OPEN GOVERNMENT GUIDE

Understanding your rights to government access and transparency

Midwest Environmental Advocates
This overview guide is intended for a broad general audience. It introduces the legal frameworks for open government in the state of Wisconsin, and is designed to help you:

- **Understand** your right to government access and transparency
- **Participate** in government decision-making
- **Advocate** for environmental issues in your own communities.
YOUR RIGHT TO KNOW

Wisconsin residents have a right to know how the state government is spending their tax dollars and exercising powers granted by the people.

Wisconsin’s open government laws entitle you to the greatest possible information regarding the affairs of government. They promote democracy by ensuring that state, regional, and local governments conduct their business with transparency.

Public engagement is a critical tool for holding government accountable to its promise of safeguarding public health and natural resources.

ABOUT THE GUIDE

This guide is designed to help you understand your right to government access and transparency under Wisconsin’s Open Records and Open Meetings laws.

Knowing your rights will make it easier for you to speak up and be heard by your elected officials. We encourage you to exercise your rights and help strengthen our democratic process by speaking up and engaging in government decision making.
LEGAL FRAMEWORKS FOR OPEN GOVERNMENT

WISCONSIN'S OPEN RECORDS LAW

The Public Records Law (Wisconsin Statutes §§ 19.31-39) guarantees the public’s right to view and/or copy governmental records, unless disclosure would be contrary to the public interest.

Under Wisconsin’s open records law, employees at state agencies are the custodians of agency records. Custodians of public records have a responsibility to serve the public by providing documentation of our government’s activities.

While there are federal laws that pertain to open government, this guide focuses on state law.

WISCONSIN'S OPEN MEETINGS LAW

The Open Meetings Law (Wisconsin Statutes §§ 19.81-19.98) promotes democracy by ensuring that all state, regional, and local governments conduct their business with transparency.

The open meetings law requires that officials notify the public by giving public notice before any government meeting takes place. The law also says that “all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session.”
WHAT CAN I REQUEST?

As a member of the public, you have the right to inspect and/or copy any record held by a government office or authority, unless it falls within specific statutory exemptions or is contrary to the public interest.

According to Wisconsin law, a “record” includes, but is not limited to:

- any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that 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)
- optical discs, and any other medium on which electronically generated or stored data is recorded or preserved
- A "record" also includes contractors’ records.

Some documents are unavailable because they are not considered "records" under state law. 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 that 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
- published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library

For a full list of exempted records, see the Appendix.
REstrictions & Exceptions

The state open records law presumes complete public access to state and local government records. However, there are some restrictions and exceptions when the harm to privacy and/or public interest outweighs the benefit to the public.

Records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by a balancing test.

The balancing test is done on a case-by-case basis, and is a fact-intensive inquiry. A records custodian must balance a strong public interest in disclosure of the record against the public interest in favoring nondisclosure.

- Is there such a record?
- Is the requester entitled to access the record pursuant to statute or court decision?
- Is the requester prohibited from accessing the record pursuant to statute or court decision?
- Does the balancing test weigh in favor of prohibiting access to the record?

Who Can I Request Records From?

Under the Public Records Law, members of the public can inspect or copy 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 created by the constitution or by any law, ordinance, rule or order
- A governmental or quasi-governmental corporation
- 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”
- A special purpose district
- Any court of law, the state assembly or the senate

When you submit a request, you are entitled to copies or transcripts of any non-exempted record. If it is impractical to copy the record, you can inspect the records. If inspection is the only option, you can ask to photograph the record, and the authority is required to provide a photograph if you ask for one.
**HOW DO I SUBMIT A RECORDS REQUEST?**

Requests can be oral or written, and can be submitted by mail, email or in person. When you submit a request, you are not required to state the purpose of the request and, with a few exceptions, you are not required to identify yourself.

Written requests are more effective than oral requests, as the request must be in writing “before an action to enforce the request is commenced.” Wis. Stat. § 19.35

In the request, you should identify the type of records, the subject matter and the time frame. If you request copies of records, you may be charged copy fees. (See Appendix for a sample letter)

The public records law does not require a response within any specific date and time, such as two weeks or 48 hours. However, the Wisconsin Department of Justice policy is that 10 working days generally is a reasonable time for responding to a simple request.

**WHAT CAN I DO IF I SUSPECT A VIOLATION OF THE LAW?**

If you suspect that a request has been unlawfully denied or that access has been unreasonably restricted or delayed, you may have legal recourse:

- Contact Midwest Environmental Advocates or another law firm and discuss your options. It may be possible to ask a court to order release of the record.

- 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.
WHO DOES THE OPEN MEETINGS LAW APPLY TO?

The Open Meetings Law applies to all state and local governmental bodies. Governmental bodies include:

- State or local agencies, boards, commissions, committees, councils and departments
- Governmental corporations that have been created directly by state legislature or some other governmental body that serve a public purpose
- Quasi-governmental corporations that significantly resemble government corporations in function, effect, or status

WHAT COUNTS AS A MEETING?

A meeting means the convening of one half or more of the members of a governmental body to exercise the responsibilities, authority, power or duties delegated to or vested in the body.

THE SHOWERS TEST

In the case **State ex rel. Newspapers, Inc. v. Showers** (YEAR), the Wisconsin Supreme Court decided that a gathering is a meeting governed by open meetings law if:

1. There is a purpose to engage in governmental business
   AND
2. The number of members present is sufficient to determine the governmental body’s course of action
NON-TRADITIONAL IN-PERSON MEETINGS

Walking Quorums are subject to open meetings laws. A walking quorum occurs when members of a governmental body gather in separate groups that do not meet the numbers requirement, but agree in those gatherings to act uniformly on certain issues. Walking quorums are a way governmental bodies can avoid the appearance of a meeting to try to get around open meetings requirements. However, courts have concluded that walking quorums are still meetings subject to open meetings laws.

Multiple Meetings are also subject to open meetings laws. Multiple meetings occur when a sufficient number of a government body attends another governmental body’s meeting in order to gather information on an issue they have authority over. When this happens, two meetings are said to have occurred, and notice must be given for both meetings.

For a list of closed meetings, see the Appendix

PUBLIC NOTICE

Public notice must be given for all meetings held by governmental bodies as required by Wisconsin Statute 19.84. Public notice must be given at least 24 hours before the start of the meeting (with some exceptions), and must share the time, date, place, and subject matter of the meeting.

Notice of a meeting must be given one of three ways:

1. Posting a notice in at least 3 public places likely to give notice to persons affected.
2. Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body's website.
3. By paid publication in a news outlet likely to give notice to persons affected.
ACCESSIBILITY

The open meetings laws require meetings to be held in a place reasonably accessible to members of the public and open to all citizens at all times. At the local level, this means that a location is adequate if it is accessible to those with functional limitations with assistance. At the state level, a location is adequate if it is accessible to those with functional limitations without assistance.

VIRTUAL MEETINGS

In March 2020, at the start of the COVID-19 pandemic, the Wisconsin Department of Justice (DOJ) released a statement addressing the use of remote technology for open meetings. According to the DOJ, government bodies can meet their open meeting obligations by conducting meetings via telephone conference call or video conference. Virtual meetings must still give notice that should include instructions on how the public can access the meeting. For those without access to remote technology and those with physical issues such as deafness, accommodations must be made so they can access virtual meetings.

WHAT CAN I DO IF I SUSPECT A VIOLATION OF THE LAW?

If you suspect that a government body has violated the open meetings law, you may have legal recourse:

- Contact Midwest Environmental Advocates to discuss your options; or
- Submit a complaint to the District Attorney's office of the county where the violation occurred. Once a district attorney receives a complaint, they may prosecute the violation at their discretion. They have two years after the violation to commence an enforcement action.
Midwest Environmental Advocates is a nonprofit environmental law center that works for healthy water, air, land and government for this generation and the next.

For 20 years, we have provided legal and technical support to those who are working to protect the rights of all people to live in a clean and healthy environment. We believe that achieving a clean and healthy environment starts with transparent and accountable government.
APPENDIX

-SAMPLE REQUEST LETTER
-EXEMPTIONS FROM OPEN GOVERNMENT LAWS
SAMPLE OPEN RECORDS REQUEST LETTER

<<Your Address>>

<<Date>>

<<Department Address>>

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 by <<preferred medium (writing, email, or by phone)>> 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.

Thank you in advance for your assistance. I can be reached by phone at <<(xxx) xxx-xxxx>>, or via email at <<email>> for any questions regarding this request.

Sincerely,

<<Name>>
THE OPEN MEETINGS LAW: EXEMPTIONS

Wis. Stat. §§ 19.85 allows for closed session meetings in the following situations:

1. Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.

2. Considering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member.

3. Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

4. Considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.

5. Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

6. Deliberating by the council on unemployment insurance.

7. Deliberating by the council on worker’s compensation.

8. Deliberating on the location of a burial site if discussing the location in public would be likely to result in disturbance of the burial site.

9. Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons.

10. Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

11. Consideration of requests for confidential written advice from the elections commission.
THE OPEN RECORDS LAW: EXEMPTIONS

 Wis. Stat. §§ 19.36 lists records specifically exempt from disclosure. Other state and federal statutes, and court decisions, also require that certain types of records remain confidential.

EXEMPTIONS FROM DISCLOSURE IN OPEN RECORDS STATUTE

• Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an employee.
• Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an individual who holds a local public office or a state public office.
• Information related to a current investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation.
• Information pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited.
• 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.
• Investigative information obtained for law enforcement purposes, when required by federal law or regulation to be kept confidential, or when confidentiality is required as a condition to receipt of state aids.

EXEMPTIONS FROM DISCLOSURE IN OTHER STATE STATUTES

• Pupil records.
• Patient health care records.
• Mental health registration and treatment records.
• Law enforcement, court, and agency records involving children and juveniles.
• Addresses of persons participating in an address confidentiality program such as “Safe At Home” under Wis. Stat. § 165.68(4)(d), may not be disclosed except by DOJ pursuant to court order.
• Dozens of additional exemptions are embedded in substantive provisions of the Wisconsin Statutes.

EXEMPTIONS FROM DISCLOSURE IN STATE COURT DECISIONS

• District attorney prosecution files.
• Executive privilege.
• Records rendered confidential by the attorney-client privilege.
• Records consisting of attorney work product, including the material, information, mental impressions, and strategies an attorney compiles in preparation for litigation.
• Purely personal emails sent or received by employees or officers on an authority’s computer system that evince no violation of law or policy.