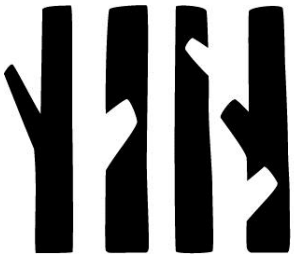
Public Records Law Tool Kit

A Guide to Wisconsin's Public Records Law:
Wis. Stat. §§ 19.31-19.39



Midwest
Environmental
Advocates

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Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and groups working to protect the public's right to clean air and water.

PUBLIC RECORDS LAW

Public access to governmental records is a key component of an open government. Most of our contact with government decision-making comes in the form of governmental records. The public has a right and responsibility to monitor these decisions and hold government accountable for their decisions.

Specifically, Wisconsin Statutes §§ 19.31-19.39 ("The Public Records Law") give the public a statutory right to view and/or copy these records, unless disclosure would be against the public interest. The Wisconsin Legislature drafted the open records statutes with a clear message in mind: Providing citizens with information on the affairs of government is

> . . .an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. 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(emphasis added).

The Public Records Law serves a basic tenet of our democratic system by providing opportunity for public oversight of government.[1] We hope you will exercise your right and help our democratic process by ensuring clean government and sound decision-making.

OVERVIEW

Wisconsin Statutes §§ 19.31-39 ("The Public Records Law") set forth the public's right to view and/or copy governmental records. In addition to the statutes, it is important to consider 2003 Wisconsin Act 47, Wis. Stat. § 19.85(1) (exemptions to the open meetings law), Court Decisions, Attorney General Opinions and Correspondence. While our state government is only bound by the state public records laws, federal laws, such as the Freedom of Information Act,[2] share the same policies and can factor into a balancing of interests.[3]

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[1] *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996); Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 1.

[2] *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428, 538 N.W.2d 608 (Ct. App. 1995).

[3] *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 32-33, 254 Wis. 2d 306, 646 N.W.2d 81. (*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, 538 N.W.2d 608 (Ct. App. 1995). Nonetheless, public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test." Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 2.)

The following sections will provide information on the type of records that are available, the timeline and procedure for receiving the records and the important role open records request can have in shaping land-use decisions.

WHAT CAN I REQUEST?

Unless it is within specific statutory exemptions or contrary to the public's interest, a member of the public ("requester") has the right to inspect or copy any "record" held by a government office or "authority". According to the Wisconsin Statutes:

A "record" includes:

- any material on which written, drawn, printed, spoke, 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;
- handwritten, typed or printed pages,
- maps or charts;
- photographs, films, recordings, tapes (including computer tapes); and
- computer printouts and optical disks.

A "record" does not include:

- drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working;
- materials which are purely the personal property of the custodian and have no relation to his or her office;
- materials to which access is limited by copyright, patent or bequest; and
- published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Wis. Stat. § 19.32 (2).

Additionally, the record:

1) Must exist. While this may seem obvious, it can be a tricky line. Records custodians are not expected to create a record by compiling information from other records.[4] The requested information will often come as it appears in the records archives, whether or not the applicable information is easily accessible

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[4] *See* Wis. Stat. § 19.35(1)(L). *See also George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 18.

within the document. Again, the records custodian is not required to find the information you requested, just the records.

2) Must be created or kept in connection with official purpose or function of the agency.[5] In addition to records created or kept directly by government, any records that are created by contractors of Government if under contract to do government job would fall into this category.[6] Therefore, this requirement would apply to Wal-Mart Traffic Studies and other reports and information provided by outside firms if the government is in contract with the firm who created the study or the studies are given to the authority in question as part of the application..

Generally, "content, not medium or format, determines whether document is a 'record' or not."[7]

WHAT IS CONSIDERED AN "AUTHORITY"?

As noted above, a member of the public ("requester") has the right to inspect or copy most records created or held by an "authority"[8] But what exactly is an "authority"?

According to the Public Records Law, members of the public "can access records from any government branch, agency or unit, including:

- A state or local office
- An elected official;
- An agency, board, commission, committee, council, department or public body corporate and politic created by constitutional, law, ordinance, rule or order;
- A governmental or quasi-governmental corporation;
- Any court of law;
- The assembly or senate;
- 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; and
- A formally constituted sub-unit of any of the above.

See Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 4; Wis. Stat. § 19.32(1) (Definition of Authority).

CAN I COPY THE DOCUMENTS OR JUST VIEW THEM?

[5] 72 Op. Att'y Gen. 99, 101 (1983); *State ex rel Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1985). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 2.
[6] Wis. Stat. § 19.36(3).
[7] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 2.
[8] See Wis. Stat. § 19.35(1); 19.32(1),(2).

Requesters can get copies or transcripts of any record.[9] If it is impractical to copy the record, the requester can inspect the records.[10] If inspection is the only option, the requester can ask to photograph the record, and the authority is required to provide a photograph if the requester asks for one[11]

The requester has a right to a copy of the original record, often called "source" material.

For example, the Attorney General identifies "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.[12]

The requester does not, however, have a right to make his/her own requested copies. "If the requester appears in person to request a copy of the record, the custodian may decide whether to make copies for the requester or let requester make them, and how the records will be copied."[13]

HOW DO I REQEST THE DOCUMENTS?

There is no magic form for open records requests. Requests can be oral or written.[14] Requests can be submitted by mail, in person or by another means that ensures its arrival. Requesters are not required to state the purpose of the request and, with a few exceptions, requesters are not required to identify themselves.[15] Finally, the request can be as broad or as specific as the requester wishes. In general, if the document can be reasonably construed to request documents, then it is an open records request.[16]

However, the goal of a request is to receive records as quickly, cheaply and easily as possible. Certain methods work better than others and, therefore, it is perhaps best to follow some guidelines.

A. Submit a Written Request

[9] Wis. Stat. § 19.35(1)(b).
[10] Wis. Stat. § 19.35(1)(f).
[11] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 52.
[12] Wis. Stat. § 19.35(1)(e); 75 Op. Att'y Gen. 133, 145 (1986).
[13] Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, 624 N.W.2d 892 (2000) (authority did not have to allow requester to make copies on requester's own portable copying machine)." Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. pp. 52-53.
[14] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 11.
[15] Wis. Stat. § 19.35(1)(i). 19.35(1)(h) and (i); See Wis. Stat. § 19.35(1) (exceptions for documents with personal information); Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 11
[16] Wis. Stat. § 19.35(1)(g); Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 12

Written requests are much better than oral requests. Written requests save confusion during the process and allow the requester to cite specific portions of the request if the response does not meet the original request. Written requests also require written responses, which are the key to reviewing the records custodian's thought process. Perhaps most importantly, the request must be in writing "before an action to enforce the request is commenced."[17] In other words, if the authority violates the public records laws with respect to an oral request, the requester needs to resubmit a written request before he/she can pursue enforcement an action.

Additionally, while a "requester need not state or provide a reason for his or her request", a custodian "almost inevitably must evaluate context to some degree" when reviewing the request.[18]

B. Make Sure That the Request is Specific and Limited in Scope

The request must be reasonably specific as to subject matter and time frame involved.[19] State the type of records, the subject matter and the time frame, noting the statutory definitions of "records" and the specific statute sections that allow access to these records.

No magic words are needed. However, to make it very clear that the request is formal and legal basis for the request is clear, it is best to use a standard template. See Appendix A for sample letter.

HOW LONG SHOULD IT TAKE TO RESPOND?

A records custodian must respond to an open records request "as soon as practicable and without delay."[20] While no specific time requirement is set, Wisconsin Department of Justice considers 10 days to be "reasonable" for records that are "easily identifiable" from the request.[21] "Reasonable" time depends on the request and staff constraints as well.[22] If delay is arbitrary and capricious, the records custodian may be fined up to $1000.[23]

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[17] Wis. Stat. § 19.35(1)(h)
[18] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 16.. (citing *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 66)
[19] Wis. Stat. § 19.35(1)(h). *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 12.
[20] Wis. Stat. § 19.35(4)(a). See Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 13.
[21] Wis. Stat. § 19.35(3)(a),(c); Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 13.
[22] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 14.
[23] Wis. Stat. § 19.37

If the request is fairly simple and copies are unnecessary, the response may be quicker. This is especially true for common documents that are on file in the office. Requesters have the right to inspect documents within 48 hours of request if the records are kept in that office, unless the office has designated at least 2 consecutive hours per week for inspection.[24]

HOW MUCH SHOULD IT COST?

Requesters may be charged copy fees if they request copies of records. According to the Public Records Law, copy fees are limited to the "actual, necessary and direct cost" of location and reproduction unless a fee is otherwise specifically established or authorized to be established by law. [25]

Wisconsin Department of Justice policy is that photocopy fees should be around 15 cents per page, and that anything in excess of 25 cents may be suspect.

The Attorney General's Compliance Outline specifically addresses potential fees, including:

- 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).
- Transcription fees may be 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).
- Location costs. Costs associated with locating records may not be charged unless they exceed $50.00. Only actual, necessary and direct location costs are permitted. Wis. Stat. § 19.35(3)(c).
- 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).
- Redaction costs. It is the attorney general's position 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 (1983). A recent Wisconsin Supreme Court case has been relied upon by some authorities as permission to charge these costs to the requester. *Osborn,* 254 Wis. 2d 266, ¶ 46.

Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 33.

Prepayment may be required in certain cases. The Attorney General notes:

[24] See Wis. Stat. § 19.35(2) Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 11.
[25] Wis. Stat. § 19.35(3)(a).

> an authority may require prepayment of any fees if the total amount exceeds $5.00.[26]. The authority may refuse to make copies until payment is received.[27] 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. In its discretion, an authority may choose to provide requested records for free or at a reduced charge.[28]

Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 54.

WHAT DOCUMENTS OR RECORDS ARE UNAVAILABLE?

Wisconsin legislative policy favors the broadest practical access to government.[29] The presumption favoring disclosure is strong, but not absolute.[30] There are documents and records that are unavailable to the public. Some documents are unavailable because they are not considered "records" under the definition given in section 19.32(2), Wis. Stat. Other "records" are unavailable because the harm to privacy and/or public interest outweighs the benefit to the public.

As the Attorney General clearly states:

> Although the presumption is always in favor of access, Wis. Stat. § 19.31; *Youmans*, 28 Wis. 2d at 683, there are some restrictions. Every records request will fall into one of three analytical categories: (1) absolute right of access; (2) absolute denial of access; and
> (3) right of access determined by balancing test. *Hathaway v. Joint School Dist. No. 1*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor case law requires disclosure or creates a blanket disclosure exception, the custodian must decide whether the strong presumption favoring disclosure is overcome by some even stronger presumption favoring limited access or nondisclosure. The balancing test. . . is used to determine whether the presumption of openness is overcome by another public policy concern. *Hempel*, 2005 WI 120, ¶ 4.

Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 17.

The "balancing test" referred to above is described further in the subchapter on "The Balancing Test." Most records that are granted absolute right of access pertain to specific

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[26] Wis. Stat. § 19.35(3)(f)
[27] *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 429-30.
[28] Wis. Stat. § 19.35(3)(e)." Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 54.
[29] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 22, 699 N.W.2d 551.
[30] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28; Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 1

and personal information that is outside the realm of land-use requests.[31] However, members of the public are granted absolute right of access to general documents such as:

> . . .books and papers 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). The burden is on the requester to show that the record in question 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 (Ct. App. 1992).

Wis. Stat. § 59.20(3); Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 19.

Records, such as maps and other basic land-use documents, may be "required to be kept" by the county clerk. The public would, therefore, have an absolute right to access these records. However, the word "absolute" is somewhat misleading. Even an "absolute right 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. [32]

The Wisconsin Statutes and Attorney General Opinions have also set forth some specific categories of records that are subject to an absolute denial of access. Specifically, the public is absolutely denied access to:

1) Preparer's notes, drafts and preliminary documents if they were only circulated within the preparer's level of authority. Wis. Stat. § 19.32(2); *State v. Panknin*, 217 Wis. 2d 200, 209-10, 579 N.W.2d 52 (Ct. App.1998) (personal notes of sentencing judge are not public records); 77 Op. Atty Gen. 100, 102-03(1988). In other words, the "draft" and "notes" cannot be used for the purpose for which it was commissioned. *Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589 (1989); *Journal/Sentinel*, 186 Wis. 2d at 455-56.

2) Published material that is on sale or at the library. Wis. Stat. § 19.32(2).

3) Purely personal info. Wis. Stat. § 19.32(2).

4) Records that are blocked by copyright, patent or bequest. Wis. Stat. § 19.32(2).

5) Continuing Requests (i.e. requests for on-going permit records) (73 Op. Att'y Gen. 37, 44 (1984).

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[31] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 17.

[32] *See State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 554, 334 N.W.2d 252 (1983); *Bruendl*, 168 Wis. 2d at 108; *In Matter of John Doe Proceeding*, 2003 WI 30, ¶¶ 59-72, 260 Wis. 2d 653, 660 N.W.2d 260; Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 19.

In addition to the broad categories above, there are more than 175 other specific exemptions that are set forth by law.[33] These exemptions include plans and specifications of state-owned or state-leased buildings (Wis. Stat. § 16.851); information the disclosure of which likely would result in the disturbance of an archaeological site (§ 44.02(23)); death tax returns and related documents (§ 72.06); information concerning livestock infected with paratuberculosis (§ 95.232); except to telephone solicitors, the State's "no-call" list (§ 100.52(2)(c)). [34]

It is important to note that all exemptions must be set forth by law. An authority cannot set blanket exemptions as a matter of its own policy.[35] When denying requests, the records custodian must cite the specific exemption, if it is the basis for the denial. See "Denying Requests." You can check the index to the Wisconsin statutes under both Public Records and the specific subject to access specific exemptions that pertain to your requests.[36] While there are plenty of exceptions, these exceptions are usually specific and their scope is meant to be "narrowly construed."[37]

Finally, beyond the specific statutory exemptions, there remains the general power of executive privilege.[38] However, this will rarely be an issue when addressing local land-use decisions.

THE BALANCING TEST:

As mentioned above, even if a record is considered a "public record" and is not subject to a specific exemption, the records custodian will still balance the public interests for and against disclosure before releasing a record.[39] The balancing test is done on a case-by-case basis.[40]. In each case, "the custodian must balance the public interest in disclosure of the record against the public interest favoring nondisclosure.[41] "[A]n "exceptional case" exists when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure."[42]

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[33] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 23.
[34] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 24.
[35] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 71.
[36] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. pp. 23-24.
[37] *Chvala v. Bubolz*, 204 Wis. 2d 82.
[38] 63 Op. Att'y Gen. 400, 410-14 (1974) (origins and scope discussed).
[39] See *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4
[40] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 17.
[41] *State ex rel. Journal Co.*, 43 Wis. 2d at 305. Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p.26.
[42] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63." Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 27.

But make sure the custodian is balancing the "public interest" in non-disclosure, not the "private interest" of the subject of the records request. The private interest of a person mentioned or identified in the record is not a proper focus of the balancing test. If there is a public interest in protecting an individual's privacy or reputational interest as a general matter (for example, to ensure 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.[43] Privacy should not be weighed based on the individual. Moreover, the identity of the requester and the purpose of the request are not part of the balancing test.[44]

If a government "cover-up" is alleged, the balance may shift towards disclosure.[45] The courts have suggested that citizens have a very strong public interest in being informed about public officials who have been derelict in their duties.[46] Therefore, the Attorney General clearly notes, "evidence of official cover-up is a potent reason for disclosing records."[47]

Additionally, exemptions to the open meetings law (Wis. Stat. § 19.85) and Freedom of Information Act (FOIA) can be considered when balancing interest.[48] Specifically, open meetings laws allowing an authority to meet in closed session, "are indicative of public policy" and can be considered as balancing factors.[49] For a full list of open meetings exemptions, see the <<Open Meetings Law>> chapter on our website. Some specific examples to note, however, are:

- Quasi-judicial deliberations. Wis. Stat. § 19.85(1)(a). (Note: Quasi-judicial hearings involved opposing parties, not general permit decisions. Again, permit reviews are NOT quasi-judicial deliberations.).[50]
- Public business involving investments, competitive factors or negotiations. Wis. Stat. § 19.85(1)(e).
- Consideration or investigation into numerous 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)
- Legal advice as to pending or probable litigation. Wis. Stat. § 19.85(1)(g).

See Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012 p. 18.

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[43] *See Linzmeyer v. Forcey*, 2002 WI 84, ¶ 31.
[44] *See Kraemer Brothers., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 27.
[45] See *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 68; Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 29.
[46] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 68; Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 29.
[47] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 29.
[48] . See 5 U.S.C. § 552. ("FOIA exemptions"); Wis. Stat. § 19.85; *See also Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 32 (discussing use of FOIA exemptions)
[49] See Wis. Stat. § 19.85(1); § 19.35(1)(a); 73 Op. Att'y Gen. 20, 22 (1984).
[50] See *State ex rel. Hodge v. Turtle Lake*, 180 w.s2d 62, 508 N.W.2d 603 (Wis. Sup. Ct. 1993).

If an open meetings exception is relied upon, the custodian must make "a specific demonstration that there is a need to restrict public access *at the time* that the request to inspect or copy the record is made." Wis. Stat. § 19.35(1)(a).[51] The fact that a meeting was closed does not necessarily mean that the records from that meeting are still restricted after the hearing is finished. Old records may have been originally created during a closed session, but the reason for the closed session no longer exists. These records would now be subject to open record requests.

PRIVACY

While there are many exemptions that restrict access to open records, privacy is not one of them. The right to privacy (Wis. Stat. § 895.50) may block access to certain, truly private information. However, the privacy statute provides that: "It is not an invasion of privacy to communicate any information available to the public as a matter of public record."[52]

Additionally, the Attorney General notes that "prominent public officials must have a lower expectation of personal privacy than regular public employees, although greater scrutiny of public employees than their private sector counter-parts comes with the territory of public employment."[53]

ELECTRONIC DOCUMENTS: SOME KEY POINTS TO REMEMBER

While electronically stored information is explicitly identified as a "record," there are potential problems associated with the handling of these records. The following information will help a requester address the potential problems associated with their request for electronic records, before problems are identified by the records custodian.

First, records custodians may view the gathering of electronic documents and printing of these documents as "compiling" a new document. As mentioned above, records custodians are not required to compile new documents. However, the act of taking an electronic copy of a document and printing it is NOT considered compiling a new, physical copy. While there are cases where requests can suggest a need to compile information into a new record, the Attorney General has set clear guidance on this issue:

> 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

[51] See Wis. Stat. § 19.85(1); § 19.35(1)(a); 73 Op. Att'y Gen. 20, 22 (1984).
[52] Wis. Stat. § 995.50(2)(c). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 31.
[53] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. pp. 32-33 (citing *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 75.)

> 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).

Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 49.

Additionally, there may be difficulty accessing electronic files. First, agencies may delete e-files if the significant information has been transferred to written form.[54] There are specific rules for retention that should be read if this issue arises.[55] Secondly, if the electronic copies exist, then they are subject to the same restrictions as physical records. Specifically, e-mails have the same "personal property" and "draft" exceptions. Given the personal nature of many e-mails, this is a likely defense against production. Also, some emails may be seen as "drafts" of future records and therefore exempt from open records laws. See "What Documents or Records are Unavialable?" A requester should remind the records custodian that personal information can be redacted and that records should not be denied just because part of the record is non-disclosable.[56] Unless the entire e-email or electronic document is within an exception, the remaining portion must still be sent.

Finally, access to info that is not readily accessible (perhaps b/c it is on a disk) must involve the same equipment that is available to employees.[57] In other words, if employees use a computer to access files, a requester should have access to a computer. However, using facilities can be tricky. Government bodies are not required to buy any equipment to ensure the same access as employees and not required to provide access to operating programs for all electronic copies.[58] Moreover, requesters cannot request

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[54] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 49.

[55] Wis. Stat. § 16.61(state); Wis. Stat. § 19.21(local); Wis. Adm. Code ch. Adm 12 (DOA rules on electronic file storage) Rules for retaining electronic docs: "Retention of state public records including electronic records is governed by Wis. Stat. § 16.61, while provisions for retention of local government records are contained in Wis. Stat. § 19.21. Specific provisions regarding optical disk and electronic storage of state and local government records are set forth in §§ 16.611 and 16.612, giving the state Department of Administration rule-making authority to prescribe standards for storage. Wis. Adm. Code ch. Adm 12 governs records stored exclusively in electronic format, but does not require an agency to maintain records in electronic format. The rule governs retention of both state and local records. The rule can be found at http://www.legis.state.wi.us/rsb/code/adm/adm012.pdf. Background and explanatory materials concerning ch. Adm 12 are found at http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf. Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 51.

[56] See Wis. Stat. § 19.36(6); *Osborn*, 254 Wis. 2d 266, ¶ 46; Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p.15.

[57] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p.21.

[58] See Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 11.

programs that are on file. Requesters are restricted to the output data from the programs.[59]

Printed copies of these records may be a good way to avoid this problem.

These pitfalls should not discourage requests for electronic information. E-mail communication, in particular, is often very revealing. E-mail discussions are more and more prevalent in the governmental process and are often a vital subsection of requested communications. Requesters should, however, note the above information as well as the time period that is selected when requesting these records[60]

PROCEDURE FOR DENYING REQUESTS

A records custodian response denying an open records request must meet specific requirements.

First, all denials of written requests must be in writing.[61] As noted earlier, records requests do not have to be in writing, but they should. The written response requirement is one reason requesters should submit written requests. Records custodians are not required to provide written responses for oral requests.

Secondly, reasons for denial must be "specific and sufficient."[62] If denial is due to an exemption, citing the statute provision would be "sufficient." If denial is due to public policy reasons, a statement of the specific public policy reasons would be specific and sufficient.[63] The denial must show reasoning that would allow the public to assess/challenge the custodian's judgment.[64]

The "specific and sufficient" requirement is highly scrutinized by reviewing courts. As the Attorney General notes, the court will not "hypothesize or consider reasons not considered by the custodian" during a writ of mandamus hearing. If no reasons are given in the denial, the court will order disclosure of the documents.[65]

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[59] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 21.
[60] See Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208;. J. B. Van Hollen19.39September 2012
[61] Wis. Stat. § 19.35(4)(b).
[62] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 25-26. Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 14.
[63] *Chvala v. Bubolz*, 204 Wis. 2d 82, 86-87, 552 N.W.2d 892 (Ct. App. 1996).
[64] See *Journal/Sentinel, Inc*, 145 Wis. 2d at 824. Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. pp. 14-15.
[65] See *Osborn v. Board of Regents*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158; *see also Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 Wis. 2d 501 (1967) (court may order mandamus even if sound, but unstated, reasons exist or can be conceived of by the court). *Cf. Blum*, 209 Wis. 2d at 388-91 (an authority's failure to cite specific statutory exemption justifying nondisclosure does not preclude the court from considering statutory exemption). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 15-16.

Additionally, the reasons must be current.[66] In other words, if records are refused because of the policy reasons that no longer apply, the records custodian must identify new, current reasons or release the record.

Finally, a 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 district attorney or attorney general.[67]

While the records custodians' reasoning must be "specific and sufficient," facts supporting the reasoning are not necessary in the denial.[68] Again, the denial is often a discretionary decision by the records custodian. The "specific and sufficient" requirement makes sure this decision can be reviewed if necessary. It does not require affirmative proof from the records custodian to establish the initial reasoning.

Always remember that decision to disclose a record is based on the records content, not its format.[69] Records custodians should not view the document as a whole, but rather the content as separate pieces of information. Therefore, the records custodian can not deny record just because part is non-disclosable.[70] Moreover, "an authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome.[71]

WHAT SHOULD I DO IF I SUSPECT A VIOLATION?

If you suspect that a request has been unlawfully denied or restricted access, delayed access unreasonable, or acted unlawfully in any other way, you may have legal recourse.

1. Contact Midwest Environmental Advocates or another law firm and discuss a possible mandamus action asking a court to order release of the record; or

[66] Wis. Stat. § 19.35(1)(a). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 15.
[67] Wis. Stat. § 19.35(4)(b). Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 15.
[68] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 15; *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 80.
[69] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 2.
[70] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 16.
[71] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 16. (citing *Osborn*, 254 Wis. 2d 266, ¶ 46.).

> 2. 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). Mandamus procedures are set forth in Chapters 781 and 783 of the Wisconsin Statutes.[72]

For more information of writs of mandamus and possible enforcement actions, view the Attorney General's Compliance Outline.

HOW DOES THIS HELP ME AFFECT LAND USE DECISIONS?

Land-use decisions involve proposed plans, permit applications, letters, e-mails and more. Copies of these records are vital if a citizen group wants to stay informed and involved in the decision-making process. Additionally, every time a member of the public requests copies of letters and emails sent between the members of a plan commission or city council and developers, the decision-making process becomes more transparent. Regardless of whether you are promoting or contesting a development project, you let the governmental body know that you are watching. Access to key information and open discussion is the key to a fair and informed process.

Specifically, when developers like Wal-Mart for example, come to town, there will be proposed plans, traffic impact studies, storm water studies and more. You owe it to your community to access these studies and plans, and review them for their potentially limited scope, unreasonable assumptions and skewed numbers. While an expert in these areas is extremely beneficial, it does not take an expert to raise questions. Often times it is the responses to those questions that reveal the real impacts involved in big-box and other projects.

Members of the public have the right to see communication between decision-makers and project developers. Before you accept two-way dialogue between developers and city councils, get informed and raise questions.

[72] Attorney General J. B. Van Hollen, DOJ, "Wisconsin Public Records Law, Wis. Stat. § 19.31-19.39. Compliance Outline." September 2012. p. 55.

Appendix A: Sample Open Records Request Letter

<<Your Address>>

<<Date>>

<<Department Address>>

Re: Public Records Request

Dear Records Custodian:

I am writing to request copies of all records regarding <<subject>>. Specifically, <<Add details>>. These records should include, but not be limited to, <<More details on exact records>>

This request is submitted pursuant to Wisconsin's Public Records Law, sections 19.31 to 19.39, Wis. Stats. Under this law, any person may request a record from an authority that has custody of the record. See Wis. Stat. § 19.32(3). If you do not have custody of studies or ordinances that are addressed in this request please forward this request to records custodians that have access to these records.

Under section 19.32, the "record" is "any material on which written, drawn, printed . . . information is recorded or preserved . . . which has been created or is being kept by an authority." Wis. Stat. § 19.32(2). Under this definition, the above documents are clearly "records" that can be requested by any person. Please let me know, in writing, if you have any questions regarding the request or need additional information.

Additionally, please provide notice, with an estimated cost of copying, and wait for my consent before copying files. <<Given our financial situation and the amount of personal time spent on this matter, I request that fees be reduced or waived, pursuant to section 19.35(3)(e), Wis. Stats.>>

I look forward to hearing from you in approximately ten working days, as this is deemed reasonable by the Wisconsin Department of Justice.

I appreciate your time and effort to produce these records. Thank you very much.

Sincerely,

<<Name>>