.2d 557, ¶ 68.
 - ii. Potential loss of morale if public employees’ personnel files are readily disclosed weighs against public access. *Hempel*, 2005 WI 120, ¶ 74, 284 Wis. 2d 162, ¶ 74, 699 N.W.2d 551, ¶ 74.
 - iii. However, there is a public interest in disciplinary actions taken against public officials and employees—especially those employed in law enforcement. *Kroeplin*, 2006 WI App 227, ¶ 22, 297 Wis. 2d 253, ¶ 22, 725 N.W.2d 286, ¶ 22. The courts repeatedly have recognized the great importance of disclosing disciplinary records of public officials and employees when their conduct violates the law or significant work rules. *Id.*, ¶ 28.
 - iv. Potential difficulty attracting quality candidates for public employment if there is a perception that public personnel files are regularly open for review is a public interest in non-disclosure. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75.
 - v. Potential chilling of candid employee assessment in personnel records also weighs against disclosure. *Hempel*, 2005 WI 120, ¶ 77, 284 Wis. 2d 162, ¶ 77, 699 N.W.2d 551, ¶ 77.
 - vi. Broadly sweeping, generalized assertions that records must be withheld to protect the safety of public employees are not sufficient. “Nearly all public officials, due to their profiles as agents of the State, have the potential to incur the wrath of disgruntled members of the public, and may be expected to face heightened public scrutiny; that is

simply the nature of public employment.” *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 63, 319 Wis. 2d 439, ¶ 63, 768 N.W.2d 700, ¶ 63. Safety concerns should be particularized when offered to justify withholding or redaction of records. Statutory provisions such as Wis. Stat. § 19.35(1)(am)2.b. (disclosure of records containing personally identifiable information pertaining to requester would endanger an individual’s life or safety) and 19.35(1)(am)2.c. (disclosure of records containing personally identifiable information pertaining to requester would endanger safety of correctional officers) may be considered as indicative of public policy recognizing safety concerns properly considered in the balancing test. *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 65 n.19, 319 Wis. 2d 439, ¶ 65 n.19, 768 N.W.2d 700, ¶ 65 n.19.

- vii. Policies expressed in the Wis. Stat. § 19.35(1)(am) exemptions to disclosure of records containing personally identifiable information pertaining to a requester who specifically indicates that the purpose of his or her request is to inspect or copy records containing personally identifiable information about the requester. *Seifert*, 2007 WI App 207, ¶¶ 23, 32-34, 305 Wis. 2d 582, ¶¶ 23, 32-34, 740 N.W.2d 177, ¶¶ 23, 32-34.

G. Special issues.

1. Privacy and reputational interests.

- a. Numerous statutes and court decisions recognize the importance of an individual’s interest in his or her privacy and reputation as a matter of public policy. For example:
 - i. Wis. Stat. § 995.50 (recognizing “right of privacy”).
 - ii. Wis. Stat. § 19.85(1)(e) (open meetings law exception, *see* Section VIII.F.2.b.iii.(e)).
 - iii. Wis. Stat. § 230.13 (certain state employee records).
 - iv. *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d 699, 704-06 (1996), *superseded by* Wis. Stat. §§ 19.356 and 19.36(10)-(12).
- b. The public interest in protecting the privacy and reputational interest of an individual is not equivalent to the individual’s personal interest in protecting his or her own character and reputation. *Zellner I*, 2007 WI 53, ¶ 50, 300 Wis. 2d 290, ¶ 50, 731 N.W.2d 240, ¶ 50.
 - i. The concern is not personal embarrassment and damage to reputation, but whether disclosure would affect any public interest. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52.
 - ii. After an individual has died, the relevant privacy interests are not those of the deceased individual but instead those of the individual’s survivors. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (family had privacy interest in preventing disclosure of death scene photographs of deceased family member).
- c. Privacy-related concerns may outweigh the public interest in disclosure if disclosure would threaten personal privacy and safety, or if other privacy protections have been established by law. *Kroeplin*, 2006 WI App 227, ¶ 46, 297 Wis. 2d 254, ¶ 46, 725 N.W.2d 286, ¶ 46.

- d. The privacy statute provides that “[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record.” Wis. Stat. § 995.50(2)(c).
- e. The public interest in protecting an individual’s reputation is significantly diminished when damaging information about the individual already has been made public. *Kroeplin*, 2006 WI App 227, ¶ 47, 297 Wis. 2d 254, ¶ 47, 725 N.W.2d 286, ¶ 47.
- f. In many cases, public interests in confidentiality, privacy, and reputation have been found to outweigh the public interest in disclosure. For example:
 - i. In *Village of Butler*, 163 Wis. 2d at 831, 472 N.W.2d at 584, the court held that the balance weighed in favor of the public’s interest in keeping police personnel records private: “disclosure of the requested records likely would inhibit a reviewer from making candid assessments of their employees in the future [And] opening these records likely would have the effect of inhibiting an officer’s desire or ability to testify in court because he or she would face cross-examination as to embarrassing personal matters. A foreseeable result is that fewer qualified people would accept employment in a position where they could expect that their right to privacy regularly would be abridged.”
 - ii. In *Kraemer Brothers*, 229 Wis. 2d at 92-104, 599 N.W.2d at 79-84, the court held that the privacy interests of employees of private companies contracting with a public entity outweighed public interest in disclosure.
 - iii. In *Hempel*, 2005 WI 120, ¶¶ 71-73, 284 Wis. 2d 162, ¶¶ 71-73, 699 N.W.2d 551, ¶¶ 71-73, the court held that it was appropriate to consider the confidentiality concerns of witnesses and complainants, and the possible chilling effects on potential future witnesses and complainants, when performing the balancing test.
- g. In many other cases, however, the public interest in disclosure has been found to outweigh any public interest in privacy and reputation. For example:
 - i. In *Local 2489*, 2004 WI App 210, ¶¶ 21, 26, 277 Wis.2d 208, ¶¶ 21, 26, 689 N.W.2d 644, ¶¶ 21, 26, the court held that the balancing test tipped in favor of public access to a completed investigation of public employee wrongdoing.
 - ii. In *Jensen v. School District of Rhineland*, 2002 WI App 78, ¶¶ 22-24, 251 Wis. 2d 676, ¶¶ 22-24, 642 N.W.2d 638, ¶¶ 22-24, the court held that the public interest in disclosure of a school superintendent’s performance evaluation outweighed his reputational interest because a public official has a lower expectation of employment privacy and because prior media reports had already compromised the superintendent’s reputational interest.
 - iii. In *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 9-26, 249 Wis. 2d 242, ¶¶ 9-26, 638 N.W.2d 625, ¶¶ 9-26, the court held that the public interest in disclosure of the names and license numbers of school bus drivers outweighed a slight privacy intrusion.
 - iv. In *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670, 677 (Ct. App. 1996), the court held that police officers have a lower expectation of privacy. The public interest in being informed of alleged misconduct by law enforcement officers and the extent to which those allegations were

properly investigated is particularly compelling. *Kroeplin*, 2006 WI App 227, ¶ 46, 297 Wis. 2d 254, ¶ 46, 725 N.W.2d 286, ¶ 46.

- v. In *Zellner I*, 2007 WI 53, ¶ 53, 300 Wis. 2d 290, ¶ 53, 731 N.W.2d 240, ¶ 53, the court held that the public has a significant interest in knowing about allegations of public schoolteacher misconduct and how they are handled, because teachers are entrusted with the significant responsibility of teaching children.
 - vi. In *Breier*, 89 Wis. 2d at 440, 279 N.W.2d at 190, the court held that public interest in disclosure of arrest records outweighed any public interest in the privacy and reputational interests of arrestees.
 - h. Privacy interests may be given greater weight where personal safety is also at issue. See *Klein v. Wis. Res. Ctr.*, 218 Wis. 2d 487, 496-97, 582 N.W.2d 44, 47-48 (Ct. App. 1998); *State ex rel. Morke v. Record Custodian*, 159 Wis. 2d 722, 726, 465 N.W.2d 235, 236-37 (Ct. App. 1990).
 - i. Access to FBI rap sheets has been held to be an unwarranted invasion of privacy, categorically. *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-71 (1989). But see Letter from James E. Doyle, Wisconsin Attorney General, to Philip Arreola, City of Milwaukee Police Chief (March 21, 1991) (rap sheets are available under Wisconsin law).
 - j. Prominent public officials must have a lower expectation of personal privacy than regular public employees; greater scrutiny of public employees than their private sector counterparts comes with the territory of public employment. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75; *Kroeplin*, 2006 WI App 227, ¶ 49, 297 Wis. 2d 254, ¶ 49, 725 N.W.2d 286, ¶ 49. There is a particularly strong public interest in being informed about public officials who have been derelict in their duties. *Id.*, ¶ 52.
2. Crime victims and their families.
- a. State and federal law recognizes rights of privacy and dignity for crime victims and their families.
 - b. The Wisconsin Constitution, art. I, § 9m, states that crime victims should be treated with “fairness, dignity, and respect for their privacy.”
 - c. The Wisconsin Statutes recognize that this state constitutional right must be honored vigorously by law enforcement agencies. The statutes further recognize that crime victims include both persons against whom crimes have been committed and a deceased victim’s family members. Wis. Stat. §§ 950.01 and 950.02(4)(a).
 - d. The Wisconsin Supreme Court, speaking of both Wis. Const. art. I, § 9, and related statutes concerning the rights of crime victims, has instructed that “justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims.” *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, ¶ 26, 692 N.W.2d 623, ¶ 26.
 - e. Federal courts, including the United States Supreme Court, also have recognized that family members of a deceased person have personal rights of privacy—in addition to those of the

deceased—under both traditional common law and federal statutory law. “Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.” *Favish*, 541 U.S. at 168.

3. Law enforcement records.

- a. Public policies favor public safety and effective law enforcement. See *Linzmeier*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, ¶ 30, 646 N.W.2d 811, ¶ 30.
- b. Police reports of closed investigations.
 - i. No blanket rule—balancing test must be done on a case-by-case basis. *Linzmeier*, 2002 WI 84, ¶ 42, 254 Wis. 2d 306, ¶ 42, 646 N.W.2d 811, ¶ 42.
 - ii. Policy interests against disclosure: interference with police business, privacy and reputation, uncertain reliability of “raw investigative data,” revelation of law enforcement techniques, danger to persons named in report.
 - iii. Policy interests favoring disclosure: public oversight of police and prosecutorial actions, reliability of corroborated evidence, degree to which sensitive information already has been made public.
- c. Police reports of ongoing investigations.
 - i. Subject to the balancing test, but policy interests against disclosure most likely will outweigh interests in favor of release. See *Linzmeier*, 2002 WI 84, ¶¶ 15-18, 254 Wis. 2d 306, ¶¶ 15-18, 646 N.W.2d 811, ¶¶ 15-18.
 - ii. Access to an autopsy report was properly denied when a murder investigation was still open. *Journal/Sentinel*, 145 Wis. 2d at 824-27, 429 N.W.2d at 774-76; see also *Favish*, 541 U.S. at 167.
 - iii. Fact that a police investigation is open and has been referred to the district attorney’s office is not a public policy reason sufficient for the police department to deny access to its investigative report. One or more public policy reasons applicable to the circumstances of the case must be identified in order to deny access, such as protection of crime detection strategy or prevention of prejudice to the ongoing investigation. *Portage Daily Register*, 2008 WI App 30, ¶¶ 23-26, 308 Wis. 2d 357, ¶¶ 23-26, 746 N.W.2d 525, ¶¶ 23-26.
- d. Confidential informants.
 - i. In a reverse of the usual analysis, records custodians must withhold access to records involving confidential informants unless the balancing test requires otherwise. Wis. Stat. § 19.36(8).
 - ii. If a record is opened for inspection, the records custodian must delete any information that would identify the informant.

- iii. "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied."
 - iv. Confidential informants outside the law enforcement context: If an authority must promise confidentiality to an informant in order to investigate a civil law violation, the resulting record *may* be protected from disclosure under the balancing test. *See Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164-68, 469 N.W.2d 638, 646-48 (1991) (tax investigation).
 - (a) The test for establishing a valid pledge of confidentiality is demanding. *See* 74 Op. Att'y Gen. 14 (1985); 60 Op. Att'y Gen. 284 (1971).
 - (b) For this kind of confidentiality agreement to override the public records law, the agreement must meet a four-factor test adopted in *Mayfair Chrysler-Plymouth*, 162 Wis. 2d at 168, 469 N.W.2d at 648:
 - (1) There must have been a clear pledge of confidentiality;
 - (2) The pledge must have been made in order to obtain the information;
 - (3) The pledge must have been necessary to obtain the information; and
 - (4) Even if the first three factors are met, the records custodian must determine that the harm to the public interest in permitting inspection outweighs the great public interest in full inspection of public records.
 - e. Special custodial and disclosure rules govern public records requests for certain shared law enforcement records. *See* Section IV.D.4., above.
4. Children and juveniles. Many, but not all, records related to children or juveniles have special statutory confidentiality protections.
- a. Law enforcement records.
 - i. Except as provided in Wis. Stat. § 48.396(1)-(1d), (5), and (6), law enforcement officers' records of children who are the subjects of investigations or other proceedings pursuant to Chapter 48 are confidential. Subjects covered by Chapter 48 include children in need of protection and services ("CHIPS"), foster care, and other child welfare services. *See also* Section VIII.E.3.d.i.
 - ii. Except as provided in Wis. Stat. § 938.396(1), (1j), and (10), law enforcement officers' records of juveniles who are the subjects of proceedings under the juvenile justice provisions of Chapter 938, including matters which would be prosecuted as crimes if committed by an adult. *See also* Section VIII.E.3.d.i.
 - iii. Other law enforcement records regarding or mentioning children are not subject to the confidentiality provisions of Wis. Stat. § 48.396 or 938.396. These records might involve children who witness crimes, are the victims of crimes that do not lead to Chapter 48 or 938 proceedings, or are mentioned in law enforcement reports for other reasons: for example, a child who happens to witness a bank robbery or be the victim of a hit and run automobile accident.

- (a) Access to these records should be resolved by application of general public records rules.
 - (b) Balancing test consideration may be given to public policy concerns arising from the ages of the children mentioned, such as whether release of unredacted records would likely subject a child mentioned to bullying at school, further victimization, or some neighborhood retaliation. In such cases, redaction of identifying information about children mentioned may be warranted under the balancing test.
- iv. Special difficulties are presented by records related to simultaneous proceedings under Chapter 48 or 938 and the adult criminal code.
 - (a) For example, investigation of a CHIPS matter may lead to criminal charges against one or more adults implicated in the investigation. Or, both an adult and a juvenile may be implicated in actions charged as an ordinary criminal matter against the adult and as the subject of Chapter 938 proceedings regarding the juvenile.
 - (b) No black and white rules are appropriate for these complicated situations. Records custodians handling requests for records in these matters are strongly encouraged to consult with their legal counsel.
- b. Court records. Records of courts exercising jurisdiction over children pursuant to Chapter 48 or juveniles pursuant to Chapter 938 are subject to the respective confidentiality restrictions of Wis. Stat. §§ 48.396(2), (6), and 938.396(2), (2g), and (10). Certain exceptions apply to motor vehicle operation records and operating privilege records pursuant to Wis. Stat. § 938.396(3)-(4).
- c. Child protective services and similar agency records.
 - i. Except as provided in Wis. Stat. § 48.78, the Department of Children and Family Services, a county department of social services, a county department of human services, a licensed child welfare agency or a licensed day care center may not make available for inspection or disclose the contents of any record kept or information received about a child in its care or legal custody.
 - ii. Except as provided in Wis. Stat. § 938.78, the Department of Corrections, a county department of social services, a county department of human services, or a licensed child welfare agency may not make available for inspection or disclose the contents of any record kept or information received about a juvenile who is or was in its care or legal custody.
- d. Student records. Pupil records of elementary and high school students are subject to the confidentiality provisions of Wis. Stat. § 118.125. The Wisconsin Department of Public Instruction provides comprehensive guidance about confidentiality and student records at <http://dpi.wi.gov/sspw/pdf/srconfid.pdf>.
- 5. Confidentiality agreements. Lawsuit settlement agreements providing that the terms and conditions of the settlement will remain confidential are public records subject to the balancing test.

- a. This applies to settlements formally approved by a court. See *In re Estates of Zimmer*, 151 Wis. 2d 122, 131-37, 442 N.W.2d 578, 582-85 (Ct. App. 1989).
 - b. This also applies to settlements not filed with or submitted to a court. See *Journal/Sentinel*, 186 Wis. 2d at 451-55, 521 N.W.2d at 169-71; 74 Op. Att'y Gen. 14.
 - c. Settlement of litigation is in the public interest, and certain parties are more likely to settle their claims if they are guaranteed confidentiality—so there is some public interest in keeping settlement agreements confidential. When applying the balancing test, however, Wisconsin courts usually find that other public interests outweigh any public interest in keeping settlement agreements confidential. See *Journal/Sentinel*, 186 Wis. 2d at 458-59, 521 N.W.2d at 172; *Zimmer*, 151 Wis. 2d at 133-35, 422 N.W.2d at 583-84; *C.L. v. Edson*, 140 Wis. 2d 168, 184-86, 409 N.W.2d 417, 423 (Ct. App. 1987).
 - d. If an authority enters into a confidentiality agreement, it may later find itself in “a no-win” situation where it must choose between violating the agreement or violating the public records law. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918, 921 (Ct. App. 1993).
6. Personnel records and other employment-related records.
- a. General concepts applicable to personnel records and the balancing test.
 - i. The records custodian almost invariably must evaluate context to some degree. *Hempel*, 2005 WI 120, ¶ 66, 284 Wis. 2d 162, ¶ 66, 699 N.W.2d 551, ¶ 66.
 - ii. The public interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling and would not, by itself, override the strong public interest in obtaining information regarding their activities while on duty. *Local 2489*, 2004 WI App 210, ¶ 27, 277 Wis. 2d 208, ¶ 27, 689 N.W.2d 644, ¶ 27.
 - iii. Public employees who serve in a position of trust, such as law enforcement, should expect closer public scrutiny. *Kroeplin*, 2006 WI App 227, ¶ 44, 297 Wis. 2d 254, ¶ 44, 725 N.W.2d 286, ¶ 44; *Local 2489*, 2004 WI App 210, ¶ 26, 277 Wis. 2d 208, ¶ 26, 689 N.W.2d 644, ¶ 26.
 - iv. Public employees have no expectation of privacy in records demonstrating potentially illegal conduct even if disclosure would dilute their effectiveness at their jobs. *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130, 133 (Ct. App. 1995).
 - v. Persons of public prominence have little expectation of privacy regarding professional conduct, even if allegations against them were disproven. *Wis. State Journal*, 160 Wis. 2d at 41-42, 465 N.W.2d at 270.
 - vi. Embarrassing computer use records do not change character as public records under the balancing test even if presented to an employee at a closed and confidential meeting. *Zellner I*, 2007 WI 53, ¶ 54, 300 Wis. 2d 290, ¶ 54, 731 N.W.2d 240, ¶ 54.

b. Factors weighing in favor of disclosure of personnel records.

- i. Records contain or dispel evidence of an official cover-up. *Hempel*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, ¶ 68, 699 N.W.2d 551, ¶ 68.
- ii. Records contain evidence/information regarding a school teacher's inappropriate comments toward students, *Linzmeier*, 2002 WI 84, ¶¶ 4, 25, 254 Wis. 2d 306, ¶¶ 4, 25, 646 N.W.2d 811, ¶¶ 4, 25, or viewing pornography on a school computer. *Zellner I*, 2007 WI 53, ¶ 53, 300 Wis. 2d 290, ¶ 53, 731 N.W.2d 240, ¶ 53.
- iii. The information that would pose the most potential reputational harm already is available in the public domain. *Kroeplin*, 2006 WI App 227, ¶ 47, 297 Wis. 2d 254, ¶ 47, 725 N.W.2d 286, ¶ 47; *Kailin v. Rainwater*, 226 Wis. 2d 134, 148, 593 N.W.2d 865, 871 (Ct. App. 1999) (concluding that courts "cannot un-ring the bell").
- iv. Employee has other available avenues of recourse, such as the ability to file a response to an inaccurate or misleading fact disclosure. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16, 251 Wis. 2d 676, ¶ 16, 642 N.W.2d 638, ¶ 16). See Section XII., below.

c. Factors weighing against disclosure of personnel records.

- i. The increased level of embarrassment would have a chilling effect on future witnesses or victims coming forward—especially in sexual harassment case. *Hempel* 2005 WI 120, ¶ 73, 284 Wis. 2d 162, ¶ 73, 699 N.W.2d 551, ¶ 73; *Local 2489*, 2004 WI App 210, ¶ 9, 277 Wis. 2d 208, ¶ 9, 689 N.W.2d 644, ¶ 9.
- ii. Loss of morale if employees believed their personnel files were readily available to the public. However, the court called this argument only "plausible" and did not "fully endorse" it. *Hempel*, 2005 WI 120, ¶ 74, 284 Wis. 2d 162, ¶ 74, 699 N.W.2d 551, ¶ 74.
- iii. The scrutiny of rank-and-file employees in the records extends so far such that it may discourage qualified candidates from entering the workforce. However, the court found this factor to weigh only "slightly" in favor of non-disclosure. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, ¶ 75, 699 N.W.2d 551, ¶ 75.
- iv. Information gleaned from the investigation could be factually inaccurate and cause unfair damage to the employee's reputation. *Hempel*, 2005 WI 120, ¶ 76, 284 Wis. 2d 162, ¶ 76, 699 N.W.2d 551, ¶ 76. However, the employee should provide facts establishing that the record contains inaccurate, misleading, and unauthenticated data. *Zellner I*, 2007 WI 53, ¶ 52, 300 Wis. 2d 290, ¶ 52, 731 N.W.2d 240, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16, 251 Wis. 2d 676, ¶ 16, 642 N.W.2d 638, ¶ 16).
- v. Disclosure could inhibit future candid assessments of employees in personnel records. *Hempel*, 2005 WI 120, ¶ 77, 284 Wis. 2d 162, ¶ 77, 699 N.W.2d 551, ¶ 77 (citing *Vill. of Butler*, 163 Wis. 2d 819, 828 n.3, 472 N.W.2d 579, 583 n.3 (Ct. App. 1991)).

- vi. Release would jeopardize *both* the personal privacy and safety of an employee. *Local 2489*, 2004 WI App 210, ¶ 28, 277 Wis. 2d 208, ¶ 28, 689 N.W.2d 644, ¶ 28 (citing *Ledford*, 195 Wis. 2d at 250-51, 536 N.W.2d at 132).
- d. Personal e-mails.
- i. Purely personal e-mails sent or received by employees or officers on an authority's computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request. *Schill*, 2010 WI 86, ¶ 9 & n.4, ___ Wis. 2d ___, ¶ 9 & n.4, ___ N.W.2d ___, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).
 - ii. Personal e-mails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the e-mails and a government function, such as a personnel investigation. *Schill*, 2010 WI 86, ¶ 23, ___ Wis. 2d ___, ¶ 23, ___ N.W.2d ___, ¶ 23 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 166 (Bradley, J., concurring); *Id.*, ¶ 180 (Gableman, J., concurring).
 - iii. *Schill* does not prevent requesters interested in how an authority's employees and officers are using e-mail accounts on the authority's computer system from obtaining access to records other than purely personal e-mails. A requester seeking this kind of information could request records showing the number of e-mails sent or received by a particular employee or officer during a specified time period, for example, and the times and dates of those e-mails.
 - iv. Like other reasons asserted by a records custodian for withholding or redacting requested records, a response asserting that responsive records consist of purely personal e-mails that will not be disclosed may be challenged by filing a petition for writ of mandamus. See Section XIII.A., below, for more information about mandamus actions.
 - v. For additional information, see 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.
- e. Other personnel records cross-references in this outline.
- i. Section VIII.E.2.: Exempt from disclosure by public records statutes.
 - ii. Section VIII.E.2.e.: Information relating to staff management planning.
 - iii. Section VIII.E.6.: No blanket exemption for all personnel records of public employees.
 - iv. Section VIII.F.2.b.iii.: Open meetings law exemptions.
 - v. Section VIII.G.1.: Privacy-related concerns may outweigh the public interest in disclosure.

- vi. Section VIII.G.7.c.vii.(a)(2): Personnel investigation prepared by an attorney may be withheld if performed after threat of litigation.

7. Records about the requester.

- a. The fact that a particular record is about the requester generally does not determine who is entitled to access that record. *See* Wis. Stat. § 19.35(1)(a) (“any requester has the right to inspect any record”).
- b. A requester does have a greater right of access than the general public to “any record containing personally identifiable information pertaining to the individual.” Wis. Stat. § 19.35(1)(am).
 - i. This is because an individual requester asking to inspect or copy records pertaining to himself or herself is considered to be substantially different from a requester, “be it a private citizen or a news reporter,” who seeks access to records about government activities or other people. *Hempel*, 2005 WI 120, ¶ 34, 284 Wis. 2d 162, ¶ 34, 699 N.W.2d 551, ¶ 34.
 - ii. The purpose of giving an individual greater access to records under Wis. Stat. § 19.35(1)(am) is so that the individual can determine what information is being maintained, and whether that information is accurate. *Hempel*, 2005 WI 120, ¶ 55, 284 Wis. 2d 162, ¶ 55, 699 N.W.2d 551, ¶ 55.
 - iii. When it applies, the Wis. Stat. § 19.35(1)(am) right of access to records containing individually identifiable information about the requester is more potent than the general Wis. Stat. § 19.35(1)(a) right of access. The Wis. Stat. § 19.35(1)(am) right is more unqualified. *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 10, 287 Wis. 2d 795, ¶ 10, 706 N.W.2d 161, ¶ 10.
- c. When a person or the person’s authorized representative makes a public records request under Wis. Stat. § 19.35(1)(a) or (am) and states that the purpose of the request is to inspect or copy records containing personally identifiable information about the person, the following procedure is required by Wis. Stat. § 19.35(4)(c)1. and 3. *Hempel*, 2005 WI 120, ¶ 29, 284 Wis. 2d 162, ¶ 29, 699 N.W.2d 551, ¶ 29. A general public records request, not indicating that the purpose of the request is to inspect or copy records containing personally identifiable information pertaining to the requester, does not trigger the following procedure. *Seifert*, 2007 WI App 207, ¶ 21, 305 Wis. 2d 582, ¶ 21, 740 N.W.2d 177, ¶ 21.
 - i. The records custodian determines if the requester has a right to inspect or copy the records under Wis. Stat. § 19.35(1)(a), the statute creating general public access rights.
 - ii. If the records custodian determines that the requester does not have a right to inspect or copy the record under Wis. Stat. § 19.35(1)(a), the records custodian then must determine if the requester has a right to inspect or copy the record under Wis. Stat. § 19.35(1)(am).
 - iii. Under Wis. Stat. § 19.35(1)(am), the person is entitled to inspect or receive copies of the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to Wis. Stat. § 19.35(1)(am).

- iv. These requests are not subject to the balancing test, because the Legislature already has done the necessary balancing by enacting exceptions to the Wis. Stat. § 19.35(1)(am) disclosure requirements. *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56, 284 Wis. 2d 162, ¶¶ 3, 27, 56, 699 N.W.2d 557, ¶¶ 3, 27, 56.
- v. The Wis. Stat. § 19.35(1)(am) exceptions mainly protect the integrity of ongoing investigations, the safety of individuals (especially informants), institutional security, and the rehabilitation of incarcerated persons.
- vi. These Wis. Stat. § 19.35(1)(am) exceptions are not to be narrowly construed. *Hempel*, 2005 WI 120, ¶ 56, 284 Wis. 2d 162, ¶ 56, 699 N.W.2d 551, ¶ 56.
- vii. Wisconsin Stat. § 19.35(1)(am) exceptions include the following:
 - (a) Any record containing personally identifiable 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 such record that is collected or maintained in connection with such an action or proceeding. Wis. Stat. § 19.35(1)(am)1.
 - (1) Wisconsin Stat. § 19.35(1)(am) contains no requirement that the investigation be current. *Seifert*, 2007 WI App 207, ¶ 36, 305 Wis. 2d 582, ¶ 36, 740 N.W.2d 177, ¶ 36.
 - (2) This section allows a custodian to deny access to a requester who is, in effect, a potential adversary in litigation or another proceeding unless or until required to do so under the rules of discovery in actual litigation. *Seifert*, 2007 WI App 207, ¶ 32, 305 Wis. 2d 582, ¶ 32, 740 N.W.2d 177, ¶ 32 (personnel investigation prepared by an attorney may be withheld if performed after threat of litigation).
 - (b) Any record containing personally identifiable information that would do any of the following if disclosed:
 - (1) Endanger an individual's life or safety. Wis. Stat. § 19.35(1)(am)2.a.
 - (2) Identify a confidential informant. Wis. Stat. § 19.35(1)(am)2.b.
 - (3) Endanger the security—including security of population or staff—of any state prison, jail, secured correctional facility, secured child caring institution, secured group home, mental health institute, center for the developmentally disabled, or facility for the institutional care of sexually violent persons. Wis. Stat. § 19.35(1)(am)2.c.
 - (4) Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in Wis. Stat. § 19.35(1)(am)2.c. and d.
 - (c) Any record that is part of a record series, as defined in Wis. Stat. § 19.62(7), that is not indexed, arranged, or automated in a way that the record can be retrieved by the

authority maintaining the record series by use of an individual's name, address, or other identifier. Wis. Stat. § 19.35(1)(am)3.

- d. Student and pupil records. Although these are generally exempt from disclosure, they are open to students and their parents (except for those legally denied parental rights). See FERPA, 20 U.S.C. § 1232g(a)(1); Wis. Stat. § 118.125(2).
- e. A patient's access to his or her own mental health treatment records may be restricted by the director of the treatment facility during the course of treatment. Wis. Stat. § 51.30(4)(d)1. However, after discharge, such records are available to the patient. Wis. Stat. § 51.30(4)(d)2.-3.; *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 840-44, 586 N.W.2d 36, 39-40 (Ct. App. 1998).
- f. After sentencing, a criminal defendant is not entitled to access his or her presentence investigation without a court order. Wis. Stat. § 972.15(4); *Hill*, 196 Wis. 2d at 425-28, 538 N.W.2d at 611-12.
- g. Other statutes may impose other restrictions on a requester's ability to obtain particular kinds of records about himself or herself.
- h. Wisconsin Stat. § 19.365(1) provides a procedure for an individual or a person authorized by the individual to challenge the accuracy of a record containing personally identifying information about that individual. See Section XII., below.

IX. Limited Duty to Notify Persons Named in Records Identified for Release.

- A. **Background.** Beginning with *Woznicki*, the Wisconsin Supreme Court recognized that when a records custodian's decision to release records implicates the reputational or privacy interests of an individual, the records custodian must notify the subject of the intent to release, and allow a reasonable time for the subject of the record to appeal the records custodian's decision to circuit court. Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees. *Klein*, 218 Wis. 2d 487, 582 N.W.2d 44; *Milwaukee Teachers' Educ. Ass'n v. Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).
- B. **Notice and judicial review procedures.** Wisconsin Stat. § 19.356 now codifies and clarifies pre-release notice requirements and judicial review procedures.
- C. **Records regarding which notice is required and pre-release court review may be sought.**
 - 1. First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.
 - 2. Limited to three categories of records by Wis. Stat. § 19.356, created in 2003 Wisconsin Act 47.
 - 3. These three categories are:
 - a. Records containing information relating to an employee created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the

employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer. Wis. Stat. § 19.356(2)(a)1.

- b. Records obtained by the authority through a subpoena or search warrant. Wis. Stat. § 19.356(2)(a)2.
- c. Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access. Wis. Stat. § 19.356(2)(a)3.

The Attorney General has opined that Wis. Stat. § 19.356(2)(a)3. does not allow release of the information without obtaining authorization from the individual employee. OAG 01-06 (August 3, 2006), at 4-5.

- 4. Notice must be provided to “any record subject to whom the record pertains.” Wis. Stat. § 19.356(2)(a).
 - a. See Sections IV.E. and IV.F., above, for the definitions of “record subject” and “personally identifiable information.”
 - b. This does not mean that every person mentioned in a record must receive notice. Instead, the record subject must—in some direct way—be a focus or target of the requested record. OAG 01-06, at 2-3.
- 5. Limited exceptions to the notice requirement apply to access by the affected employee, for purposes of collective bargaining, or for investigation of discrimination complaints. Wis. Stat. § 19.356(2)(b) and (c).
- 6. Written notice is required. Wis. Stat. § 19.356(2)(a).
- 7. Notice must be served before permitting access to the record and within three business days after making the decision to permit access. Wis. Stat. §§ 19.345 and 19.356(2)(a).
- 8. Notice must be served personally or by certified mail. Wis. Stat. § 19.356(2)(a).
- 9. The notice must briefly describe the requested record and include a description of the record subject’s rights under Wis. Stat. § 19.356(3) and (4) to seek a court order restraining access of the record. Wis. Stat. § 19.356(2)(a). It may be helpful to include copies of the records identified for release and a copy of Wis. Stat. § 19.356.
- 10. Explaining in the notice what, if any, information the authority intends to redact before permitting access may prevent efforts to obtain a court order restraining release. Enclosing copies of the records as redacted for intended release serves the same purpose.
- 11. An expedited procedure for seeking court review after receipt of a notice is set forth in Wis. Stat. § 19.356(3)-(8). Strict timelines apply to the notice and judicial review requirements. Courts must give priority to these judicial reviews. See Wis. Stat. § 19.356(3)-(8). See generally *Local 2489*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644. Appeal of a circuit court order on judicial review pursuant to Wis. Stat. § 19.356(4)-(7) must be filed within twenty days of entry of the circuit court order. *Zellner v. Herrick* (“*Zellner II*”), 2009 WI 80, ¶ 27, 319 Wis. 2d 532, ¶ 27, 770 N.W.2d 305, ¶ 27.

12. The authority may not provide access to a requested record within twelve business days of sending the notice. If a judicial review action is commenced, access may not be provided until that review action concludes. Wis. Stat. §§ 19.345 and 19.356(5).
 13. A notice may include information beyond what the statute requires in order to assist the recipient in understanding why the notice is being provided.
- D. Records regarding which notice is required and supplementation of the record is authorized.**
1. A different kind of notice is required if an authority decides to permit access to a record containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office. Wis. Stat. § 19.356(9)(a).
 2. Again, first perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.
 3. See Sections IV.E., IV.H., and IV.G., above, for the definitions of "record subject," "state public office" and "local public office."
 4. Notice must be served on the record subject personally or by certified mail within three business days of making the decision to permit access to the records, and before releasing the records. Wis. Stat. §§ 19.345 and 19.356(9)(a).
 5. The notice must briefly describe the requested records and describe the record subject's right to augment the records as provided in Wis. Stat. § 19.356(9)(b). Wis. Stat. § 19.356(9)(a).
 6. Within five business days after receipt of a notice pursuant to Wis. Stat. § 19.356(9)(a), the record subject may augment the record with written comments and documents of the record subject's choosing. Wis. Stat. §§ 19.345 and 19.356(9)(b).
 7. The authority must release the record as augmented by the record subject, except as otherwise authorized or required by statute. Wis. Stat. § 19.356(9)(b).
- E. Courtesy notice.**
1. Written or verbal notice of anticipated public records releases may be provided as a courtesy to persons not entitled to receive Wis. Stat. § 19.356 notices, such as crime victims or public information officers.
 2. Courtesy notices are not required by law. They can be used to provide affected persons with some advance notice of public records releases related to those persons.
 3. The first step is to perform the usual public records analysis. There is no need to consider whether courtesy notice should be provided if no records are going to be released.
 4. Courtesy notices should not suggest that the recipient is entitled to seek pre-release court review.
 5. Courtesy notice procedures should not unduly delay related records releases.

X. Electronic Records.

A. **Introduction.** The same general principles apply to records in electronic format, but unique or unresolved problems relating to storage, retention, and access abound.

1. The public records law defines the term “record” broadly to include “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.” Wis. Stat. § 19.32(2). See Section IV.A., above.
2. Because the content or substance of information contained in a document determines whether it is a “record” or not, information concerning public access set forth in the remainder of this outline generally applies. OAG I-06-09, at 2. However, many questions unique to electronic records have not yet been addressed by the public records statute itself, by published court decisions, or by opinions of the Attorney General.

B. Record identification.

1. Electronically stored information generally constitutes a “record” within the meaning of the public records law so long as the recorded information is created or kept in connection with official business. The substance, not the format, controls whether it is a record or not. *Youmans*, 28 Wis. 2d at 679, 137 N.W.2d at 473.
 - a. Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include word processing documents, database files, e-mail correspondence, web-based information, PowerPoint presentations, and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions, see Section VIII.B., above.
 - b. Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes “electronically formatted documents” in its definition of public records.
 - c. Information regarding government business kept or received by an elected official on her website, “Making Salem Better,” more likely than not constituted a record. OAG I-06-09, at 2-3.
2. Drafts, notes, and personal use exceptions to the definition of “record” apply to electronic information. Electronic information may fall into these exceptions to the definition of “record,” based on application of the general concepts set out in Section IV.A.5.a., above.
 - a. As with paper documents, whether electronic information fits within the “draft” or “notes” exceptions requires documentation of the individuals to whom the information has been circulated. See Section IV.A.5.a., above.
 - b. Personal e-mails.
 - i. Purely personal e-mails sent or received by employees or officers on an authority’s computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request. *Schill*, 2010 WI 86, ¶ 9 & n.4, ___ Wis. 2d ___, ¶ 9 & n.4, ___ N.W.2d ___, ¶ 9 & n.4 (Abrahamson, C.J., lead

opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

- ii. Personal e-mails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the e-mails and a government function, such as a personnel investigation. *Schill*, 2010 WI 86, ¶ 23, ___ Wis. 2d ___, ¶ 23, ___ N.W.2d ___, ¶ 23 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 166 (Bradley, J., concurring); *Id.*, ¶ 180 (Gableman, J., concurring). For additional information, see 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.
3. Electronic documents may contain contextual information and file history preserved only when viewed in certain formats, such as data generated automatically by computer operating systems or software programs. Whether this information is considered a "record" subject to public access is largely unanswered.
 - a. Metadata. Literally defined as "data about data," metadata has different meanings, depending on context. In the context of word processing documents, metadata is information that may be hidden from view on the computer screen and on a paper copy, but, when displayed, may reveal important information about the document.
 - i. No controlling Wisconsin precedent addresses the application of the public records law to such data, although a circuit court has held that metadata is not part of the public record because it includes drafts, notes, preliminary computations, and editing information. *McKellar v. Prijic*, Case No. 09-CV-61 (Outagamie Co., July 29, 2009).
 - ii. Legal commentary and federal cases addressing the treatment of metadata during litigation and civil discovery also are helpful for understanding access and retention issues related to metadata. See, e.g., selected publications from The Sedona Conference and its various working groups, including *The Sedona Guidelines: Best Practice Guidelines for Managing Information & Records in the Electronic Age* (Sept. 2005), and *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed., June 2007), available online at http://www.thesedonaconference.org/content/miscFiles/publications_html; see also *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008).
 - b. E-mail messages may contain transmission information in the original format that does not appear on a printed copy or when stored electronically. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), held that when e-mails are requested under a FOIA request, the electronic version rather than a paper print-out must be provided. In 1999, the same court upheld a federal rule that permitted paper copies to be the only archived public record of e-mails. *Pub. Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999). Central to the *Public Citizen* decision was the existence of the newly-adopted federal rule requiring that paper print-outs of e-mails must include the sender, recipient, date, and receipt data. The federal court reasoned that if paper print-outs of e-mails include this fundamental contextual information, they satisfy federal public records laws.

- c. Computers contain “cookies,” temporary internet files, deleted files, and other files that are not consciously created or kept by the user, but are instead generated or stored automatically. In addition, although a user may delete files, deleted materials remain on the computer until overwritten, unlike conventional documents discarded and destroyed as trash. Some of these materials are akin to drafts or materials prepared for personal use, or are simply not materials created or kept in connection with official business. Nonetheless, when such materials are collected, organized, and kept for an official purpose, they may constitute a record accessible under the public records statute. *See, e.g., Zellner I*, 2007 WI 53, ¶¶ 22-31, 300 Wis. 2d 290, ¶¶ 22-31, 731 N.W.2d 240, ¶¶ 22-31 (holding that a CD-ROM containing adult images and internet searches compiled in the course of an employee disciplinary action was not within the copyright exception to the definition of a public record; assuming without discussion that the material was a record based on its use by the school district).
- C. **Access.** If electronically-stored material is a record, the records custodian must determine whether the public records law requires access. Recurring issues relating to access include the following.
1. **Sufficiency of requests.** Under Wis. Stat. § 19.35(1)(h), a request must be reasonably limited “as to subject matter or length of time represented by the record.” *See* Section VI.D.; *Schopper*, 210 Wis. 2d at 212-13, 565 N.W.2d at 189-90. Record requests describing only the format requested (“all e-mails”) without reasonable limitations as to time and subject matter are often not legally sufficient. If so, the custodian may insist that the requester reasonably describe the records being requested. Even if a requester appears to limit a request by specifying the time period or particular search terms or individual mail boxes to be searched, such requests for voluminous e-mail records have been held to be insufficient and unreasonably burdensome. *Gehl*, 2007 WI App 238, ¶¶ 23-24, 306 Wis. 2d 247, ¶¶ 23-24, 742 N.W.2d 530, ¶¶ 23-24 (search requests for all e-mails exchanged by numerous individuals without specifying any subject matter, and for searches based on numerous broad search terms, were properly denied as insufficient).
 2. **Manner of access.**
 - a. Wisconsin Stat. § 19.35(1)(k) permits an authority to impose reasonable restrictions on the manner of access to original records if they are irreplaceable or easily damaged. Concerns for protecting the integrity of original records may justify denial of direct access to an agency’s operating system or to inspect a public employee’s assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security concerns may also justify such a restriction. *See WIREdata II*, 2008 WI 69, ¶¶ 97-98, 310 Wis. 2d 397, ¶¶ 97-98, 751 N.W.2d 736, ¶¶ 97-98 (*reversing* court of appeals decision allowing requesters direct access to an authority’s electronic database; recognizing that “such direct access . . . would pose substantial risks”). Provision of the requested data “in an appropriate format”—in this case, as portable document files (“PDFs”)—was sufficient. *Id.*, ¶ 97.
 - b. Records posted on the internet. The Attorney General has advised that agencies may not use online record posting as a substitute for their public records responsibilities; and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in Wis. Stat. § 19.32(2) or 19.35(1)(g). Letter from James E. Doyle, Wisconsin Attorney General, to John Muench (July 24, 1998). Nonetheless, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters.

- c. The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself. OAG I-06-09, at 3-4.
3. Must the authority provide a record in the format in which the requester asks for it?
 - a. Wisconsin Stat. § 19.35(1)(b), (c), and (d), require that copies of written documents be “substantially as readable,” audiotapes be “substantially as audible,” and copies of videotapes be “substantially as good” as the originals.
 - b. By analogy, providing a copy of an electronic document that is “substantially as good” as the original is a sufficient response where the requester does not specifically request access in the original format. See *WIREDATA II*, 2008 WI 69, ¶¶ 97-98, 310 Wis. 2d 397, ¶¶ 97-98, 751 N.W.2d 736, ¶¶ 97-98 (provision of records in PDF format satisfied requests for records in “electronic, digital” format); *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, ¶ 10, 237 Wis. 2d 840, ¶ 10, 615 N.W.2d 190, ¶ 10 (holding that provision of an analog copy of a digital audio tape (“DAT”) complied with Wis. Stat. § 19.35(1)(c) by providing a recording that was “substantially as audible” as the original). See also *Autotech Techs.*, 248 F.R.D. at 558 (where litigant did not specify a format for production during civil discovery, responding party had option of providing documents in the “form ordinarily maintained or in a reasonably usable form”).
 - c. Wisconsin Stat. § 19.36(4) provides, however, that material used as input for or produced as the output of a computer is subject to examination and copying. *Jones* ultimately held that, when a requester specifically asked for the original DAT recording of a 911 call, the custodian did not fulfill the requirements of Wis. Stat. § 19.36(4) by providing only the analog copy. *Jones*, 2000 WI App 146, ¶ 17, 237 Wis. 2d 840, ¶ 17, 615 N.W.2d 190, ¶ 17. In *WIREDATA II*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, the Wisconsin Supreme Court declined to address the issue of whether the provision of documents in PDF format would have satisfied a subsequent request specifying in detail that the data should be produced in a particular format which included fixed length, pipe delimited, or comma-quote outputs, *id.*, ¶¶ 8 n.7, 93, and 96, leaving questions concerning the degree to which a requester can specify the precise electronic format that will satisfy a record request to be answered in subsequent cases. Thus, it behooves the records custodian who denies a request that records be provided in a particular electronic format to state a legally sufficient reason for denying access to a copy of a record in the particular format requested.
 - d. Computer programs or software are expressly protected from examination or copying even though material used as computer input or produced as output may be subject to examination and copying unless otherwise exempt from public access. Wis. Stat. § 19.36(4). For the definition of “computer program,” see Wis. Stat. § 16.971(4)(c); *cf.* Wis. Stat. §§ 137.11(3) and 943.70.
 - e. There is a right to a copy of a computer tape, and a right to have the information on the tape printed out in a readable format. Wis. Stat. § 19.35(1)(e); 75 Op. Att’y Gen. 133, 145 (1986).
 - f. Wisconsin Stat. § 19.35(1)(e) gives requesters a right to receive a written copy of any public record that is not in readily comprehensible form. A requester who prefers paper copies of electronic records may not be able to insist on them, however. If the requester does not have

access to a machine that will translate the information into a comprehensible form, the agency can fulfill its duties under the public records law by providing the requester with access to such a machine. *See* 75 Op. Att’y Gen. at 145.

- g. With limited exceptions, Wis. Stat. § 19.35(1)(L) provides that a records custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format. *George*, 169 Wis. 2d 573, 485 N.W.2d 460. Under Wis. Stat. § 19.36(6), however, the records custodian is required to delete or redact confidential information contained in a record before providing access to the parts of a record that are subject to disclosure.
 - i. When records are stored electronically, the distinction between redaction of existing records and the creation of an entirely new record can become difficult to discern. *See Osborn*, 2002 WI 83, ¶¶ 41-46, 254 Wis. 2d 266, ¶¶ 41-46, 647 N.W.2d 158, ¶¶ 41-46.
 - ii. The Attorney General has advised that where information is stored in a database a person can “within reasonable limits” request a data run to obtain the requested information. 68 Op. Att’y Gen. 231, 232 (1979). Use a rule of reason to determine whether retrieving electronically stored data entails the creation of a new record. Consider the time, expense, and difficulty of extracting the data requested, and whether the agency itself ever looks at the data in the format requested. *Cf. N.Y. Pub. Interest Research Group v. Cohen*, 729 N.Y.S.2d 379, 382-83 (N.Y. Sup. Ct. 2001) (where a “few hours” of computer programming would produce records that would otherwise require weeks or months to redact manually, the court concluded that requiring the necessary programming did not violate the New York statutory prohibition against creation of a new record).
- h. A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law. Wis. Stat. § 66.1102(4).
 - i. “Political subdivision” means any city, village, town, or county. Wis. Stat. § 66.1102(1)(b).
 - ii. “Land information” means any physical, legal, economic or environmental information, or characteristics concerning land, water, groundwater, subsurface resources, or air in Wisconsin. It includes information relating to topography, soil, soil erosion, geology, minerals, vegetation, land cover, wildlife, associated natural resources, land ownership, land use, land use controls and restriction, jurisdictional boundaries, tax assessment, land value, land survey records and references, geodetic control networks, aerial photographs, maps, planimetric data, remote sensing data, historic and prehistoric sites, and economic projections. Wis. Stat. § 66.1102(1)(a), incorporating by reference Wis. Stat. § 59.72(1)(a).
- i. Wisconsin Stat. § 19.35(1)(a) provides that “any requester has a right to inspect any *record*.” Compare this to the language of the federal Freedom of Information Act, 5 U.S.C. § 552, which requires that “public information” be made available. Cases in other jurisdictions have found this distinction significant in deciding whether information must be provided in a

particular format. Cf. *AFSCME v. County of Cook*, 555 N.E.2d 361, 366 (Ill. 1990); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. Ct. App. 1995).

4. Role of the records custodian. Under Wis. Stat. § 19.34(2), the records custodian is legally responsible for providing access to public records.
 - a. The records custodian must protect the right of public access to electronic records stored on individual employees' computers, such as e-mail, even though the individual employee may act as the *de facto* records custodian of such records. Related problems arise when individual employees or elected officials use personal e-mail accounts to correspond concerning official business.
 - b. Shared-access databases involving multiple agencies.
 - i. Information of common use or interest increasingly is shared electronically by multiple agencies. To prevent confusion among participating agencies and unnecessary delays in responding to requests for records, establishment of such a database should be accompanied by detailed rules identifying who may enter information and who is responsible for responding to requests for particular records.
 - ii. Special custodial and disclosure rules govern public records requests for certain shared law enforcement records. See Section IV.D.4., above.
 - c. Government data collected and processed by independent contractors. A government entity may not avoid its responsibilities under the public records law by contracting with an independent contractor for the collection and maintenance of government records and then simply directing requesters to the independent contractor for handling of public records requests. The government entity remains the "authority" responsible for complying with the law and is liable for a contractor's failure to comply. *WIREDATA II*, 2008 WI 69, ¶¶ 82-89, 310 Wis. 2d 397, ¶¶ 82-89, 751 N.W.2d 736, ¶¶ 82-89.

D. Retention and storage.

1. The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is made. See *Gehl*, 2007 WI App 238, ¶ 15 n.4, 306 Wis. 2d 247, ¶ 15 n.4, 742 N.W.2d 530, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)).
2. Issues related to record retention that are exclusive to electronic records often derive from their relative fragility, susceptibility to damage or loss, and difficulties in insuring their authenticity and accessibility.
 - a. The Wisconsin Department of Administration ("DOA") has statutory rule-making authority to prescribe standards for storage of optical disks and electronic records. Wis. Stat. §§ 16.611 and 16.612. DOA has promulgated Wis. Admin. Code ch. Adm 12 which governs the management of records stored exclusively in electronic format by state and local agencies, but does not require an agency to maintain records in electronic format. Wisconsin Admin. Code ch. Adm 12 defines terms of art relating to electronic records, establishes requirements for accessibility of electronic records from creation through use, management,

preservation, and disposition, and requires that state and local agencies must also comply with the statutes and rules relating to retention of non-electronic records. Wisconsin Admin. Code ch. Adm 12 can be found at <http://www.legis.state.wi.us/rsb/code/adm/adm012.pdf>.

- b. Beyond Wis. Admin. Code ch. Adm 12, DOA and the state public records board are engaged in an ongoing project to update existing state policies governing retention and storage of e-mail as well as other electronic records. Information concerning current but out-dated e-mail retention policies, as well as an ongoing effort to update these policies and procedures, is located at <http://www.doa.state.wi.us/subcategory.asp?linksubcatid=1360&locid=0>.
- c. Documents posted online. In recent years, agencies have frequently taken advantage of the ease of posting public records on government websites. State agencies are required by law, Wis. Stat. § 35.81, *et seq.*, to provide copies of agency publications to the Wisconsin Reference and Loan Library for distribution to public libraries through the Wisconsin Document Depository Program. The Wisconsin Digital Archives has been established to preserve state agency web content for access and use in the future, and to provide a way for state agencies to fulfill their statutory obligation to participate in the Document Depository Program with materials in electronic formats. For more information about this program, see http://dpi.wi.gov/rll/pdf/state_agency_digital_archives_guidelines.pdf.

XI. Inspection, Copies, and Fees.

A. Inspection.

- 1. A requester generally may choose to inspect a record and/or to obtain a copy of the record. "Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form." Wis. Stat. § 19.35(1)(b).
- 2. A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority's employees. Wis. Stat. § 19.35(2).
- 3. A records custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Wis. Stat. § 19.35(1)(k).
- 4. For unique issues concerning inspection and copying of electronic records, see Section X.C.2.-3., above.

B. Copies.

- 1. A requester is entitled to a copy of a record, including copies of audiotapes and videotapes. Wis. Stat. § 19.35(1). The records custodian must provide a copy if requested. *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 525-27, 549 N.W.2d 253, 254-55 (Ct. App. 1996).
 - a. If requested by the requester, the authority may provide a transcript of an audiotape recording instead of a copy of the audiotape. Wis. Stat. § 19.35(1)(c).
 - b. If an authority receives a request to inspect or copy a handwritten record or a voice recording that the authority is required to protect because the handwriting or recorded voice would identify an informant, the authority must provide—upon request by the requester—a

transcript of the record or the information contained in the record if the record or information is otherwise subject to copying or inspection under the public records law. Wis. Stat. § 19.35(1)(em).

- c. Except as otherwise provided by law, a requester has a right to inspect records, the form of which does not permit copying (other than written record, audio tapes, video tapes, and records not in readily comprehensible form). Wis. Stat. § 19.35(1)(f).
 - i. The authority may permit the requester to photograph the record.
 - ii. The authority must provide a good quality photograph of a record, the form of which does not permit copying, if the requester asks that a photograph be provided.
2. The requester has a right to a copy of the original record, *i.e.*, "source" material.
 - a. A request for a copy of a 911 call in its original digital form was not met by providing an analog copy. *Jones*, 2000 WI App 146, ¶¶ 10-19, 237 Wis. 2d 840, ¶¶ 10-19, 615 N.W.2d 190, ¶¶ 10-19. *See* Section X.C.3.
 - b. A request for an "electronic/digital" copy was satisfied by provision of a PDF document containing the requested information, even though the PDF did not have all of the characteristics the requester might have wished. *WIREData II*, 2008 WI 69, ¶ 96, 310 Wis. 2d 397, ¶ 96, 751 N.W.2d 736, ¶ 96.
 - c. A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law. Wis. Stat. § 66.1102(4). *See* Section X.C.3.h., above.
3. The requester does not have a right to make requested copies. If the requester appears in person to request a copy of a record that permits photocopying, the records custodian may decide whether to make copies for the requester or let the requester make them, and how the records will be copied. Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, ¶¶ 1, 9, 12-13, 624 N.W.2d 892, ¶¶ 1, 9, 12-13 (2000) (requester was not entitled to make copies on requester's own portable copying machine).

C. Fees.

1. *Copy fees* may be charged.
 - a. Copy fees are limited to the "actual, necessary and direct cost" of reproduction unless a fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).
 - b. DOJ's policy is that photocopy fees should be around \$.15 cents per page, and that anything in excess of \$.25 cents may be suspect.
2. *Photography and photographic reproduction fees* may be charged if the authority provides a photograph of a record, the form of which does not permit copying, but are limited to the "actual, necessary and direct" costs. Wis. Stat. § 19.35(3)(b).

3. *Costs of a computer run* may be imposed on a requester as a copying fee. Wis. Stat. § 19.35(1)(e) and (3)(a); 72 Op. Att’y Gen. 68, 70 (1983). An authority may charge a requester for any computer programming expenses required to respond to a request. *WIREData II*, 2008 WI 69, ¶ 107, 310 Wis. 2d 397, ¶ 107, 751 N.W.2d 736, ¶ 107.
4. *Transcription fees* maybe charged, but are limited to the “actual, necessary and direct cost” of transcription, unless a fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).
5. *Location costs.* Costs associated with locating records may not be charged unless they total \$50.00 or more. Only actual, necessary, and direct location costs are permitted. Wis. Stat. § 19.35(3)(c).
6. *Mailing and shipping fees* may be charged, but are limited to the “actual, necessary and direct cost” of mailing or shipping. Wis. Stat. § 19.35(3)(d).
7. *Redaction costs.* It has been the position of recent Attorneys General that costs of separating, or “redacting,” the confidential parts of records from the public parts generally must be borne by the authority. 72 Op. Att’y Gen. 99. A recent supreme court case has been relied upon by some authorities as permission to charge these costs to the requester. *Osborn*, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, ¶ 46, 647 N.W.2d 158, ¶ 46.
8. The somewhat contradictory views of the Attorneys General and the court in *Osborn* may simply reflect the difficulty, in extreme cases, of distinguishing between redacting discrete items of confidential information from a larger document, and the practical necessity of actually creating or compiling a new record from a mass of collected data. The more the manipulation of the non-confidential information resembles the creation of a new record, the more likely it is that a court will approve charging the “actual, necessary and direct cost of complying with” a public records request. *Osborn*, 2002 WI 83, ¶¶ 3, 46, 254 Wis. 2d 266, ¶¶ 3, 46, 647 N.W.2d 158, ¶¶ 3, 46; *WIREData II*, 2008 WI 69, ¶ 107, 310 Wis. 2d 397, ¶ 107, 751 N.W.2d 736, ¶ 107 (“an authority may charge a requester for the authority’s actual costs in complying with the request, such as any computer programming expenses or any other related expenses. . . . [A]n authority may recoup all of its actual costs”).
9. *Contractor costs.* If a record is produced or collected by a person who is not an authority pursuant to a contract with the authority, i.e., a contractor, the fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record by the person who makes the reproduction or transcription, unless another fee is established or authorized by law. Wis. Stat. § 19.35(3)(g).
10. An authority may require prepayment of any fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). The authority may refuse to make copies until payment is received. *Hill*, 196 Wis. 2d at 429-30, 538 N.W.2d at 613. Except for prisoners, the statute does not authorize a requirement for prepayment based on the requester’s failure to pay fees for a prior request.
11. An authority has discretion to provide requested records for free or at a reduced charge. Wis. Stat. § 19.35(3)(e).

12. An authority may not make a profit on its response to a public records request, but may recoup all of its actual costs. *WIREData II*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, ¶¶ 103, 107, 751 N.W.2d 736, ¶¶ 103, 107.
13. *Other statutory fees.* Specific statutes may establish express exceptions to the general fee provisions of Wis. Stat. § 19.35(3). Examples include Wis. Stat. § 814.61(10)(a) (court records), Wis. Stat. § 59.43(2)(b) (land records recorded by registers of deeds), and Wis. Stat. § 6.36(6) (authorizing fees for copies of the official statewide voter registration list).

XII. Right to Challenge Accuracy of a Record.

- A. An individual authorized to inspect a record under Wis. Stat. § 19.35(1)(a) or (am), or a person authorized by that individual, may challenge the accuracy of a record containing personally identifiable information pertaining to that individual. Wis. Stat. § 19.365(1).
- B. *Exceptions.* This right does not apply if the record has been transferred to an archival repository, or if the record pertains to an individual and a specific state statute or federal law governs challenges to the accuracy of that record. Wis. Stat. § 19.365(2).
- C. The challenger must notify the authority, in writing, of the challenge. Wis. Stat. § 19.365(1).
- D. The authority then may:
 1. Concur and correct the information; or
 2. Deny the challenge, notify the challenger of the denial, and allow the challenger to file a concise statement of reasons for the individual's disagreement with the disputed portions of the record. A state authority must also notify the challenger of the reasons for the denial. *See* Wis. Stat. § 19.365(1)(a) and (b).

XIII. Enforcement and Penalties.

- A. **Mandamus.** The public records law encourages assertion of the right to access.
 1. If an authority withholds a record or part of a record, or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may:
 - a. Bring an action for mandamus asking a court to order release of the record; or
 - b. Submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that an action for mandamus be brought asking the court to order release of the record to the requester.

Wis. Stat. § 19.37(1).

2. Mandamus procedures are set forth in Chapters 781 and 783 of the Wisconsin Statutes.
3. A request must be made in writing before a mandamus action to enforce the request is commenced. Wis. Stat. § 19.35(1)(h).

4. In a mandamus action, the court must decide whether the records custodian gave sufficiently specific reasons for denying an otherwise proper public records request. If the records custodian's reasons for denying the request were sufficiently specific, the court must decide whether the records custodian's reasons are based on a statutory or judicial exception or are sufficient to outweigh the strong public policy favoring disclosure. Ordinarily the court examines the record to which access is requested *in camera*. *Youmans*, 28 Wis. 2d at 682-83, 137 N.W.2d at 475; *George*, 169 Wis. 2d at 578, 582-83, 485 N.W.2d at 462, 464.
 - a. To obtain a writ of mandamus, the requester must establish four things. *Watton*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, ¶ 8, 751 N.W.2d 369, ¶ 8.
 - i. The requester has a clear right to the records sought.
 - ii. The authority has a plain legal duty to disclose the records.
 - iii. Substantial damage would result if the petition for mandamus was denied.
 - iv. The requester has no other adequate remedy at law.
 - b. A records custodian who has denied access to requested records defeats the issuance of a writ of mandamus compelling their production by establishing, for example, that the requester does not have a clear right to the records. *Watton*, 2008 WI 74, ¶ 8 n.9, 311 Wis. 2d 52, ¶ 8 n.9, 751 N.W.2d 369, ¶ 8, n.9.
5. The court may allow the parties or their attorneys limited access to the requested record for the purpose of presenting their mandamus cases, under such protective orders or other restrictions as the court deems appropriate. Wis. Stat. § 19.37(1)(a); *Appleton Post-Crescent v. Janssen*, 149 Wis. 2d 294, 298-305, 441 N.W.2d 255, 256-59 (Ct. App. 1989) (allowing limited attorney access only for purposes of case preparation).
6. Statutes of limitation.
 - a. Except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced with three years after the cause of action accrues. Wis. Stat. § 893.90(2).
 - b. A committed or incarcerated person must bring an action for mandamus challenging denial of a request for access to a record within ninety days after the request is denied by the authority. Wis. Stat. § 19.37(1m).

B. Civil penalties.

1. Attorneys' fees, damages of not less than \$100.00, and other actual costs shall be awarded to a requester who prevails in whole or in substantial part in a mandamus action concerning access to a record under Wis. Stat. § 19.35(1)(a). Wis. Stat. § 19.37(2)(a).
 - a. The purpose of Wis. Stat. § 19.37(2) is to encourage voluntary compliance, so a judgment or order favorable in whole or in part in a mandamus action is not a necessary condition precedent to finding that a party prevailed against a requester under Wis. Stat. § 19.37(2). *Eau Claire Press Co.*, 176 Wis. 2d at 159-60, 499 N.W.2d at 920.

- b. *Caution:* Damages may be awarded if the prevailing requester is a committed or incarcerated person, but that requester is not entitled to any minimum amount of damages. Wis. Stat. § 19.37(2)(a).
 - c. *Caution:* For an attorney fee award to be made, there must be an attorney-client relationship. *Young*, 165 Wis. 2d at 294-97, 477 N.W. 2d at 347-48 (no attorney fees for *pro se* litigant).
 - d. To establish that he or she has “prevailed,” the requester must show that the prosecution of the mandamus action could “reasonably be regarded as necessary to obtain the information” and that a “causal nexus” exists between the legal action and the records custodian’s disclosure of the requested information. *Eau Claire Press Co.*, 176 Wis. 2d at 160, 499 N.W.2d at 920.
 - e. Cases discussing recovery of attorney fees where plaintiff “substantially prevails” and recovering fees and costs after the case is dismissed for being moot: *Racine Educ. Ass’n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326-30, 385 N.W.2d 510, 512-14 (Ct. App. 1986); *Racine Educ. Ass’n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 522-25, 427 N.W.2d 414, 416-17 (Ct. App. 1988); *Eau Claire Press Co.*, 176 Wis. 2d at 159-60, 499 N.W.2d at 920.
 - f. Actual damages shall be awarded to a requester who files a mandamus action under Wis. Stat. § 19.35(1)(am), relating to access to a record containing personally identifiable information, if the court finds that the authority acted in a willful or intentional manner. Wis. Stat. § 19.37(2)(b). There are no automatic damages in this type of mandamus case nor is there statutory authority for the court to award attorney fees and costs.
- 2. Punitive damages may be awarded to a requester if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excess fees. Wis. Stat. § 19.37(3).
 - 3. A civil forfeiture of not more than \$1,000.00 may be imposed against an authority or legal custodian who arbitrarily or capriciously denies or delays response to a request or charges excessive fees. Wis. Stat. § 19.37(4).
- C. **Criminal penalties.** In addition to mandamus relief and civil forfeitures, criminal penalties also are available for:
- 1. Destruction, damage, removal, or concealment of public records with intent to injure or defraud. Wis. Stat. § 946.72.
 - 2. Alteration or falsification of public records. Wis. Stat. § 943.38.
- D. **Miscellaneous enforcement issues.**
- 1. A requester cannot seek relief under the public records law for alleged violations of record retention statutes when the non-retention or destruction predates submission of the public records request. *Cf.* Wis. Stat. § 19.35(5). *Gehl*, 2007 WI App 238, ¶¶ 13-15, 306 Wis. 2d 247, ¶¶ 13-15, 742 N.W.2d 530, ¶¶ 13-15.

2. An authority may not avoid liability under the public records law by contracting with an independent contractor for the collection, maintenance, and custody of its records, and by then directing any requester of those records to the independent contractor. *WIREData II*, 2008 WI 69, ¶ 89, 310 Wis. 2d 397, ¶ 89, 751 N.W.2d 736, ¶ 89.
3. If requested records are released before a mandamus action is filed, the plaintiff has no viable claim for mandamus and therefore no right to seek the other remedies provided in Wis. Stat. § 19.37. *Capital Times Co. v. Doyle*, Case No. 09-CV-3734 (Dane Co., April 7, 2010), *appeal pending*, Case No. 2010AP1687 (Wis. Ct. App.).
4. A small claims action is not the proper way to secure production of public records, and one attempt to do so was found to be frivolous. *Knuth v. Town of Cedarburg*, 2010 WI App 33, 323 Wis. 2d 824, 781 N.W.2d 551, 2010 WL 174141 (January 20, 2010) (unpublished).²

²Unpublished opinions issued on or after July 1, 2009, by the Wisconsin Court of Appeals may be cited for their persuasive value. See Wis. Stat. § 809.23(3).