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

COMPLIANCE OUTLINE

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DEPARTMENT OF JUSTICE
ATTORNEY GENERAL PEGGY A. LAUTENSCHLAGER

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

Prepared by
Mary E. Burke, Maureen McGlynn Flanagan and Maura FJ Whelan
Assistant Attorneys General
Wisconsin Department of Justice
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I. 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.

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.

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. *Building and Constr. Trades Council of South Cent. Wisconsin v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). It serves 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 (1996).

II. Sources of Wisconsin Public Records Law.

A. Wis. Stat. §§ 19.31-19.39 (the public records statutes). The public records statutes, related Wisconsin statutes and 2003 Wisconsin Act 47, which amended the public records statutes, can be accessed on the Revisor of Statutes' website: www.legis.state.wi.us/rsb.

B. Wis. Stat. § 19.85(1) (exemptions to the open meetings law).

C. Court decisions.

D. Attorney General opinions and correspondence.

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 (Ct. App. 1995). Nonetheless, public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test discussed in Section VII below. *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 32-33, 254 Wis. 2d 306, 646 N.W.2d 811.

III. 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 (1985). Content, not medium or format, determines whether document is a "record" or not.

2. Not everything a public official creates is a public record. *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 680 N.W.2d 792.

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; and

   e. Electronic records and communications.

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 or provided to the authority under the general contract to which the authority is a party. *Building & Constr. Trades Council of South Cent. Wisconsin*, 221 Wis. 2d at 585.

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. Shorewood Sch. Bd.*, 186 Wis. 2d 443, 453, 521 N.W.2d 165 (Ct. App. 1994).

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 (Ct. App. 1998) (personal notes of sentencing judge are not public records).

i. This exception is limited to documents that are circulated within the preparer's level of 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 (1989); *Journal/Sentinel*, 186 Wis. 2d at 455-56.

iii. Preventing "final" corrections from being made does not indefinitely qualify a document as a draft. *Fox*, 149 Wis. 2d at 417.

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.

v. This exclusion will be narrowly construed; the burden of proof is on the custodian. *Fox*, 149 Wis. 2d at 411, 417.

b. Published material available for sale or at the library. Wis. Stat. § 19.32(2).

c. Purely personal property with no relation to the office. Wis. Stat. § 19.32(2).

d. Material with access limited due to copyright, patent or bequest. Wis. Stat. § 19.32(2).

B. **"Requester."**

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

2. *Exception*. Any of 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; or

   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 (1b), (1c), (1d), (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 some exceptions specified in Wis. Stat. § 19.35(1)(am).

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

1. A state or local office;

2. An elected official;

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

4. A governmental or quasi-governmental corporation;

5. Any court of law;

6. The 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; and

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 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 designee, are the legal custodian 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 to fulfill its duties under Chapter 19. If no designation is made, 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).

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; and

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)).

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) to (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. § 20.293(4g);

8. Specified technical college district executives and Wisconsin Technical College System senior executive positions identified in Wis. Stat § 20.923(7); and

9. Municipal judges.

IV. Before Any Request: Procedures For Authorities.

A. **Establish public 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 must include:

1. A description of its organization;

2. The established times and places at which the public may obtain information and access to records in its 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; and

7. Each position that constitutes a local public office or a state public office.

B. **Designate hours for access to public records.** 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, access to the records during those office hours unless otherwise specifically authorized by law.

2. If 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. **Identify facilities for requesters to access public records.** 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. **Determine fees for responding to public records requests**. Wis. Stat. § 19.35(3). For detailed information about permissible costs, see Section X.C. of this outline.

E. **Ascertain applicable records retention policies.** Record retention is a subject 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. *Caveat*: Under the public records law, an authority may not destroy a record after receipt of a request for that record for 60 days after denial or until related litigation is completed. Wis. Stat. § 19.35(5).

V. The Request.

A. **Requests do not have to be in writing**.

B. **The requester generally does not have to identify himself or herself.** *Caveat*: Substantive statutes, such as those concerning student records and health records, may restrict record access to certain persons. When records of that nature are the subject of a public records request, the custodian should confirm before releasing the records that the requester is someone statutorily authorized to obtain the requested record. See Wis. Stat. § 19.35(1)(i) for other limited circumstances in which a requester may be required to show identification.

C. **The requester does not need to state the purpose of the request.** Wis. Stat. § 19.35(1)(h) and (i).

D. **The request must be reasonably specific as to 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 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific).

E. **"Magic words" are not required.**

1. 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 under the "Freedom of Information Act" is sufficient. *See ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 23, 259 Wis. 2d 276, 655 N.W.2d 510.

F. **"Continuing" requests are not contemplated by the public records law**. "The right of access applies only to extant records, 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).

VI. The Response to the Request.

A. **Mandatory:** The custodian must respond to a public records request. *ECO, Inc*, 259 Wis. 2d 276, ¶¶ 13-14.

B. **Timing:** Response must be given "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 days generally is a reasonable time for response.

3. What is a reasonable time for 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.

4. Requests for public records should be given high priority.

5. An arbitrary and capricious delay or denial exposes the custodian to punitive damages and a $1,000 forfeiture. Wis. Stat. § 19.37. See Section XII of this outline for further information.

C. **Format:** If the request is in writing, a denial of access also must be in writing. Wis. Stat. § 19.35(4)(b).

D. **Content:** Reasons for denial must be specific and sufficient.

1. Don't state a mere conclusion, be specific.

   a. If confidentiality is guaranteed by statute, citation to the statute is sufficient.

   b. If further discussion is needed, a 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 (Ct. App. 1996). 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 (Ct. App. 1988). *But see State ex rel. Blum v. Board of Education*, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997).

   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 itself to deny access subsequently to a record of the meeting. Wis. Stat. § 19.35(1)(a).

2. The purpose of the specificity requirement is to give adequate notice of the basis for denial and to ensure that the custodian has exercised judgment. *Journal/Sentinel, Inc*, 145 Wis. 2d at 824.

3. The specificity requirement provides a means of restraining custodians from arbitrarily denying access to public records.

4. The sufficiency requirement provides the requester with sufficient notice of reasons for denial to enable him or her to prepare a challenge, and provides a basis for review in event of a court action.

5. If denial of a public records request is challenged in a court mandamus proceeding, the court will examine the sufficiency of the reasons stated for denying the request. It is not the court's role to hypothesize or consider reasons not asserted by the custodian. 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. 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).

6. 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. Wis. Stat. § 19.35(4)(b).

E. **Redaction:** If part of the record is public information, then the public part must be disclosed. Wis. Stat. § 19.36(6). An authority is not relieved of the duty to redact just because the authority believes that redacting confidential information is burdensome. *Osborn*, 254 Wis. 2d 266, ¶ 46.

F. **Motive:** The requester's motive or the purpose of the request cannot be considered in determining nature of the response.

VII. Analyzing the Request.

A. **Is there such a record?** The 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 (Ct. App. 1992). If record doesn't exist, inform the requester. *Cf. State ex rel. Zinngrabe v. School Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988); *ECO, Inc.*, 259 Wis. 2d 276, ¶¶ 13-14.

B. **Is requester entitled to access to and inspection of the record?** 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).

C. **Absolute Right of Access.**

1. By statute. Where access is expressly required by statute. *Youmans*, 28 Wis. 2d at 685a. 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, 477 N.W.2d 340 (Ct. App. 1991).

b. 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) (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 (1969) (statute compels court clerk to disclose memorandum decision impounded by judge because it is a paper "required to be kept in his office").

c. *Caveat*: Even 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. *See State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 555, 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.

2. By court decision. For example:

a. Daily arrest log or police "blotter" at police department. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 439, 279 N.W.2d 179 (1979).

b. Faculty outside income reports. *Capital Times v. Bock*, Dane County Case No. 164-312, April 12, 1983.

c. *Note*: In these cases, the court concluded that a case-by-case determination of public access would pose excessive and unwarranted administrative burdens.

D. **Absolute Denial of Access.** *See* Wis. Stat. § 19.36(2)-(12) for a list of records specifically exempt from disclosure by the terms of the public records statute. Many of these exceptions are discussed elsewhere in this outline. Some that are not include: trade secrets (§ 19.36(5)); identities of applicants for public positions (§ 19.36(7)); and computer programs (but not data) (§ 19.36(4)). In addition, "[a]ny 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 . . . ." Wis. Stat. § 19.36(1). Statutory exemptions are to be narrowly construed. *Chvala v. Bubolz*, 204 Wis. 2d 82.

1. By state statute. For example:

a. Personal information contained in personnel records of public employees and public officials: home address, e-mail address, home telephone number, social security number. Wis. Stat. § 19.36(10)(a), (11).

b. Additional personnel information, including current investigations into possible wrongdoing "prior to the disposition of the investigation"; and certain employee evaluation information. *See* Wis. Stat. § 19.36(10). *Caveat*: These exemptions do not apply to individuals holding "local public office" or "state public office" as defined by Wis. Stat. § 19.32(1bg). *See also* Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment be closed to the public).

An "investigation" reaches its final "disposition" when the public employer has completed it. 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, et al. v. Rock County, et al.*, 2004 WI App 210, ¶¶ 12, 15, __ Wis. 2d __, 689 N.W.2d 644.

c. Pupil records (except as specifically authorized). Wis. Stat. § 118.25.

d. Patient health care records (except as specifically authorized). Wis. Stat. § 146.82.

e. There are more than 175 additional exemptions in the Wisconsin Statutes. Some examples: plans and specifications of state-owned or state-leased buildings (Wis. Stat. § 16.851); information the disclosure of which would likely 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)).

Know the statutes and regulations applicable to your own agency! You can also check the index to the Wisconsin Statutes under both "Public Records" and the specific subject. *E.g.*, "veterinarians" (§ 453.075).

2. By federal statute (unless authorized by the statutes themselves). For example:

a. Social security numbers obtained after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(V)(viii)(I).

b. School districts receiving federal funds may not disclose personally identifiable information contained in student records (with certain exceptions). *See* 20 U.S.C. § 1232g (Family Educational Rights and Privacy Act ("FERPA"). *But note*: students and parents (unless

parental rights have been legally revoked) are allowed access to the student's records and may allow access to third parties by written consent. *Osborn*, 254 Wis. 2d 266, ¶ 27.

c. 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. Parts 160 and 164.

d. The USA PATRIOT Act, Public Law 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.

3. By state court decision. "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 (1991) ("common law limitation does exist against access to prosecutor's files under the public records law"). *Caveat*: 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: Ít is the nature of the documents and not their location which determines their status under" the public records statute. *Nichols*, 199 Wis. 2d at 274.

b. Under common law, criminal defendant has no right of discovery. *Young*, 165 Wis. 2d 276.

c. Executive privilege. 63 Op. Att'y Gen. 400, 410-14 (1974) (origins and scope discussed).

d. Attorney-client privilege. *See George*, 169 Wis. 2d at 582. *Cf. Wis. Newspress v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 783 n.3, 546 N.W.2d 143 (1996) (public records status of attorney work product uncertain).

E. **The Balancing Test.**

1. The balancing test explained. The custodian must balance the public interest in disclosure of the record against the public interest favoring nondisclosure. *State ex rel. Journal Co.*, 43 Wis. 2d at 305. The private interest of a person mentioned or identified in the record is not a proper element of the balancing test except indirectly. 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*, 254 Wis. 2d 306, ¶ 31. The identity of the requester and the purpose of the request are not part of the balancing test. *See Kraemer Brothers., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999)

2. Compare your reasons for denial with statutory or common law factors indicating that denying access is or may be appropriate. Weigh these against public interest in disclosure. Specific policy reason, rather than mere statement of legal conclusion or recitation of exemption, must be given. *Pangman & Associates. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991). Blanket exemptions as a matter of custodial policy will not hold up.

   a. Evidentiary privileges.

      i. Wis. Stat. ch. 905 enumerates a dozen different privileges. These are strictly interpreted in the trial context. *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190, 248 N.W.2d 433 (1977). Evidentiary privileges do not by themselves provide sufficient justification for denying access. *See*, *e.g.*, 1975 Judicial Council note to Wis. Stat. § 905.09.

      ii. The weight accorded to certain privileges should be greater where independent statements of public policy support denial of access. For example, the physician-patient privilege is reinforced by Wis. Stat. § 146.82, HIPAA, and Wis. Admin. Code § Med. 10.02(2)(n) ("unprofessional conduct" includes divulging patient confidences).

      iii. *Caveat*: 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. This is because it "is no mere evidentiary rule. It restricts professional conduct." *Armada Broadcasting, Inc. v. Stirn*, 177 Wis. 2d 272, 280, n. 3, 501 N.W.2d 889 (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. Exemptions to the open meetings law (Wis. Stat. § 19.85), allowing an authority to meet in closed session, "are indicative of public policy" and can be considered as balancing factors. Wis. Stat. §§ 19.35(1)(a); 73 Op. Att'y Gen. 20, 22 (1984). *Caveat*: 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) (emphasis added). For example:

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

   ii. Personnel matters. Wis. Stat. § 19.85(1)(b), (c) and (f). (To the extent a particular employment record is not exempted from disclosure by another statute, *e.g.*, Wis. Stat. § 19.36(10), the common law balancing test is applicable.)

   Reliance on § 19.85 as a balancing test factor in the employment context has been examined in many cases. *See e.g.*, *Wis. Newspress*, 199 Wis. 2d 768 (balancing test weighed in favor of disclosure of completed disciplinary investigation); *Wis. State Journal v. UW-Platteville*, 160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990) (same).

   iii. Meetings considering probation or parole or strategies for crime detection or prevention. Wis. Stat. § 19.85(1)(d).

   iv. Public business involving investments, competitive factors or negotiations. Wis. Stat. § 19.85(1)(e).

   v. 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) (emphasis added).

   vi. Legal advice as to pending or probable litigation. Wis. Stat. § 19.85(1)(g).

c. Privacy and reputational interests. Wis. Stat. § 895.50.

i. Numerous statutes and court decisions recognize the importance of the individual's interest in his privacy and reputation as a matter of public policy. *See*, *e.g.*, Wis. Stat. § 895.50 (recognizing "right of privacy"); § 19.85(1)(f) (described above); § 230.13 (state employee records remain private); *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d (1996), *superseded by statute*, 2003 Wisconsin Act 47. 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." Wis. Stat. § 895.50(2)(c).

ii. In many cases, public interest in privacy and reputation has outweighed public interest in disclosure. In *Village of Butler*, 163 Wis. 2d at 830-31, 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." *See also Kraemer Brothers., Inc*, 229 Wis. 2d 86 (privacy interests of employees of private companies contracting with a public entity outweighed public interest in disclosure).

iii. In contrast, in many other cases, public interest in disclosure has outweighed public interest in privacy and reputation. *See Local 2489*, 2004 WI App 210, ¶¶ 21, 26 (balancing test tips in favor of public access to completed investigation of employee wrongdoing); *Jensen v. School Dist. of Rhinelander*, 2002 WI App 78, ¶¶ 22-24, 251 Wis. 2d 676, 642 N.W.2d 638 (public interest in disclosure of school superintendent's performance evaluation outweighed his reputational interest because public official has lower expectation of employment privacy and because prior media reports had already compromised reputational interest); *Atlas Transit Inc. v. Korte*, 2001 WI App 286, 249 Wis. 2d 242, 638 N.W.2d 625 (public interest in disclosure of names and license numbers of school bus drivers outweighs slight

privacy intrusion); *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996) (police officers in particular have lower expectation of privacy); *Breier*, 89 Wis. 2d 417 (public interest in disclosure of arrest records outweighs public interest in privacy and reputation interests of arrestees).

iv. Privacy interest may be given greater weight where personal safety is also at issue. S*ee Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 496-97, 582 N.W.2d 44 (Ct. App. 1998); *State ex rel Morke v. Record Custodian*, 159 Wis. 2d 722, 726, 465 N.W.2d 235 (Ct. App.), *rev'd on other grounds*, 155 Wis. 2d 521, 455 N.W.2d 893 (1990).

v. *But see*: Access to FBI rap sheets held to be an unwarranted invasion of privacy, categorically. *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989). *But see* Letter of March 21, 1991, from Attorney General James E. Doyle to Chief Philip Arreola (rap sheets are available under Wisconsin Law).

d. Exceptions set out in FOIA, 5 U.S.C. § 552. *See Linzmeyer*, 254 Wis. 2d 306, ¶ 32.

e. Special issues for law enforcement agencies.

i. Police report of closed investigation. No strict rule—balancing test must be done on case-by-case basis. *Linzmeyer*, 254 Wis. 2d 306, ¶ 42. 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. Policy interests in favor of release: public oversight of police and prosecutorial actions; reliability of corroborated evidence; degree to which sensitive information already made public. In Linzmeyer's case, the scales tilted in favor of disclosure.

ii. Police report of ongoing investigation. Subject to balancing test, but policy interests against disclosure will most likely outweigh interests in favor of release in every case. *See Linzmeyer*, 254 Wis. 2d 306, ¶¶ 15-18.

(a) Access to autopsy report properly denied where murder investigation still open. *Journal/Sentinel, Inc.*, 145 Wis. 2d 818.

iii. Informants. Wis. Stat. § 19.36(8). In a reverse of the usual analysis, custodians must withhold access to records involving confidential informants unless the balancing test requires otherwise. If record is open for inspection, custodian must delete any information which would identify the informant. "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied."

F. **Traps for the Unwary.**

1. Confidentiality agreements.

a. Litigation settlements providing that the terms and conditions of the settlement are to remain confidential are public records subject to the balancing test. This is true of settlements formally approved by the court, *see In Matter of Estates of Zimmer*, 151 Wis. 2d 122, 442 N.W.2d 578 (Ct. App. 1989), as well as settlements not filed or submitted to the court. *See Journal/Sentinel*, 186 Wis. 2d 443; 74 Op. Att'y Gen. 14 (1985).

b. Because the settlement of litigation is in the public interest, and because certain parties are more likely to settle their claims if they are guaranteed confidentiality, there is a public interest in keeping settlement agreements confidential. However, the Wisconsin Court of Appeals has so far given that interest very little weight when applying the balancing test. *See Journal/Sentinel*, 186 Wis. 2d at 458-59; *Zimmer*, 151 Wis. 2d at 133-35; *C.L. v. Edson*, 140 Wis. 2d 168, 184-86, 409 N.W.2d 417 (Ct. App. 1987).

c. If an authority enters into such a confidentiality agreement, it may later find itself in "a no-win situation" where it must choose between violating the agreement or the public records law. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

d. Confidential informants outside of 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 v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638

(1991) (tax investigation). However, the test for establishing a valid pledge of confidentiality is demanding. *See* 74 Op. Att'y Gen. 14; 60 Op. Att'y Gen. 284 (1971).

2. When the record is about the requester.

   a. As a general matter, the fact that the record is about the requester is not determinative. *See* Wis. 2d 19.35(1)(a) ("<u>any requester</u> has the right to inspect <u>any record</u>") (emphasis added).

   b. However, a requester has a greater right of access than the general public to "any record containing <u>personally identifiable information</u> pertaining to the individual." Wis. Stat. § 19.35(1)(am) (emphasis added). *Caveat*: See statute for specific statutory limitations on this right of inspection, which are principally directed towards protecting the integrity of ongoing investigations, the safety of individuals (informants in particular), institutional security, and the rehabilitation of incarcerated persons.

   c. Although a "committed or incarcerated person" is generally not even within the statutory definition of "requester," such a person is a requester with respect to records that specifically reference that person or his/her minor children (with certain qualifications). Wis. Stat. § 19.32(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* 20 U.S.C. § 1232g(a)(1)(A) (FERPA); Wis. Stat. § 118.125(2).

   e. A patient's access to his own mental health treatment records may be restricted by the directory 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. *Id.* at (4)(d)2.-3. *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 586 N.W.2d 36 (Ct. App. 1998).

   f. After sentencing, a defendant is not entitled to access to his presentence investigation without a court order. Wis. Stat. § 972.15(4); *Hill*, 196 Wis. 2d 419.

   g. Check your own statutes to determine whether the requester's personal connection to the record must be considered in analyzing the request.

h. An individual "may challenge the accuracy of a record containing personally identifiable information pertaining to the individual." Wis. Stat. § 19.365(1).

VIII. Limited Duty to Notify Record Subjects.

A. Beginning with *Woznicki*, the Wisconsin Supreme Court recognized that when a custodian's decision to release records implicates the reputational or privacy interests of an individual, the custodian must notify the subject of intent to release and allow a reasonable time for the subject of record to appeal decision to circuit court. Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees. *Klein*, 218 Wis. 2d 487; *Milwaukee Teachers' Ed. Ass'n v. Milwaukee Bd. of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

B. 2003 Wisconsin Act 47, § 4, creating Wis. Stat. § 19.356, partially codified and attempted to clarify the scope of the *Woznicki* remedy. Wis. Stat. § 19.356 limits the notice requirements and right to judicial review to defined types of records pertaining primarily to employee record subjects.

C. Act 47 defined the term "record subject." See Section III above for definitions of the term "record subject" (Wis. Stat. § 19.32(2g)) and the related term "personally identifiable information" (Wis. Stat. § 19.32(1r)).

D. Wis. Stat. § 19.356(2) now generally limits the notice and judicial review requirements first recognized in *Woznicki* to the following categories of records (but see section F. below regarding officers and employees holding a state or local public office):

1. 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, rule or policy of the employer.

2. Records obtained by the authority through a subpoena or search warrant.

3. Records prepared by an employer other than an authority, if the record contain information relating to an employee of that employer, unless the employee authorizes access.

E. There are limited exceptions to the notice and review requirement for access by the affected employee, for purposes of collective bargaining or for investigation of discrimination complaints. *See* Wis. Stat. § 19.356(b) and (c).

F. If the record subject is an officer or an employee holding a local or state public office, the record subject has the right to notice and to augment the record with written comments and documentation, but no right of judicial review, prior to release. Wis. Stat. § 19.356(9).

G. Act 47 creates strict timelines for notice and judicial review requirements, and requires that courts give priority to "*Woznicki* notice" cases under Wis. Stat. § 19.356. *See* Wis. Stat. § 19.356(3)-(8). *See generally Local 2489* 2004 WI App 210.

H. In effect, Act 47 separates employee records held by an authority into three categories:

1. Employment-related records that are closed to public access. *See* Wis. Stat. § 19.36(10)-(12) (see Sections VII.D.1.a. & b., above).

2. Employment-related records that may be released under the balancing test only with prior notice and the right of judicial review or right to augment the record by the "record subject." Wis. Stat. § 19.356(2) and (9).

3. All other employment-related records, which may be released after application of the ordinary balancing test without notice to the record subject or the right to judicial review, unless some other statutory provision bars release (for example, Wis. Stat. § 230.13).

IX. Electronic Records.

A. Because the content or substance of information contained in a document determines whether it is a "record" or not, *see* Sec. III A, above, discussion in preceding sections of outline generally governs public access to electronic records as well. Issues unique to determining whether electronically-stored information is a public "record" include:

1. Is the request for an existing record?

a. The authority is not required to create a new record by extracting and compiling information from existing records in a new format. Wis. Stat. § 19.35(1)(L). *George*, 169 Wis. 2d 573.

b. 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).

c. When does retrieving electronically stored data become compiling information in a new format? Use a rule of reason. Consider how complicated it is to extract the data requested and whether the agency itself ever looks at the data in the format requested.

2. Is the record created or kept by the authority?

a. Certain kinds of data generated automatically by computer operating systems may, or may not, be retained by the agency system or on individual personal computers (PC), depending on default settings in the agency system itself or on actions by an individual using the PC. To what extent is such automatically generated data a "record" and must this data be retained by the agency custodian? *See* Wis. Stat. § 19.32(2) (defining "record" for purposes of public access and § 16.61 (defining "record" for purposes of retention of state agency records). *See also* Wis. Adm. Code ch. Adm 12, "Electronic Records Management—Standards and Requirements." *Cf. Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) (concluding that paper print outs could not be substituted for or retained in lieu of stored electronic records unless paper versions include all significant material contained in the electronic records); and *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999) (upholding Federal Archivist's schedule for disposal of agencies' word processing and e-mail files once those files were copied to a paper or electronic record-keeping system).

b. Answering the question "who is the record custodian" may be challenging when an authority utilizes a shared network or database. County law enforcement agencies, for example, may utilize a shared network of law enforcement-related information including arrest report, warrants, protection orders, and court dispositions. If a county participating in the network receives a request for all information relating to crimes committed by a particular person, there may be confusion concerning who is the custodian of stored information. Having a clear statement in the agreement setting up the network identifying who is responsible for particular records in the database can head off disputes and potential litigation concerning responsibility for handling requests for information stored in the database.

c. Does the electronically-stored information fit within the "purely personal property" or "draft" exemptions to "record?" In many cases, answering these questions involves a straight-forward application of the general concepts set out in Sec. III.A., above. Making the determination is no more easy or difficult than with paper documents. *Cf. Times Publishing Co. v. City of Clearwater*,

830 So.2d 844 (Fla. App. 2002) (holding that personal e-mail of city employees were not subject to disclosure under Florida public records statute); *approved sub nom. State of Florida v. City of Clearwater*, 863 So.2d 149 (Fla. 2003) (automatic creation of a "header" for each e-mail generated or received on city computers did not make the headers or the e-mails themselves subject to disclosure; personal e-mail is not subject to disclosure by virtue of its placement on a government-owned computer). However, determining whether electronically-stored information fits within the "draft" exception requires adequate documentation of the individuals to whom the information has been circulated.

d. Requests that simply seek information stored in a particular electronic format, such as e-mail, may not be sufficient under Wis. Stat. § 19.35(1)(h), unless the request is also reasonably limited as to length of time and subject matter of the records sought. *Cf. Schopper*, 210 Wis. 2d 209.

B. Although access to electronic records is governed by the same statutes and common law doctrines discussed in Section VII above, there are a variety of novel and difficult issues peculiar to electronic media concerning retention, storage, inspection and copying of electronic records. Specific statutes governing retention, storage and access to electronic records include:

1. Provisions contained in the public records statute itself:

a. § 19.34(2) requires the custodian to provide access to records, while § 19.35(2) requires that facilities provided to the public for inspecting and copying records be comparable to those provided employees. An authority is not, however, required to purchase special equipment or to provide a separate room for this purpose.

b. § 19.35(1)(e) gives requester the right to receive from an authority having custody of a record "not in a readily comprehensible form" a copy of the information assembled and reduced to written form on paper. The Attorney General has opined that reduction to written form is required only if the data is not otherwise comprehensible to the requester and that providing the requester with access to a machine capable of reading a computer tape would fulfill the custodian's statutory duty. *See* 75 Op. Att'y Gen. 133 (1986). *See also* subsecs. 19.35(1)(c) and (d) (requiring that copies of audiotapes be "substantially as audible" and copies of videotapes be "substantially as good" as the originals).

c. § 19.35(1)(k) permits an authority to impose reasonable restrictions on manner of access to original records if they are irreplaceable or easily damaged.

d. § 19.35(1)(L) provides that, with limited exceptions, a custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format.

e. § 19.36(4) provides that a computer program is not subject to examination or copying under the statute, but that material used as input for the computer or material produced as a product of the computer program is. For the definition of "computer program," *see* § 16.971(4)(c); *cf.* § 137.11(3), created by 2003 Act 294 § 13. In *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, the custodian had complied with § 19.35(1)(c) by providing an analog copy of a 911 tape originally recorded in digital audio tape ("DAT") format because the copy was "substantially as audible as the original." The court held, however, that the custodian was nonetheless also required to provide access to the original in the DAT format based on § 19.36(4), since the DAT original was material produced as a result of a computer program.

2. 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://enterprise.state.wi.us/home/erecords/Default.htm.

3. The Uniform Electronic Transactions Act (UETA), recently enacted in Wisconsin as 2003 WI Act 294, amends Ch. 137 and creates ch. 137, subch. II, governing electronic transactions and records as well as electronic notarization and acknowledgment. UETA primarily impacts commercial or business transactions including, potentially, government contracts. It establishes a legal framework that facilitates and validates certain electronic transactions. Although government agencies are not required to accept electronic signatures, they <u>may</u> do so. Rulemaking, under the aegis of the state Department of Administration, is needed to

provide uniform standards concerning the use of electronic records and electronic signatures by government units. UETA does not supersede state record retention requirements.

C. Unresolved issues specific to electronic records.

1. Storage and access to e-mail correspondence of state officials and employees. Beyond ADM 12, the state Department of Administration is engaged in an ongoing project to update existing state policies governing retention and storage of e-mail. Information concerning current, but out-dated e-mail retention policies can be found at http://enterprise.state.wi.us/home/email/default.htm. The agency is currently updating state e-mail policies and procedures. Information concerning that ongoing effort is located at http://enterprise.state.wi.us/home/email/retention.htm.

2. To what extent must stored electronic records duplicate all aspects of original documents, including e-mail "headers" and information embedded in original document? For example, depending on the processing system, draft information deleted from a final document may be retrievable from the original record. Wisconsin law is in need of clarification. *Jones*, 237 Wis. 2d 84, might be interpreted to require that custodians to retain electronic documents in the original format and make copies available in that format. The federal appeals court concluded in *Public Citizen*, 184 F.3d 900, however, that the federal archivist's rulemaking authority validly permits custodians of federal electronic records to store records meeting specified minimum standards; storage in the original format is not required.

3. Inspection of electronic records. Access to computer records by government employees is ordinarily limited by several levels of security to protect the integrity of original records, including varying restrictions on password access and on the kind of access one employee may have to agency records originated by another employee. To what extent can requesters insist on direct access to computer records? In view of § 19.35(1)(k), the better view may be that while requesters must be provided with accurate electronic copies of records requested and, e.g., access to a computer on which the electronic copies can be reviewed or accessed, direct access to operating programs cannot be required.

X. Inspection, Copying 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 of copying of requested records comparable to those used by the authority's employees. Wis. Stat. § 19.35(2).

3. A 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).

B. Copies:

1. A requester is entitled to a copy of a record, including copies of audiotapes and videotapes. Wis. Stat. § 19.35(1). Must provide a copy if requested. *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 525-27, 549 N.W.2d253 (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, upon request by the requester the authority must provide 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 the record if the requester requests that a photograph be provided.

2. 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).

3. The requester has a right to a copy of the original record, *i.e.*, "source" material. A request for a copy of a 911 call in its original digital form is not met by providing an analog copy. *Jones*, 237 Wis. 2d 840, ¶¶ 10-19.

4. The requester does not have a right to make 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. 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).

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. 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).

4. 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).

5. 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).

6. 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 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.

7. 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. 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.

8. In its discretion, an authority may choose to provide requested records for free or at a reduced charge. Wis. Stat. § 19.35(3)(e).

XI. Right to Challenge Accuracy of a Record.

A. An individual authorized to inspect a record under Wis. Stat. §§ 19.35(1)(a) or 19.35(1)(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. This right was created in 1993 Wis. Act 47.

D. The challenger must notify the authority, in writing, of the challenge. Wis. Stat. § 19.365(1).

E. 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 also must notify the challenger of the reasons for the denial.

Wis. Stat. § 19.365(1)(a) and (b).

XII. Enforcement and Penalties.

A. **Mandamus**. 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:

1. Bring an action for mandamus asking a court to order release of the record; or

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).

B. A request must be made in writing before a mandamus action to enforce the request is commenced. Wis. Stat. § 19.35(1)(h).

C. A committed or incarcerated person must bring any action for mandamus challenging denial of a request for access to a record within 90 days after the request is denied by the authority. Wis. Stat. § 19.37(1m).

D. 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 (Ct. App. 1989).

E. In a mandamus action, the court must decide whether the custodian gave sufficiently specific reasons for denying an otherwise proper public records request. If the custodian's reasons for denying the request were sufficiently specific, the court must decide whether the custodian's reasons are sufficiently specific to outweigh the strong public policy favoring disclosure. Answering the second question may require *in camera* inspection by the court of the record to which access is requested. *Youmans*, 28 Wis. 2d at 682-83; *George*, 169 Wis. 2d at 578, 582-83.

F. The public records law encourages assertion of the right to access.

1. Attorneys' fees, damages of not less than $100, 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.

   b. *Caveat*: 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.

   c. *Caveat*: For an attorney fee award to be made, there must be an attorney-client relationship. *Young*, 165 Wis. 2d at 294-97 (no attorney fees for *pro se* litigant).

   d. Cases discussing recovery of attorney fees where plaintiff "substantially prevails" and recovering fees and costs after the case is dismissed for being moot: *Racine Ed. Ass'n v. Board of Ed. For Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326-30, 385 N.W.2d 510 (Ct. App. 1986); *Racine Ed. Ass'n v. Board of Ed. For Racine Unified Sch. Dist.,* 145 Wis. 2d 518, 522-25, 427 N.W.2d 414 (Ct. App. 1988); *Eau Claire Press Co.*, 176 Wis. 2d at 159-60.

2. Actual damages shall be awarded to a requester who files a mandamus action relating to access to a record under Wis. Stat. § 19.35(1)(am) 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.

3. Punitive damages may be awarded to a requester if the court finds that the an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excess fees.

4. Civil forfeiture of not more than $1,000 may be imposed against an authority or legal custodian who arbitrarily or capriciously denies or delays response to a request or charges excessive fees.

G. In addition to mandamus relief, criminal penalties also are available:

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.

APPENDIX A

WISCONSIN DEPARTMENT OF JUSTICE

PUBLIC RECORDS NOTICE

WISCONSIN DEPARTMENT OF JUSTICE
PUBLIC RECORDS NOTICE

The Wisconsin Department of Justice is administered through four divisions that are responsible for providing legal, criminal investigation, and other law enforcement services to state and local government, and in certain matters, directly to state citizens. The Department also includes the Office of Crime Victim Services. The positions of the Attorney General, Deputy Attorney General and the Administrators of the Divisions of Legal Services, Law Enforcement Services, Criminal Investigations and Management Services and the Director of the Office of Crime Victim Services constitute state public offices for purposes of the Wisconsin public records laws. The Department has designated one legal custodian of public records for the entire Department, and deputy custodians as indicated below.

Members of the public may obtain information and access to the Department's public records, or obtain copies of these records by contacting the legal custodian, Linda Wells, 17 West Main, Post Office Box 7857, Madison, Wisconsin 53707-7857, telephone number 608-266-7369 or V/TTY 800-947-3529. If you prefer, you may contact any of the deputy custodians directly, in the event that you seek records which you believe to be in their possession. The Department's office is open Monday through Friday, from 7:45 a.m. to 4:30 p.m.

Please make your request for the specific records you seek, orally or in writing, to either the legal custodian or one of the deputy custodians during the office hours specified above. Please direct your request to only one of the custodians, who will forward it to a different custodian, if necessary. The Department may bill you $.15 for each copy made. There will be an additional charge for criminal history searches and for specialized documents and photographs. Requests which exceed a total cost of $5.00 may require prepayment. Requesters appearing in person may be asked to make their own copies or the Department will make copies for requesters, at its option. All requests will be processed as soon as practicable and without delay.

The various divisions of the Department of Justice and the deputy custodians within each division are as follows:

Division of Legal Services

The deputy custodian is Heather Blicharz, 17 West Main, Post Office Box 7857, Madison, Wisconsin 53707-7857, telephone number 608-266-0684 or V/TTY 800-947-3529.

This division functions in a manner which most closely resembles the traditional role of the "Office of the Attorney General." The division's attorneys are responsible for providing legal advice and counsel to state and local agencies as well as to citizens in certain matters. The division is comprised of seven specialized units, each headed by a supervising attorney.

Division of Criminal Investigation

This division is responsible for investigating, either independently or in conjunction with local law enforcement agencies, certain criminal cases which are of statewide influence and importance, to include the Uniform Substances Control Act. The Division's responsibilities are delegated to several specialized bureaus: Arson and Special Assignments, Gaming and Financial Crimes, Public Integrity, Investigative Services, and Narcotics.

The deputy custodians for each bureau are as follows: Director Carolyn Kelly, Arson and Special Assignments Bureau; Director Robert Sloey, Gaming Enforcement Bureau and Financial Crimes Unit; Director Robbie Lowery, Public Integrity Bureau; Director Craig Klyve, Investigative Services Bureau; Director Mike Myszewski, Narcotics Bureau.

Each deputy custodian can be reached at 17 West Main Street, Post Office Box 7857, Madison, Wisconsin 53707-7857, telephone number 608-266-1671.

Division of Law Enforcement Services

The deputy custodian is Lou Wilcynski, 17 West Main, Post Office Box 7857, Madison, Wisconsin 53707-7857, telephone number 608-267-2224 or V/TTY800-947-3529.

This division provides technical and scientific assistance to local law enforcement agencies and establishes training standards for law enforcement officers. The division is comprised of the Crime Information Bureau, the Training and Standards Bureau and the State Crime Laboratories.

Division of Management Services

The deputy custodian is Angie Decker, 17 West Main, Post Office Box 7857, Madison, Wisconsin 53707-7857, telephone number 608-266-2140 or V/TTY 800-947-3529.

This division provides basic staff support services to the other divisions within the Department in the areas of budget preparation, fiscal control, personnel management, payroll, training, facilities and information technology.

Office of Crime Victims Services

The deputy custodian is Kathryn Sullivan, 17 West Main, Post Office Box 7951, Madison, Wisconsin 53707-7951, telephone number 608-264-9497 or V/TTY 800-947-3529.

The Office of Crime Victims Services provides compensation to persons who are the innocent victims of certain violent crimes or, in the event of death, to their dependents.

PEGGY A. LAUTENSCHLAGER, Attorney General
Revised September, 2004

APPENDIX B

PUBLIC RECORDS LAW

WISCONSIN STATUTES §§ 19.31-19.39 (2003-04)

19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it 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. Further, providing persons with such information is declared to be 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.

19.32 Definitions. As used in ss. 19.33 to 19.39:

(1) "Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi−governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a family care district under s. 46.2895; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

(1b) "Committed person" means a person who is committed under ch. 51, 971, 975 or 980 and who is placed in an inpatient treatment facility, during the period that the person's placement in the inpatient treatment facility continues.

(1bg) "Employee" means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.

(1c) "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. 973.09 (4) as a condition of placement, during the period of confinement for which the person has been sentenced.

(1d) "Inpatient treatment facility" means any of the following:

(a) A mental health institute, as defined in s. 51.01 (12).

(c) A facility or unit for the institutional care of sexually violent persons specified under s. 980.065.

(d) The Milwaukee County mental health complex established under s. 51.08.

(1de) "Local governmental unit" has the meaning given in s. 19.42 (7u).

(1dm) "Local public office" has the meaning given in s. 19.42 (7w), and also includes any appointive office or position of a local governmental unit 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 s. 111.70 (1) (i).

(1e) "Penal facility" means a state prison under s. 302.01, county jail, county house of correction or other state, county or municipal correctional or detention facility.

(1m) "Person authorized by the individual" means the parent, guardian, as defined in s. 48.02 (8), or legal custodian, as defined in s. 48.02 (11), of a child, as defined in s. 48.02 (2), the guardian, as defined in s. 880.01 (3), of an individual adjudged incompetent, as defined in s. 880.01 (4), the personal representative or spouse of an individual who is deceased or any person authorized, in writing, by the individual to exercise the rights granted under this section.

(1r) "Personally identifiable information" has the meaning specified in s. 19.62 (5).

(2) "Record" means 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. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. "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.

(2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.

(3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

(4) "State public office" has the meaning given in s. 19.42 (13), but does not include a position identified in s. 20.923 (6) (f) to (gm).

19.33 Legal custodians. (1) An elected official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.

(2) The chairperson of a committee of elected officials, or the designee of the chairperson, is the legal custodian of the records of the committee.

(3) The cochairpersons of a joint committee of elected officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.

(4) Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employees of the authority entrusted with records subject to the legal custodian's supervision.

(5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.

(6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.

(7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.

(8) No elected official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee's records by rule or by law.

19.34 Procedural information. (1) Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the

authority that constitutes a local public office or a state public office. This subsection does not apply to members of the legislature or to members of any local governmental body.

(2) (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.

(b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:

1. Permit access to its records upon at least 48 hours' written or oral notice of intent to inspect or copy a record; or

2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

(c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.

(d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day's notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

19.345 Time computation. In ss. 19.33 to 19.39, when a time period is provided for performing an act, whether the period is expressed in hours or days, the whole of Saturday, Sunday, and any legal holiday, from midnight to midnight, shall be excluded in computing the period.

19.35 Access to records; fees. (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes 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.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual, has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or receive

a copy of any such information. The right to inspect or copy a record under this paragraph does not apply to any of the following:

1. Any record containing personally identifiable information that is 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.

2. Any record containing personally identifiable information that, if disclosed, would do any of the following:

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85 (2) (bg), secured correctional facility, as defined in s. 938.02 (15m), secured child caring institution, as defined in s. 938.02 (15g), secured group home, as defined in s. 938.02 (15p), mental health institute, as defined in s. 51.01 (12), center for the developmentally disabled, as defined in s. 51.01 (3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

3. Any record that is part of a records series, as defined in s. 19.62 (7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(b) 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. If a requester appears personally to request a copy of a record, the authority having custody of the record may, at its option, permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio tape recording a copy of the tape recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video tape recording a copy of the tape recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36 (8) (b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (b) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) FEES. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds $5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.

(4) TIME FOR COMPLIANCE AND PROCEDURES. (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if

the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37 (1) or upon application to the attorney general or a district attorney.

(c) If an authority receives a request under sub. (1) (a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1) (a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1) (a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1) (a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1) (am) and grant or deny the request accordingly.

(5) RECORD DESTRUCTION. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under s. 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

(6) ELECTED OFFICIAL RESPONSIBILITIES. No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official.

19.356 Notice to record subject; right of action. (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

(2) (a) Except as provided in pars. (b) and (c) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject.

The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:

1. A record containing information relating to an employee that is created or kept by the authority and that is 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 employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

(b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. 111.

(c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. 106.54 or 230.45 or subch. II of ch. 111 if the record is provided by an authority having responsibility for that function.

(3) Within 5 days after receipt of a notice under sub. (2) (a), a record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the requested record.

(4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2) (a). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.

(6) The court, in an action commenced under sub. (4), may restrain the authority from providing access to the requested record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.

(7) The court, in an action commenced under sub. (4), shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

(8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law. An appeal shall be taken within the time period specified in s. 808.04 (1m).

(9) (a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

(b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

19.36 Limitations upon access and withholding. (1) APPLICATION OF OTHER LAWS. 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 s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

(2) LAW ENFORCEMENT RECORDS. Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

(3) CONTRACTORS' RECORDS. Subject to sub. (12), each authority shall make available for inspection and copying under s. 19.35 (1) 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. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

(4) COMPUTER PROGRAMS AND DATA. A computer program, as defined in s. 16.971 (4) (c), is not subject to examination or copying under s. 19.35 (1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

(5) TRADE SECRETS. An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90 (1) (c).

(6) SEPARATION OF INFORMATION. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS. (a) In this section, "final candidate" means each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to an authority for appointment to any state position, except a position in the classified service, or to any local public office. "Final candidate" includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the office or position by an authority, and whenever there are less than 5 candidates for an office or position, each such candidate. Whenever an appointment is to be made from a group of more than 5 candidates, "final candidate" also includes each candidate in the group.

(b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS. (a) In this subsection:

1. "Informant" means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:

a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.

b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.

2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b), and includes the department of corrections.

(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

(9) RECORDS OF PLANS OR SPECIFICATIONS FOR STATE BUILDINGS. Records containing plans or specifications for any state−owned or state−leased building, structure or facility or any proposed state−owned or state−leased building, structure or facility are not subject to the right of inspection or copying under s. 19.35 (1) except as the department of administration otherwise provides by rule.

(10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

(a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

(d) 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.

(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records, except to an individual to the extent required under s. 103.13, containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

(12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority shall not provide access to a record prepared or provided by an employer performing work on a project to which s. 66.0903, 103.49, or 103.50 applies, or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, “personally identifiable information” does not include an employee’s work classification, hours of work, or wage or benefit payments received for work on such a project.

19.365 Rights of data subject to challenge; authority corrections. (1) Except as provided under sub. (2), an individual or person authorized by the individual may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if the individual is authorized to inspect the record under s. 19.35 (1) (a) or (am) and the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual’s disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a 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 pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(1m) TIME FOR COMMENCING ACTION. No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

(1n) NOTICE OF CLAIM. Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) PENALTY. Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district

attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.