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## ***An Informed Public: Part Two*** ***The Public Records Law***

### **COMPLETE PUBLIC ACCESS**

Wisconsin's public records law states that it is to be interpreted always with a presumption of complete public access, as is consistent with the operations of government. The law states that the denial of public access to records generally goes against the public interest, and that access may be denied only in exceptional cases. In other words, unless access is precluded by law or the custodian shows that good cause exists for denying access, any requester generally has a right to inspect any state or local government record in Wisconsin.

### **WHAT ARE "PUBLIC RECORDS"?**

Under the public records law, a "record" is defined as "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." Not every piece of paper or computer file kept by a public office is a public record. It is the content, not the format, of a document that determines whether it is a record. Documents that are not public records include personal property that has no relation to a public office, published material available at the library or for sale, and material with limited access because of copyright, patent, or bequest. A draft document is not a record while it is being written or

revised by the writer or if it is circulated between only the writer and the person for whom the document is being drafted and if it is not used for any official purpose. Simply labeling a document "draft" does not exempt it from access under the public records law.

The official or agency that has custody of a record is called an "authority." An authority can be a state or local office, an elected official, a public body such as an agency or committee, a court of law, the state assembly or senate, certain public or nonprofit corporations, and formal subunits of public bodies. The authority confers on a "legal custodian" the full legal power to make decisions and perform the authority's public records responsibilities. An elected official is the legal custodian of his or her records as well as the records of the office; however, an official can name an employee as the legal custodian of those records. For a committee of elected officials, the chairperson or the chairperson's designee is the legal custodian of the committee's records.

### **ACCESSING RECORDS**

Every authority, except for members of the legislature and members of local governmental bodies, is required to adopt public records access procedures and make that

information, in the form of a notice, available for public inspection by displaying it at its office. The notice must contain the following information: a description of the authority's organization, the established times and places for access to its records, the identity of its legal custodian, the methods for gaining access to the records, and all positions in the authority that

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***The public records law helps keep the processes of state government transparent and accessible to the public.***

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are high-ranking public offices, as defined by law. If an authority does not have regular office hours and requires advance notice to view a record, that information must also be included.

A person generally does not have to make his or her request for a record in writing unless he or she plans to take legal action to enforce the request. Usually a person cannot be refused in his or her request for making the request anonymously. A person need not state the reason for a request, and usually need not make the request in person.

A legal custodian can, however, impose reasonable restrictions on the manner of access to an original record if it is easily damaged or irreplaceable. Also, a request for a record without a reasonable limitation of subject matter or length of time represented is not sufficient

under law. The right of access applies only to existing records and does not require extraction of information from existing records for compilation in a new format. The legal custodian may also charge the requester the actual costs of duplicating a record.

An authority must, as soon as possible and without delay, either fill a records request or notify the requester of its intent to deny the request.

## **GRANTING AND DENYING ACCESS**

Before granting or denying a request, a legal custodian must consider three general categories into which a records request may fall: (1) absolute right of access to a record; (2) absolute denial of access, which may be mandatory or permissive; and (3) the potential right of access as determined by the “balancing test.”

Some records with the absolute right of access are specified by state statute, such as traffic accident reports, or by court decision, such as the daily arrest log of a police department.

Some statutes or court decisions require or authorize the absolute denial of access. By statute, absolute denial of access applies to any record with information kept by an employer that contains an employee’s home address, e-mail, telephone number, or social security number, except in certain situations. Access to a record must be denied if the record contains information that relates to the *current* investigation of a possible criminal offense or possible misconduct by an employee. Trade secrets are exempt from disclosure.

Hundreds of state statutes govern access to public records relating to specific matters. Federal statutes

may also define when access to records is denied, as is the case with patient health care records. The balancing test is used when state or federal laws do not specifically authorize or direct a legal custodian to provide or withhold access to a record. Under the test, a record is accessible unless the custodian demonstrates that the public interest in nondisclosure of the record outweighs the public interest in disclosure. If the public interest in nondisclosure outweighs the public policy favoring access, the case is “exceptional.”

If an authority denies a public records request, the authority must cite specific and sufficient reasons for the denial. Citation of a statute alone may not be enough unless confidentiality of the record is authorized or guaranteed by that statute. A denial must be specific—it must give the requester adequate basis for the denial and ensure that the legal custodian exercised judgment in considering the request and did not arbitrarily deny it. The specificity also provides the requester with information that can enable him or her to prepare a legal challenge to the denial; it gives the courts a basis for review of the case if there is a legal challenge. In the event of a denial, requesters often turn to the courts for a decision. Like legal custodians, the courts make decisions on a case-by-case basis.

## **PERSONAL INFORMATION**

Someone who requests a record that contains personally identifiable information about him- or herself generally has a greater right of access to that record than the general public. The Wisconsin Supreme Court has interpreted the law to mean that such a person is considered to be substantially different from other requesters.

With exceptions, a person is entitled to records containing personally identifiable information about him- or herself and these requests are not subject to the balancing test. Access to records with personally identifiable information is given so a person can determine what information is being kept about him or her and whether it is accurate. A person generally has the right to challenge personally identifiable information about him- or herself in a record.

Sometimes an authority must notify the subject of a record of the authority’s intent to release records that contain information about the subject. For example, an authority must notify a person if he or she is an employee who is the subject of an investigation into a disciplinary matter or employment-related violation and the records contain information relating to the investigation or violation. The law provides specific time periods for the authority to serve the record subject written notice. The notice briefly describes the record, rights of the record subject, and time periods for the subject to respond and petition a court to restrict access.

## **SUMMARY**

The public records law helps keep the processes of state government transparent and accessible to the public. The laws are complex but designed to keep citizens informed while protecting the privacy of those who are the subjects of certain records. The public records law and the open meetings law together ensure that Wisconsinites have every chance to know how their government is run.

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# Governing Wisconsin: "Public Records"

## Study Questions

1	Who is normally the custodian of public records?	
2	What harm could occur without the public records law?	
3	Could a Web page that is viewable only by the employees of a government agency be subject to the public records law? Why or why not?	
4	At what point does a rough draft of a government memo become a public record?	
5	What could you do if a public record contains errors in personally identifiable information about you?	
6	Of all the reasons that may be given for denying a request for a record, which is the strongest?	

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## Study Questions in the Cognitive Domain

1	Who is normally the custodian of public records?	The person or group of people in charge of a government agency or other public entity is usually the custodian of records.	Cognition
2	What harm could occur without the public records law?	Without access to public records, the people could lose control of the government. If a government agency could conceal its records, it could engage in illegal or improper activities.	Comprehension
3	Could a Web page that is viewable only by the employees of a government agency be subject to the public records law? Why or why not?	Yes. The content, not the form, determines what is a public record. Visual or electromagnetic material can be a public record if it contains information that is disclosable under the public records law.	Application
4	At what point does a rough draft of a government memo become a public record?	The draft becomes a public record if it is shown to persons other than those for whom the document is being prepared, if revisions to it are complete, or if the draft is used for an official purpose.	Analysis
5	What could you do if a public record contains errors in personally identifiable information about you?	You can notify the authority or the custodian of the record, in writing, of the necessary correction. If the authority does not make the correction, you can commence a legal action in a court of law to require the correction.	Synthesis
6	Of all the reasons that may be given for denying a request for a record, which is the strongest?	The strongest reason to deny a request for a record is that disclosure would invade a person's privacy if the requested record contains personally identifiable information.	Evaluation