WISCONSIN'S OPEN RECORDS LAW: AN OVERVIEW OF THE ISSUES

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WISCONSIN'S OPEN RECORDS LAW: AN OVERVIEW OF THE ISSUES AND THE IMPACT OF TECHNOLOGY

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I. INTRODUCTION

A. Over 30 Years Old (in its current form): Public Records Law in its current form took effect January 1, 1983.

1. Periodic Legislative Reviews? In 2002, the Joint Legislative Council established a Special Committee on Review of the Open Records Law, which was specifically directed to "recommend changes in the law to accommodate electronic communications. . . ." The Committee issued a report to the legislature on March 25, 2003, without recommending any change to the definition of record or any change to accommodate electronic communications. **See *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 123, 327 Wis. 2d 572, 786 N.W.2d 177** (citing Wisconsin Legislative Council, Special Committee on Review of the Open Records Law: Report to the Legislature 5 (Mar. 25, 2003)).

B. Public Records Law Has Always Evolved With the Times: Courts are routinely required to interpret the meaning of statutory language and apply it to "complicated social questions" involving technology that was not contemplated when a statute was enacted. ***See, e.g., Schill*, 2010 WI 86, ¶ 4** (discussing how the public records law should be applied to email, a technology not contemplated when the legislature enacted the law)**.**

C. Technology Does Not Limit Public Records Law: "As technology advances and computer systems are refined, it would be sadly ironic if courts could disable Wisconsin's open records law by limiting its reach. After all, as modern society rapidly adds to its sophisticated methods of data collection, it inevitably filters 'the human mouth, tongue, [and] vocal cords' through computer systems. A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent." ***State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶ 19, 237 Wis.2d 840, 615 N.W.2d 190**.

D. Limit to Technologies' Expansive Reach: Public Records Law recognizes "presumption of complete public access, *consistent with the conduct of governmental business.*" **Wis. Stat. § 19.31** (emphasis added).

E. Huge Costs Imposed on Governmental Bodies: "There is no question that the cost of redacting records can be a significant burden on governmental agencies. As the volume and complexity of records maintained by many units of government has increased since 1982, so, too, has the magnitude of redaction costs. For larger governmental units, redaction of records may consume thousands of hours of employee time, and tens of thousands of dollars each year. These duties are mostly performed by employees with other responsibilities and, during tight budget times, most governmental bodies are already understaffed." **Attorney General J. B. Van Hollen's Statement March 12, 2012 "Sunshine Week 2012: The Importance of Access to Pubic Records."**

II. "RECORDS" AND ELECTRONICALLY CREATED OR STORED DATA

A. "Record":

1. Definition of "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. 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 …materials to which access is limited by copyright, patent or bequest" **Wis. Stat. § 19.32(2)** (emphasis added).

B. Electronically created and stored data can be a public record and may be sought.

1. Overview:

a. "It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office." ***International Union v. Gooding*, 251 Wis. 362, 370-371, 29 N.W.2d 730 (1947)**;

b. "It is the content of the record, not its format or location, that is determinative." **OAG I—06—09 (Dec. 23, 2009) p. 2**. ***See also Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 22, 327 Wis. 2d 572, 786 N.W.2d 177**.

2. Types:

a. computer disk, drives and tapes
b. computer printouts
c. optical disks
d. CD-ROMs
e. word processing documents
f. database files
g. e-mails
h. web-based information
i. PowerPoint presentations
j. audio recordings
k. video recordings
l. digital recordings
m. personal electronic devices?????
n. Metadata?????

3. Must distinguish data from a computer program or software program which may be **copyrighted** or which may be a **trade secret**.

a. **Computer programs or software** are exempt from disclosure but material input and material produced is not. **Wis. Stat. § 19.36(4)**. ***See also* Wis. Stat. § 19.32(2)** ("record" does not include "materials to which access is limited by copyright, patent or bequest");

b. **Definition of "Computer programs":** generally, the processes for the treatment and verbalization of data. **Wis. Stat. § 16.971(4)(c)1**. ***See also* Wis. Stat. § 137.11(3)** ("'Computer program' means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.") and **Wis. Stat. § 943.70** (regarding "computer crimes" and defining "access," "computer," "computer network," "computer program," "computer software," "computer supplies," and "computer system");

c. **Trade Secrets:** An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret. **Wis. Stat. § 19.36(5)**. **Trade**

secret means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

i. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use;

ii. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances. **Wis. Stat. § 13.90(1)(c)**;

d. A CD with collected websites and images viewed by a teacher, later disciplined, is a public record despite the copyright exception in **Wis. Stat. § 19.32(2)**. ***Zellner v. Cedarburg School District,* 2007 WI 53, ¶¶ 26-32, 300 Wis.2d 290, 731 N.W.2d 240** ("Under the circumstances presented in this case, the images and websites listed and recorded in the memo and the CD are not commercial in nature, because they can be accessed free of charge via the internet, and because the District will not profit from the distribution of the images. Additionally, allowing public access to the CD and the memo for purposes of adhering to the Open Records Law will not affect the potential marketability of the images, nor is it likely to relate to their value.").

III. RECORDS CUSTODIANS

A. Officers

1. Each municipal officer or official must keep "all property and things" related to the position and permit access and copying. **Wis. Stat. § 19.21.**

a. Elected officials. **Wis. Stat. § 19.33(1)**;

b. Chairpersons and co-chairpersons of a committee of elected officials. **Wis. Stat. § 19.33(2) and (3**).

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

1. A state or local office.

a. A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the "authority" for purposes of the public records law. ***WIREdata, Inc. v. Vill. of Sussex*** **("*WIREdata II*"), 2008 WI 69, ¶ 75, 310 Wis. 2d 397, ¶ 89, 751 N.W.2d 736** (municipality's independent contractor assessor not an authority for public records purposes);

b. Only "authorities" are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests. ***Id.***, **¶¶ 77-78.**

2. An elected official.

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

4. A governmental or quasi-governmental corporation.

a. A corporation is a quasi-governmental corporation for purposes of the public records law "if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status." ***State v. Beaver Dam Area Dev. Corp.*****, 2008 WI 90, ¶ 9, 312 Wis. 2d 84, 752 N.W.2d 295, ¶ 9;**

b. Quasi-governmental corporations are not limited to corporations created by acts of government. ***Id.*** **at ¶ 44. See, e.g.,** ***Wisconsin Professional Police Asso., Inc. v. Wisconsin Counties Ass.*****, No. 2014AP249, 2014 WL 4637474 (Wis. Ct. App. Sept. 18, 2014)** (Wisconsin Counties Association, an unincorporated not-for-profit association, is not an "authority");

c. Determining whether a corporation is a quasi-governmental corporation requires a case by case analysis. ***Beaver Dam*** **at ¶¶ 8-9.** No one factor is conclusive. The non-exclusive list of factors involve five basic categories:

i. The extent to which the private corporation is supported by public funds;

ii. Whether the private corporation serves a public function and, if so, whether it also has other, private functions;

iii. Whether the private corporation appears in its public presentations to be a governmental entity;

iv. The extent to which the private corporation is subject to governmental control; and

v. The degree of access that government bodies have to the private corporation's records. **OAG I-02-09 (March 19, 2009).**

5. Any court of law.

6. The state assembly or senate.

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

a. Wisconsin Humane Society records regarding dog impoundment and disposition are accessible, ***State ex rel Schultz v. Wellens*, 208 Wis. 2d 574, 561 N.W.2d 775 (App. 1997);**

b. Legal Aid Society of Milwaukee is an "authority" because 50% of funds received from county. ***Cavey v. Walrath*, 229 Wis. 2d 105, 598 N.W.2d 775 (App. 1997).**

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

C. Custodians

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. Virtually any municipal body, committee, commission, group, department or division created or constituted under Wisconsin law is an "authority" whose records are subject to public access. **Wis. Stat. § 19.32(1).**

3. Each such "authority" must designate in writing one or more persons or positions occupied by an officer or employee as a "custodian" to

whom records requests can be made. **Wis. Stat. § 19.33(4).**

a. If no custodian designated, the "authority's" highest-ranking officer is deemed custodian. **Wis. Stat. § 19.33(4).**

4. Each authority must display and make available for inspection and copying a notice describing the organization and describe methods the public may use to obtain records. **Wis. Stat. § 19.34(1).**

a. The notice shall also separately identify each position employed by the authority that constitutes a "local public office" (i.e. elective office, administrators or managers, department heads, appointive offices). **Wis. Stat. § 19.34(1). § 19.32(1dm).**

5. **Duty to maintain** the records and balance requests for access.

6. **Duty to verify:** an authority that maintains personally identifiable information that may result in an adverse determination about the individual's rights, benefits or privileges shall (a) collect information directly from the individual; or (b) verify if collected from another. Wis. Stat. § 19.67(1).

7. **Duty to transfer:** upon expiration of term or by vacancy, each officer shall deliver all property in his/her custody to successor. **Wis. Stat. § 19.21(2).**

D. Others

1. **Shared authorities**.

a. **Shared Records Among Law Enforcement**: Where law enforcement operations share custody of records through a technology authority the custodian is the authority for which the record is stored. **Wis. Stat. § 16.964(18)(b)** ("For purposes of requests for access to records under s. 19.35 (1), if the office has custody of a record containing law enforcement investigation information, the office and any other law enforcement agency with which the office shares the information contained in the record are not the legal custodians of the record as it relates to that information. For such purposes, the legal custodian of the record is the law enforcement agency that provides the law enforcement investigation information to the office. If the office or any other law enforcement agency receives a request under s. 19.35 (1) for access to information in such a record, the office

or the other law enforcement agency shall deny any portion of the request that relates to law enforcement investigation information."); **Wis. Stat. § 19.35(7)(b)** ("a local information technology authority that has custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology usage is not the legal custodian of the record. For such purposes, the legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used."). **But see 2013 Act 20, effective July 2, 2013, repealing provisions of § 16.964.**

2. **Private parties "under contract" (consultants, surveys). Wis. Stat. § 19.36(3).**

a. Obligation for disclosure does not extend to a private contractor that creates and maintain records for its own purposes. ***Building and Construction Trades Council v. Waunakee Comm. School Dist.*, 221 Wis. 2d 575, 585 N.W.2d 726 (App. 1998);**

b. Requester not entitled to the listed names of purchasers of municipal bonds created and maintained by Village's bonding agent-Robert W. Baird. ***Machotka v. Village of West Salem*, 2000 WI App 43, 203 Wis. 2d 106, 607 N.W.2d 319;**

c. Assessors who are independent contractors are not "authorities" subject to record requests. ***WireData v. Village of Sussex*, 2007 WI App 22, 298 Wis.2d 743, 729 N.W.2d 757, revd. on other grounds 2008 WI 69;**

d. Custodian may not disclose names and personally identifiable information of the prevailing wage employees of independent contractors unless authorized by the employee. **Wis. Stat. § 19.36(12);**

i. Prevailing wage information does not include work classification, hours of work or wages and benefits.

3. **Independent Contractors**

a. A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the "authority" for purposes of the public records law. ***WlREdata*, 2008 WI 69, ¶ 75** (municipality's independent

contractor assessor not an authority for public records purposes);

b. Only "authorities" are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests. ***Id.* ¶¶ 77-78.**

IV. HANDLING REQUESTS FOR RECORDS, INCLUDING DIGITAL/ ELECTRONIC INFORMATION

A. Requester and their Rights:

1. Any person may inspect any public record subject to recognized exceptions. **Wis. Stat. § 19.35(1)(a).** However, a requester must comply with regulations or restrictions imposed by law. **Wis. Stat. § 19.35(1)(j).**

2. Any person may make or receive a copy of any record**. Wis. Stat. § 19.35(1)(b).**

3. There are no "magic words" and any written request for records requires a response, ***ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510.** Motivation of those seeking access to public records immaterial, ***State ex rel Youmans v. Owens*, 28 Wis. 2d 672, 677, 137 N.W.2d 470 (1965).**

4. Requester need not disclose identity unless record is at a private residence, or whenever security reasons or federal law requires it. **Wis. Stat. § 19.35(1)(i).** The identity of the requester will not control the decision to disclose. ***Levin v. Board of Regents*, 2003 WI App 181, 266 Wis. 2d 481, 688 N.W.2d 779**. Limitations are placed upon requests by incarcerated persons or those committed to the Department of HFS. **Wis. Stats. § 19.32(1)**.

5. May make the request orally or in writing. **Wis. Stat. § 19.35(1)(h).**

6. May receive a copy of an audio or video recording. **Wis. Stat. § 19.35(1)(c) & (d)**; ***State ex rel. Milwaukee Police Association v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190** (a request may direct production of an original digital tape (DAT)).

B. Request Must "Reasonably Describe" the Requested Record

1. A request for a record without a reasonable limit as to the subject matter or length of time is not sufficient. **Wis. Stat. § 19.35(1)(h)**.

2. "[A] records custodian should not have to guess at what records a requester desires." ***Seifert v. School Dist. of Sheboygan Falls,* 2007 WI App 207, ¶ 42, 305 Wis.2d 582, 740 N.W.2d 177**.

3. A records custodian is not permitted to deny a request based solely on the custodian's assertion that the request could reasonably be narrowed. ***State ex rel. Gehl v. Connors,* 2007 WI App 238, ¶ 20, 306 Wis. 2d 247, 742 N.W.ed 5327**.

4. The fact that a public records request may result in generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited. ***Gehl,* 2007 WI App 238, ¶ 23**.

a. "At some point", an overly broad request becomes sufficiently excessive to warrant rejection pursuant to Wis. Stat. § 19.35(1)(h). ***Id.* ¶ 24**;

b. The right to inspect public records is not absolute. ***Id.* ¶ 24;**

c. **Seeking virtually every available digital or electronic record:** may be impermissible. ***See id.* ¶ 23** ("The first part of Gehl's records request seeks virtually every email that passed between all employees of the five County offices and departments named in his request and any of approximately thirty-four individuals over a two-year period. The request is not tied to any particular subject matter. As a result, the County would be required to locate and copy all emails relating to every aspect of hundreds of employees' contacts with others, without regard to content or relationship to matters involving the Gehl property.");

d. **Generic or overly broad search terms for emails or data searches:** possibly excessive and may be rejected. ***See id.* ¶ 23** ("The second part of Gehl's request includes search terms as generic as 'income requirement,' 'land use plan,' 'driveway' and ''zoning authority.' We do not accept Gehl's argument that terms such as these are necessary to elicit the records he seeks. Instead, the terms are so broad on their face as to require the production of a large volume of records relating to virtually all County zoning matters that were taken up over a two-year period, without regard to the parties involved and without regard to whether the matters implicated Gehl's interests in any way.").

5. Complex Digital/Electronic Requests

a. Requests for digital or electronic information which are highly complex and technical may call into question whether such requests comport with the purpose of the specificity requirement, which is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request. ***Schopper v. Gehring*, 210 Wis.2d at 213, 565 N.W.2d 187 (Ct. App. 1997)** ("While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired."); ***Gehl*, 2007 WI App 238, ¶ 17** ("the purpose of this time and subject matter limitation is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources deciphering and responding to a request.");

b. A request for "tape and transcript" of 3 hours of 911 calls on 60 channels was vague as to the subject matter and time; deemed impermissibly broad where it required the transcription of 180 hours of tape. ***Schopper*, 210 Wis. 2d at 209**;

c. **Requests Which Yield Nonresponsive Electronic/Digital Records:** Wisconsin public record law does not require that documents not within the request be produced for inspection. ***McCullough Plumbing, Inc. v. Village of McFarland*, 2006 WI App 1, ¶¶ 26, 28, 288 Wis.2d 657, 707 N.W.2d 579** (Municipality properly withheld 13 emails which were yielded by search and later determined to be nonresponsive. "Here, McCullough asked for documents indicating that ductile iron pipe must be used for water laterals. This is a clear request for specific documents indicating that the Village of McFarland requires ductile iron piping. None of the twelve e-mails in question use the words 'ductile iron,' let alone indicate that ductile iron pipe must be used for water laterals.").

6. **Clarification from Requester When Handling Complex Requests for Digital or Electronic Information:** "A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request. These contacts, which are not required by the public records law, may assist both the records

custodian and the requester in determining how to proceed. Records custodians making these courtesy contacts should take care not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the public records law." **DOJ's Compliance Outline (2012) p. 12**.

C. **Time for Response.**

1. "As soon as practical and without delay" custodian must fill request or notify of decision. **Wis. Stat. § 19.35(4)(a); *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996)**.

2. No prescribed deadlines but DOJ policy is typically 10 days.

3. There may not be deliberate delay.

4. **Factors which may influence time to respond:** size of request; location of records; need to consult with attorney; need to notify subject of records; and redactions where necessary.

5. **Complex requests for digital/electronic records may allow "reasonable latitude" in time for response:**

a. Courts have recognized that municipalities should be afforded reasonable latitude in the time frame for their responses in situations where the requests are complex. ***WIREdata v. Village of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 NW 2d 736** (Agreeing with DOJ that Open Records Law should not be construed for allowing a mandamus action even where municipalities were acting diligently in attempting to respond in a timely manner. "We further concur with the DOJ's opinion that what constitutes a reasonable time for a response by an authority "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 other related considerations. Accordingly, whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request.");

b. **Handle complex requests diligently and in good faith:** "An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request." ***Id.* ¶ 56**.

D. **New Records/Compilations:** An authority has no obligation to create a new record to respond to a request. **See *State ex rel Zinngrabe v. School Dist. of Sevastopol,* 146 Wis. 2d 629, 431 N.W.2d 734 (App. 1988); Wis. Stats. §19.35(1)(L).**

1. The open records law does not require the custodian to collect or compile statistics or to create a record, ***George v. Record Custodian*, 169 Wis. 2d 573, 578, 485 N.W. 2d 460 (App. 1992)/**

E. **Access**

1. **Facilities:** Must provide requester with facilities comparable to those used by employees to inspect, copy and abstract records. **Wis. Stat. § 19.35(2)**.

a. Municipality may undertake to protect loss of data and damage to hardware;

b. Municipality may put reasonable time restrictions on use of computer terminal;

c. Municipality may disallow requester from using copier, computer, printer, etc., so long as it fills request. ***See* Wis. Stat. § 19.35(2); 72 Op. Att'y Gen. 36, 38 (OAG 9-83)** (copier and microfilm printer can be run exclusively by authority's personnel, rather than requester, so long as authority opts to provide requested copies).

2. **Reasonable limits** are allowed to protect records easily destroyed or irreplaceable. **Wis. Stat. § 19.35(1)(k)**.

a. **Setting Rules for Inspections:** May be permissible. "Concerns for protecting the integrity of original records may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security concerns may also justify such a restriction." **DOJ's Compliance Outline (2012) p. 47-48 (citing *WIREdata v. Village of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 NW 2d 736); see also *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 12-13, 240 Wis. 2d 551, 624 N.W.2d 892** (in construing Wis. Stat. § 19.35(1)(b) to find that the custodian, not the requester, has the option to choose how a record will be copied, court said: "this interpretation satisfies an

important public policy concern. [The Clerk], like other record custodians, has important administrative obligations. Like other custodians, the county clerks must keep the records in their possession in good condition and have them readily accessible. The custodians are obligated to preserve and protect the records under their custody while at the same time allowing the public the right to access and copy these documents. The legislature was obviously aware of these two public interests and struck a balance by giving the custodian the option to determine how the records are copied.");

b. **Having staff monitor inspection:** "Depending on the circumstances, it may be appropriate to allow the requester to inspect paper copies without having an employee sit next to the requester." **See *Responses to Questions About the Public Records Law Submitted During DOJ's Webinar October 20, 2011 Webinar*, Prepared by Attorney General's Office November 10, 2011, p. 6**;

c. **Concerns with protecting integrity of record or fragile records:** The authority may determine that it is necessary to have a staff person closely monitor inspection of the records by the requester. ***Id***. "If the requester asks to inspect electronic records, the authority will have to determine how that can be accomplished efficiently and realistically given technological and other issues raised by those records. Some possibilities may include providing a CD or DVD containing the records to the requester at no charge, allowing the requester to view the records at a computer terminal without access rights to other records of the authority, or assigning a staff member to supervise or display the electronic records at one of the authority's computers." ***Id***.

3. Requester may be barred from leaving with original. ***See generally*** **Wis. Stat. § 19.35(1)(k)**.

4. **May Deny Access to Computerized Database:**

a. May deny direct access to examine electronic records, extract information from them, or copy them;

b. Concerns with confidentiality and protecting data may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer;

c. ***See WIREdata,* 2008 WI 69, ¶ 97:** "We share the DOJ's concern….that allowing requesters such direct access to the electronic databases of an authority would pose substantial risks. For example, confidential data that is not subject to disclosure under the open records law might be viewed or copied. Also, the authority's database might be damaged, either inadvertently or intentionally. We are satisfied that it is sufficient for the purposes of the open records law for an authority, as here, to provide a copy of the relevant data in an appropriate format."

6. Requester's Own Equipment: Clerk may decline requester's demand to use his or her own equipment (such as requester's own photocopier) in concern to protect originals. ***Grebner v. Schiebel,* 2001 WI App 17, 240 Wis. 2d 551, 624 N.W.2d 892** (concluding that county clerk with custody of voting records could determine how to satisfy an open records request including by denying access to poll records in order to make copies with requester's own portable photocopying machine).

F. Format

1. Substantially as Good Standard.

a. **Written Documents.** Copies of written documents must be "substantially as readable." **Wis. Stat. § 19.35(1)(b)** ("If a requester appears personally to request a copy of a record that permits photocopying, 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.");

b. **Audiotapes.** Must be "substantially as audible as the original." **Wis. Stat. § 19.35(1)(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.");

c. **Videotapes.** Copies of videotapes must be "substantially as good" as the originals. **Wis. Stat. § 19.35(1)(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 video tape recording a copy of the tape

recording substantially as good as the original.").

2. **Requester Does not Specify Digital/Electronic Format or Demand Original Format**. Providing a copy of an electronic document that is "substantially as good" as the original is a sufficient response where the requester does not specifically request access in the original format. ***See WIREdata,* 2008 WI 69, ¶¶ 97-98** (provision of records in PDF format satisfied requests for records in "electronic, digital" format); ***State ex reI. Milwaukee Police Ass 'n v. Jones,* 2000 WI App 146, ¶ 10** (holding that provision of an analog copy of a digital audio tape (DAT) complied with Wis. Stat. § 19.35(1)(c) by providing a recording that was "substantially as audible" as the original).

3. **Requester Specifies Format or Demands Original Format of Electronic/Digital Records.**

   a. May be required to comply with requests for a specified format. ***State ex rel Milwaukee Police Association v. Jones,* 2000 WI App 146, ¶ 17**, **237 Wis. 2d 840**, **615 N.W. 2d 190** (when a requester specifically asked for the original DAT recording of a 911 call, the custodian did not fulfill the request by providing only the analog copy.);

   b. Undeveloped body of law as to whether requester may demand particularized technological format. ***WIREdata,* 2008 WI 69**, **¶¶ 14-15, 25 n.7, 93, and 96** (declined to address the issue of whether the provision of documents in PDF format would have satisfied a subsequent request specifying in detail that the data should be produced in a fixed length, pipe delimited, or comma-quote outputs);

   c. A requester has the right to receive land information data in the same format in which the record is maintained by the custodian, unless the requester request that a copy be provided in a different format that is authorized by law. **Wis. Stat. § 66.1102(4)**;

      i. **"Land Information"** (1) means any physical, legal, economic or environmental information or characteristics concerning land, water, groundwater, subsurface resources or air in this state; and (2) it includes information relating to topography, soil, soil erosion, geology, minerals, vegetation, land cover, wildlife, associated natural resources, land ownership, land use, land use controls and restriction,

jurisdictional boundaries, tax assessment, land value, land survey records and references, geodetic control networks, aerial photographs, maps, planimetric data, remote sensing data, historic and prehistoric sites and economic projections. **Wis. Stat. §§ 59.72(1)(a) and 66.1102(1)(a)**;

ii. Applies to Cities, Villages, Towns or Counties. **See Wis. Stat. § 66.1102(1)(b)**.

4. Records Which are Not in Readily Comprehensible Form: 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. **Wis. Stat. § 19.35(1)(e).**

5. Photographing Unspecified Records: Any requester has a right to inspect any record not specified "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. **Wis. Stat. § 19.35(1)(f).**

6. Requesters' Obligations – Is it a Limitation on Format of their Choosing? A requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law. **Wis. Stat. § 19.35(1)(j).**

G. Redaction/Separability:

1. General Rule: If record contains information that comingles accessible information with that to be withheld custodian must separate and/or delete inaccessible information. **Wis. Stat. § 19.36(6). See, e.g., *State ex rel Dalton v. Mundy*, 80 Wis. 2d 190, 257 N.W.2d 877 (1977)** (researcher granted right to abortion records with custodian obscuring the patient names); ***Maynard v. City of Madison*, 101 Wis. 2d 273, 304 N.W.2d 163 (1981)** (care must be taken to assure information redacted cannot still be deduced by what remains).

2. Must Redact Even if Burdensome: No relief from mandatory duty to redact. ***Osborn v. Board of Regents*, 2002 WI 83, ¶¶ 43, 45, 254 Wis. 2d 266, 647 N.W.2d 158** (rejecting University's argument that public records law does not require it to expend numerous hours and dollars redacting thousands of student application records to comply

with Osborn's request; "We agree with Osborn and conclude that the University must comply with the statutory duty to delete or redact information not subject to disclosure.").

3. Care must be taken to assure information redacted cannot still be deduced by what remains. ***Maynard v. City of Madison*, 101 Wis.2d 273, 304 N.W.2d 163 (1981) (**disclosure of confidential informant).

4. Procedures must be in place to allow separability and still maintain integrity of original.

V. PROCEDURE TO ASSURE ACCESS

A. Notice of Right to Access

1. Each authority must adopt, display and disseminate a notice which provides: (a) a description of the organization; (b) where; (c) how; (d) when custodians may be asked for access; and (e) how much for will be charged copies. **Wis. Stat. § 19.34(1).**

a. Exceptions: members of legislature or local government body members.

B. Time for Access

1. If there are regular hours at the location where records exist, custodian must provide access during office hours. **Wis. Stat. § 19.34(2)(a).**

2. If no regular hours, authority must provide access (a) on 48 hours advance notice; or (b) in a set period of at least 2 consecutive hours weekly. **Wis. Stat. § 19.34(2)(b).**

C. Balancing Test

1. When a statutory or common-law exception does not apply, "the balancing test must be applied in every case in order to determine whether a particular record should be released." ***Woznicki v. Erickson*, 202 Wis.2d 178, 183, 549 N.W.2d 699 (1996)**. The balancing test inquires "whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." ***Id.* at 183-84**.

D. Notice to Employees and Officials

1. Except as authorized by Wis. Stats. § 19.356(1) no records subject is entitled to notice or judicial review of a decision to disclose records.

2. Where requests are made for disclosure of records of "employees" or "elected officials," balancing may allow for the disclosure of the following per **Wis. Stats. § 19.356(2).**

a. Records of an employee relating to an investigation into disciplinary rule violations or civil/criminal violations;

b. Records obtained through subpoena or warrant;

c. Records from a previous employer that reference the subject employee unless the employees give permission.

3. Where disclosure is not barred and balancing allows disclosure, the employee or official must be given notice personally or by certified mail within three days. **Wis. Stat. § 19.356(2).**

a. After notice the subject has five days to notify the employer they intend to object. **Wis. Stat. § 19.356(3);**

b. The subject has ten days to go to court to file an objection. **Wis. Stat. § 19.356(4**);

c. The employers must wait twelve days before they allow access to the requester if there is no objection; or if objection, until the case is resolved and appeal time has run. **Wis. Stat. § 19.356(5).**

4. When the record subject is an officer or employee holding a local public office, the authority has three days after it decides to permit access to provide notice to him or her personally or by certified mail. **Wis. Stats. § 19.356(9)(a).**

a. Within five days the subject may augment records to be released with additional comments and documentation which must be released with the requested records. **Wis. Stat. § 19.356(9)(b);**

b. Is the right to augment in the alternative to judicial review?

5. Recommendations for a notice per ***Woznicki:***

a. A request has been received;

b. After balancing, records are to be released which you may consider private;

c. These records are described as _____ and you may review them;

d. You may seek review by a court to stop release;

e. You must notify the custodian of your objection in five days and file your suit within ten days.

6. "When the disclosure of requested records implicates the privacy interests of individuals, those individuals have the right to judicial review of the decision to release," ***Kraemer Brothers v. Dane County*, 229 Wis. 2d 86, 94, 559 N.W.2d 75 (App. 1999).**

a. While public employees have a lower expectation of privacy because of their choice of public employment, the same is not true of private contractors who provide services to municipalities, ***Kraemer Bros., supra.***

7. School district's decision to release critical letters was appropriate under the public records law; plaintiff's decision not to challenge release under ***Woznicki*** because her reputation would be damaged by filing suit was not actionable, ***Ulichny v. Merton School Dist.*, 93 F. Supp. 2d 1011 (E.D. Wis. 2000) affd. (7th Cir. 2001).**

8. Diminished reputation is insufficient to overcome balance in favor of disclosure, ***Jensen v. School District of Rhinelander*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638.**

9. Privacy interests and employee safety may justify nondisclosure, ***Local 2489 v. Rock Co.*, 2004 WI App 210, 277 Wis.2d 208, 689 N.W.2d 644**.

E. **Judicial Review**: The custodian's balancing of interests for and against disclosure is a question of law for which a court can substitute its judgment. ***Milwaukee Teacher's Association v. Bd. of School Dir.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).**

1. The court reviews under the common law balancing test. **Wis. Stat. § 19.356(6).**

2. The court will issue a decision within ten days after filing and proof of service. **Wis. Stat. § 19.356(7).**

3. Tppeals must be initiated within twenty days from which judgment

or order appealed. **Wis. Stat. § 808.04(1a). *Zellner v. Herrick*, 2009 WI 80, 319 Wis. 2d 532; 770 N.W. 2d 305.**

4. Claim preclusion bars a requester from challenging the subsequent disclosure of records found appropriately disclosed in earlier appeals, ***Levin v. Bd. of Regents*, 2003 WI App 181; 266 Wis. 2d 481, 688 N.W.2d 779.**

F. Denials: must be specific, setting forth reasons. Wis. Stat. § 19.35(4)(b).

1. Conclusory statement that record is "confidential" is insufficient, ***Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967). but see *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, 249 Wis. 2d 242, 638 N.W.2d 625 rev. denied,** (stating conclusion after balancing sufficient).

2. Denial may be oral unless demand for written reasons is submitted within 5 days. Wis. Stat. § 19.35(4)(b).

3. Written denial must explain that decision may be reviewed by mandamus or petition to attorney general or district attorney. Wis. Stat. § 19.35(4)(b).

G. Response may provide practical limits.

1. Requester may be barred from leaving with original.

2. Reasonable limits are allowed to protect records easily destroyed or irreplaceable. **Wis. Stat. § 19.35(1)(k).**

3. Clerk may decline requester's demand to use his or her own equipment (here the requester's own photocopier) in concern to protect originals. ***Grebner v. Schiebel*, 2001 WI App 17, 240 Wis. 2d 551, 624 N.W.2d 892.**

4. Original and copies distinguished: a "copy" of an electronically stored document should be labeled as such.

VI. FEES FOR COMPLIANCE WITH REQUESTS AND FOR EXPANSIVE OR COMPLEX DIGITAL/ELECTRONIC INFORMATION

A. General Rule: Fees may not exceed "the actual, necessary and direct cost" unless a fee is otherwise set by law; including cost of labor. **Wis. Stat. § 19.35(3)(a)**.

1. Charges for excessive fees disallowed and may result in penalties

and punitive damages. **See. Wis. Stat. §§ 19.37(3)-(4)**.

2. Issues controlled by Wis. Stat. § 19.35(3) and ***Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367**.

B. Legislative Allowance for Seeking Reimbursement for Costs

1. Costs of "reproduction and transcription of the record." **Wis. Stat. § 19.35(3)(a)**.

a. **"Reproduction":** The act of reproducing or the condition or process of being reproduced. "Reproduce," in turn is defined as "to produce a counterpart, an image, or a copy of." ***Milwaukee Journal Sentinel*, 2012 WI 65 ¶ 31** (Inherent in this definition is the notion that the document or record is not altered, but simply copied. We read "reproduction" in Wis. Stat. § 19.35(3)(a) to refer to rote, ministerial tasks that do not change the content of the record. Examples of "reproduction" under the Law might occur when a custodian prints out a copy of a record that is stored electronically, or makes a photocopy of a record that is stored in hard copy.) ***See also State v. Multaler*, 2002 WI 35, ¶ 62, 252 Wis.2d 54, 643 N.W.2d 437** (suggesting that "a reproduction is 'a copy of something printed, scanned, photographed, or produced by other means.'"); ***State v. Stevenson*, 2000 WI 71, ¶ 38, 236 Wis.2d 86, 613 N.W.2d 90** ("To reproduce is to recreate or subsequently produce. By definition, a reproduction is not contemporaneous to the event.");

b. **"Transcription":** The act or process of transcribing or something that has been transcribed;

c. **Attorney General's Opinion:** In response to a query about charging fees for "computer runs" from the Department of Health and Social Services' computer database, which "can frequently be quite expensive," Attorney General opined: "In my opinion, the reproduction and transcription of a record includes the assembly and reduction of the record to written form on paper. Therefore, you may impose the cost of the computer run on the requester as a copying fee." **72 Op. Att'y Gen. 68, 70 (1983) (OAG 19-83)**. ***See also* 72 Op. Att'y Gen. 150, 151 (1983) (OAG 40-83)** (Questioned whether "actual, necessary and direct costs" includes costs of the copying equipment *as well as* the cost of labor

expenses incurred in making the request: "It is my opinion that labor expenses that are actually, necessarily and directly incurred in connection with reproduction of public records may be incorporated in the fee charged for reproduction of the documents. Typically this will mean that a copy fee may include a charge for the time it takes for the secretary or clerk to reproduce the records on a copying machine.");

d. **Be Cautious of Charging Costs Above $ .25 per page:** Attorney General view costs above that amount as "suspect."

2. Photographing of a record where the form of the record does not permit copying. **Wis. Stat. § 19.35(3)(b)**.

3. To locate or search for record if this cost is more than $50.00. **Wis. Stat. §19.35(3)(c)**.

a. "**locate**" means "to find by searching, examining, or experimenting." ***Milwaukee Journal Sentinel,* 2012 WI 65, ¶ 29**. ("We agree with the League of Wisconsin Municipalities ... that "[a] custodian who knows that a record is located somewhere in a large file cabinet downstairs has not 'located' the record." However, we disagree with the League that '[a] record is not truly 'located' until it exists in a releasable form.' Once the custodian goes to the file cabinet (or the computer file), removes the responsive record, and holds that responsive record in his or her hands (or views it on a computer screen), the record has been located.");

b. **Is a Search for Emails or Other Data a Location Cost?** "It is reasonable to consider a search for emails within a computer system either as a 'location cost' or a 'computer run' under section 19.35(3)." ***See* Informal Attorney General Correspondence, February 4, 2010 to Mr. Jim Zellmer, Virtual Properties, Inc**. (discussing the divergence of views. "[T]he public records statute was enacted well before email and other electronic means of communications and record storage became common, so it is reasonable to consider a search for emails within a computer system either as a 'location' cost, or as 'computer run' under section 19.35(3). But the District's [cost] estimate is not for the computer search, which is already complete, but for what is left to be done in preparing the response to [the requester]." The Assistant Attorney General went on to express some skepticism of using the "location" concept for formally

justify the charges but "I cannot say that the charge itself is unreasonable in light of the totality of circumstances" at issue); **72 Op. Atty. Gen. 68, 71 (1983)** (**OAG 10-83**) (copying fees of a computer run were chargeable but not location fees "since you do not have to locate the record.").

4. Mailing or shipping. **Wis. Stat. § 19.35(3)(d)**.

5. Copying fees of a computer run but not location fees. **72 Op. Atty. Gen. 68, 71 (1983) (OAG 19-83)**.

C. Computer Programming and <u>Any Other Related Expense</u>:

1. May charge for computer programming expenses. ***WIREdata*, 2008 WI 69, ¶ 107. See also, *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 50 n. 28** (the present case does not call for us to examine ***WireData***'s statement that an authority may charge a fee for 'computer programming expenses or any other related expenses ... We note, however, that certain computer programming expenses may fall within 'locating' or 'reproduction' which are allowable categories of fees.").

2. May not profit when filling the request. ***Id*. ¶ 103**.

3. **May Recover Actual Costs of Complying with Request?** An authority may not be required, by itself, to bear the cost of producing documents. ***Id*. ¶ 104** (real estate assessment data from three municipalities). "[A]an authority may charge a requester for the authority's actual costs in complying with the request, such as any computer programming expenses or any other related expenses… [a]n authority may recoup all of its actual costs" **Id. ¶ 107**.

D. Redaction Costs

1. **Unresolved Tension Between Redacting and "Creating" a Record**: "[M]ay simply reflect the difficulty, in extreme cases, of distinguishing between redacting discrete items of confidential information from a larger document, and the practical necessity of actually creating or compiling a new record from a mass of collected data. The more the manipulation of the non-confidential information resembles the creation of a new record, the more likely it is that a court will approve charging the 'actual, necessary and direct cost of complying with' a public records request." **DOJ's Compliance Outline (2012) p. 51**. ***See also Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 50 n. 28** ("the present case also does not

call for us to address the attorney general's contention that, 'in extreme cases,' it may become difficult to 'distinguish[] between redacting discreet items of confidential information from a larger document and the practical necessity of actually creating or compiling a new record from a mass of collected data.'"); **Informal Attorney General Correspondence, February 4, 2010 to Mr. Jim Zellmer, Virtual Properties, Inc** ("The divergence in views may be partially explained by the fact that in extreme cases, distinguishing between redaction of confidential information from an existing record, on the one hand, and creation of an entirely new (non-confidential) record, on the other, may be conceptually impossible. Authorities are not required to create new records in response to a request. …In addition, as the sheer amount of necessary redaction increases, the argument for passing on that cost to requesters may become more reasonable. Redacting 5,000 e-mails could be a major undertaking.").

2. **Redaction Costs Rejected by Attorney General:** costs of separating, or "redacting," the confidential parts of records from the public parts generally must be borne by the authority. "[T]here is no provision under Wis. Stat. § 19.36(6) [obligation to redact/delete] or elsewhere for charging such separation costs…". **72 Op. Att'y Gen. 99, 101-102 (1983) (OAG 28-83)**. **See 72 Op. Att'y Gen. 150, 151 (1983) (OAG 40-83)** ("It is my opinion that labor expenses that are actually, necessarily and directly incurred in connection with reproduction of public records may be incorporated in the fee charged for reproduction of the documents. Typically this will mean that a copy fee may include a charge for the time it takes for the secretary or clerk to reproduce the records on a copying machine.").

3. **Cannot Charge for Costs Associated with Redaction or Deletion:** The Open Records Law does not allow municipalities to charge for the costs, including staff time, of redacting or deleting information. ***Milwaukee Journal Sentinel,* 2012 WI 65 ¶¶ 6, 22, 26-27**. Such costs do not fall within the statutory provisions governing "locating" or "reproduction." Nor does prior case law allow for recovery of such costs. ***Id.* ¶¶ 44-54**.

4. **Other alternatives?:** While the Supreme Court in the ***Milwaukee Journal Sentinel*** case found that municipalities could not impose fees for redaction costs, the Court found that the legislature has protected municipalities in other ways. First, municipalities may charge fees for the specific tasks set forth in Wis. Stat. § 19.35. Also, an authority may reject "a request for a record without a reasonable limitation as to subject matter or length of time."

Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 56 (citing Wis. Stat. § 19.35 (1)(h))**. "Moreover, the law affords authorities 'reasonable latitude in the timeframe for their response.'" ***Id. (**citing Wiredata, 310 Wis.2d 397, ¶ 56**).

E. Prepayment

1. An authority may require prepayment if fee is estimated to exceed $5.00. **Wis. Stat. § 19.35(3)(f).**

2. An authority may refuse to make copies until payment is received. ***State ex rel Hill v. Zimmerman***, **196 Wis. 2d 419, 429-430, 538 N.W.2d 608 (App. 1995)**.

F. Fee Waivers or Reductions: An authority may waive or reduce fees if it determines it to be in the public interest to do so. **Wis. Stat. § 19.35(3)(e)**

VII. EMAILS

A. Personal Email: Decision in *Schill v. Wis. Rapids Sch. Dist.*

1. Split decision leaving unanswered questions. No application to work-related or non-personal email communications that pertain to government business. If the contents of the personal e-mails are records under the Public Records Law, then the courts must undertake a balancing test to decide whether the statutory presumption favoring disclosure of public records is outweighed by any other public interest. ***Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 20, 327 Wis. 2d 572, 786 N.W.2d 177**.

2. Background: Citizen requested all e-mails of five teachers of the Wisconsin Rapids School District. The requester indicated that the purpose of the request was to determine whether the teachers were abusing the school district's policy that allowed incidental personal use of its e-mail system. However, there were no allegations of improper use or violation of the school district's internet policy. ***Id.* ¶ 13.**

3. Majority's ruling:

a. When a record custodian decides that the content of an e-mail is purely personal, has no connection to the government's functions, and evinces no violation of law or policy, the documents are not subject to disclosure under the public records law. ***Id.* ¶ 10, n.4**;

b. If the content of personal e-mail is used as evidence in a disciplinary matter or to investigate misuse of government resources, the personal e-mail is a "record" under **Wis. Stat. § 19.32(2)** and may be subject to disclosure under the public records law. ***Id.* ¶¶ 23, 141**;

c. "As a result of today's decision, in addition to the other decisions the record custodian makes, he or she will have to determine whether the content of an e-mail is solely personal or has a connection to a governmental function. We recognize that it may not always be easy for the record custodian to separate the content of personal e-mails from the content of e-mails relating to school business." ***Id.* ¶ 136**. If the content of the e-mail is "personal in part and has some connection with the government function in part, then the custodian may need to redact the personal content and release the portion connected to the government function." ***Id.* ¶ 137**;

d. The lead opinion reasoned that its decision was in line with decisions of other states, the text of the definition of "record," the text's and statute's legislative history, case law, and the Attorney General's interpretations of the law. ***Id.* ¶¶ 8, 21-22, 49, 56-57, 63, 79, 85-86, 102-104, 110, 115-116, 127, 130**;

e. There was no evidence in the record that the teacher's personal e-mail had any connection to a government function. ***Id.* ¶¶ 16-18;**

f. No balancing test is required since the documents are not "records." ***Id.* ¶ 24;**

g. "[T]there is a distinction between allowing public oversight of employees' use of public resources and invoking the Public Records Law to invade the private affairs of public employees by categorically revealing the contents of employees' personal e-mails." ***Id.* ¶ 81**. "Disclosure of the contents of the Teachers' personal e-mails is not 'consistent with the conduct of government business.'" ***Id.* ¶ 82**.

4. Justices Bradley and Gableman's Concurring Opinions:

a. The e-mails were "records" as defined by the public records law;

b. However, when the content of the e-mails is purely personal and evinces no violation of the law or policy, the public's interest in nondisclosure always outweighs the public's interest in disclosure;

c. Justice Bradley wrote that the purely personal e-mails are not subject to a balancing test and not subject to disclosure. ***Id.* ¶ 172**. Disclosure of personal e-mail "does not keep the electorate informed about the 'official acts' and 'the affairs of government' when the contents of the e-mails evince no violation of law or policy. Disclosure of the contents of such e-mails would not further the public policy declaration found." ***Id.* ¶ 167;**

d. Justice Gableman stated: "The purpose of the open records law is to open a window into the affairs of government, not to open a window into the private lives of government employees. Therefore, where e-mails, either individually or cumulatively, are of a purely personal nature and reflect no violation of law or policy, the public has no interest in such e-mails, and the public interest in nondisclosure will always outweigh the public interest in disclosure. Thus, the public has no interest in such things as a teacher's e-mail reflecting after-work plans, setting up a doctor's appointment, or securing baby-sitting for her children. If the e-mails reflected such activities as a teacher's romantic involvement with a student, campaigning for a politician using government resources, or abuse of the e-mail system in violation of the district policy, the public interest would undoubtedly be strong. Such a determination can only be made by reviewing each e-mail." ***Id.* ¶ 182**.

B. Personal Email: *Schill*'s Lessons and Limitations

1. E-mail sent or received on an authority's computer system is a record. ***Schill*, 2010 WI 86, ¶ 56**.

2. Purely personal, non-work related e-mails are not "records" where the content has no connection to a "government function." Contours of "government function" were not defined because parties agreed in that case that the emails were purely personal. ***Id.* ¶ 16**.

3. A records custodian should not release the content of an email that is purely personal and evinces no violation of law or policy.

4. Did not address the right of the government employer to monitor,

review, or have access to the personal e-mails of public employees using the government e-mail system. ***Id.*, ¶ 14**.

5. Attorney General J.B. Van Hollen released an open memorandum to Interested Parties on the practical impact to public records custodians and public records requesters of the recent Wisconsin Supreme Court case:
http://www.doj.state.wi.us/news/files/Memo_InterestedParties-Schill.pdf

See also DOJ's Compliance Outline (2012) p. 3 ("E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record.").

6. Records custodians must review each email correspondence in response to an open records request to evaluate whether that email constitutes a record subject to disclosure and then whether the record should be disclosed in part or in full.

7. E-mail senders' identifying information may not be protected. ***The John K. MacIver Institute for Public Policy, Inc. v. Jon Erpenbach*, 2014 WI App 49, 354 Wis.2d 61, 848 N.W.2d 862 (Wis. Ct. App.)**(State Senator ordered to release requested records without redaction of identifying information such as the name and e-mail address of the sender because the information was not "purely personal" and because the mere possibility of negative repercussions was not enough to tip the balance in favor of nondisclosure.).

C. Spam and Junk Email

1. **Not a Record?** Copies of documents received for purely informational purposes, not specifically affecting the affairs of the receiving municipality are generally not "records." **72 Op. Att'y Gen. 99, 100-101 (1983) (OAG 28-83)** (copies of documents from other agencies purely for informational purposes and which have no relation to the function of subject office are not public records and therefore do not have to be preserved or kept.).

2. **Are they "Kept"?** Records mean any material "which has been created or is being kept by an authority." **Wis. Stat. § 19.32(2)**.

3. **Filter or Avoid Keeping:** Work with technology department or consultants to filter or take other steps to reject spam, junk and other unwanted e-mail.

VIII. PRIVATE AND PUBLIC WEBSITES

A. Private Websites

1. **Public Information on Private Website Likely a "Record":** Information regarding government business kept or received by an elected official on her website more likely than not constituted a record. **OAG 06—09 (Dec. 23, 2009) p. 2-3** (Town Chairman's website, "Making Salem Better," granted access to about 140 Town members and at least partly addressed community business; she was an "authority"; the website met the definition of a "record" because she "created or kept" the website and its contents; she was using the website not for "purely personal content" but instead "actively presents and receives written communication on matters of public interest that relate to the chair's officials duties (library board representation, a high school addition project, and a round-about intersection)…..").

2. **Distinction between personal/official capacity irrelevant.** "[T]he Wisconsin public records law does not draw a distinction between the personal and public capacity of elected officials at the time of the record's creation, but rather looks to the content of the information in question." **OAG 06—09 (Dec. 23, 2009) p. 2**.

3. **Accessing Records Only, not Active Participation.** "The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself." **OAG I—06—09 (Dec. 23, 2009) p. 3-4**.

B. Public Websites

1. **Posting records on public website may be insufficient:** "[A]gencies may not use online record posting as a substitute for their public records responsibilities; and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in Wis. Stat. § 19.32(2) or 19.35(l)(g). …. Nonetheless, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters." **DOJ's Public Records Law Compliance Outline (August 2012) p. 48**.

IX. LIMITATIONS ON ACCESS

A. Balancing

1. When presented with a request, a custodian must first determine if there exists a statutory exception or a recognized legal limitation to access.

2. Where a potential limitation may exist, the custodian is to "weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy ... in allowing inspection", ***Newspapers, Inc. v. Breier,*** **89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).**

a. Where harm outweighs benefits from access he or she must refuse the request and state specifically the reasons for this refusal, ***State ex rel. Youmans v. Owens,*** **28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965);**

b. The denial of public access is allowed "only in the exceptional case", ***Oshkosh Northwestern v. Oshkosh Library Board,*** **125 Wis. 2d 480, 482, 373 N.W.2d 459 (App. 1985);**

c. If in balancing, the interests are about even, there should be disclosure. **73 O.A.G. 26 (1984);**

d. Although not dispositive, the exemptions under the Open Meetings Law under § 19.85(1) are indicative of public policy and may be considered in the balancing. **Wis. Stat. § 19.35(1)(a);**

B. Personal Information

1. Authorities may have obligations as to "personally identifiable information". **Wis. Stat. § 19.62-19.80.**

2. Any person has the right to inspect and copy records pertaining to the individual and containing personally identifiable information. Wis. Stat. § 19.35(1)(am) except: (1) records regarding an enforcement action, arbitration or court action; (2) records that might endanger persons, informants or the security and rehabilitation functions of prisons, § 19.35(1)(am) and (4)(c). or (3) records that are part of a "record series" [defined in § 19.62(7)] that is not indexed or automated or arranged to retrieve by name;

a. These exceptions are not subject to the balancing test and should not be narrowly construed, ***Hempel v. Baraboo*, 2005 WI 120, 284 Wis.2d 162, 699 N.W.2d 551;**

b. These exceptions bar inmates access to personal records which contain information which would endanger security. ***State ex rel. Greer v. Stahowiak*, 2005 WI App 219, 287 Wis.2d 795, 706 N.W.2d 161.**

3. "Personally identifiable information" means information that can be associated with a particular individual through one or more identifiers or other information or circumstances. **Wis. Stat. § 19.62(5).**

a. The objective of this law is to allow an individual to determine if information kept is accurate but was not intended to give an individual access to records of an internal investigation that may identify informants, ***Hempel v. Baraboo*, 2005 WI 120, 284 Wis.2d 162, 699 N.W.2d 551**.

4. Drivers Privacy Protection Act (DPPA), 18 U.S.C. §2721-25.

a. Forbids the disclosure of "personal information" about any individual obtained by the state's Department of Motor Vehicles in connection with a motor vehicle record;

i. The disclosure of information to create commercial mailing lists is barred;

ii. The disclosure of information by law enforcement to individuals for personal use is forbidden;

b. Exceptions - personal information collected under this section may be used:

i. By any government agency including any court or law enforcement agency in carrying out its functions;

ii. In connection with motor vehicle or drivers safety and theft, emissions, product recall or advisories;

iii. In providing notice of towed or impounded vehicles;

iv. In research and by any insurer in connection with claims investigation and underwriting;

v. By an employer to verify info for a commercial driver's license;

vi. By an information manager (WEST) and sold to permissible users. ***Graczyk v. Wests*, 660 F. 3d 275 (7th Cir. 2011)**;

vii. For any other use specifically authorized under law if such use is related to the operation of a motor vehicle or public safety [the DPPA will not bar a request to a school district for the names and license numbers of its bus drivers, ***Atlas Transit v. Korte*, 2001 WI App 286, 249 Wis.2d 242, 638 N.W.2d 625, rev denied.];**

c. "Personal information":

i. Includes the motorists name and address, photographs, social security number, driver identification number, telephone number and medical or disability information;

ii. Does not include five digit zip code, information on vehicle accidents, driving violations and driver's status.

5. State Identification Cards: limits to disclosure. **Wis. Stats. § 343.50(8).**

6. Information collected by the state is a public record. Under 1999 Wis. Act 88 (effective date 11-1-2000) the Wis. DOT, DNR and DRL are prohibited, with certain exceptions from providing information compiled that contains personal identifiers of ten or more people. (**See for example Wis. Stat. § 23.45 and §343.235**).

a. Information containing personal identifiers of ten or more persons is still allowed to: municipal clerks, the department of revenue, police (when used to perform legally authorized functions) or insurers (when used to issue policies, underwrite or pay claims);

i. Persons receiving this information are also required to keep this confidential;

b. "Personal identifiers" include a person's name, address and

zip code.

7. A list of names and addresses (including e-mail addresses) compiled by a legislator and used for official purposes is subject to disclosure. **O.A.G. 2-03 (2003)**. Where a legislator custodian decides that a given list has to be released under the open records statute, "the person whose names, addresses or telephone numbers are contained on the list are not entitled to notice and the opportunity to challenge the decision prior to release of the record."

C. Personnel Information

1. Public employers must <u>not</u> disclose per Wis. Stats. § 19.36(10) the following:

a. Home address, e-mail, phone number or social security number, unless employee so authorizes;

i. Except that address of elected officials may be disclosed per Wis. Stat. § 19.36(11);

b. Information relating to a current investigation of employee disciplinary rule violations or potential criminal or civil violations;

i. Except that records of disciplinary investigations which have been concluded or records obtained by subpoena or warrant may be subject to disclosure after ***Woznicki*** notice;

ii. An investigation is completed and records, after balancing, subject to disclosure even though grievance may still be pending, ***Local 2489 v. Rock County,*** **2004 WI App 210, 277 Wis.2d 208, 689 N.W.2d 644;**

c. Employee examination information except for the score (unless prohibited by law);

d. Performance evaluations, records used for staff planning, records used for future salary adjustments, wages bonus plans, promotions, assignments, letters of reference and employee ratings. ***Lakeland Times and Gregg Walker v. Lakeland Union High School,*** **No. 2014AP95, 2014 WL 4548127 (Wis. Ct. App. Sept. 16, 2014)** (information was exempt from disclosure under Wis. Stat. § 19.36(10)(d),

which bars an authority from disclosing employee records used for "staff management planning" when the records contain information relating to one or more specific employee and when the record is used by an authority or by the employer of the employee for staff management planning);

i. This exception to disclosure protects performance evaluations and routine disciplinary information but not investigation and misconduct records, ***Kroeplin v. Wis. DNR*, 2006 WI App 227, 297 Wis.2d 254, 725 N.W.2d 286, rev. denied.**

2. Various state and federal laws require employers to retain records regarding wages, equal opportunity, affirmative action, illnesses, accidents, tests, exams, sex, age demotions, transfers, pension, immigration, family data, lay off, termination pension, **Guide to Record Retention Requirements (2007).**

3. Employment personnel records may be partially exempt from disclosure under Wis. Stat. § 19.85(1)(c) and (f).

a. An employee may inspect personnel documents used to determine qualifications for employment, promotion, transfer, compensation, termination or discipline. **Wis. Stats. § 103.13(2);**

b. Employee may augment or correct information in personnel file. **Wis. Stats. § 103.13(4).**

4. Employer must use balancing test in weighing request for personnel information considering type of information and status of employee, ***Wisconsin Newspress, Inc. v. Dist. of Sheboygan Falls*, 199 Wis. 2d 769, 546 N.W.2d 143 (1996).**

a. Disciplinary records of administrator may be accessible, ***Wisconsin Newspress, supra; Kroeplin v. Wis. DNR, supra.***;

b. Employees diminished reputation is insufficient to overcome balance in favor of disclosure, ***Jensen v. School District of Rhinelander*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638;**

c. Instituting a sexual harassment policy which in part assures confidentiality to the accuser may protect against the disclosure of such investigation materials, per ***Hempel v. City***

***of Baraboo,* 2005 WI 120, 284 Wis.2d 162, 699 N.W.2d 551**;

d. Public policy for ensuring the safety and welfare of public employee may overcome the presumption of access. **See *State of Wisconsin ex rel. Korry L. Ardell v. Milwaukee Board of School Directors and Lynne A. Sobczack*, 2014 WI App 66, 354 Wis.2d 471, 849 N.W.2d 894 (Ct. App. 2014)** (review denied 2014 WI 122) (the requester, who had physically harmed the public employee in the past, sought records of employee's sick days; notes or disciplinary actions and investigations conducted against employee. The MBSD had documented and well-founded safety concerns for its employee. In 2008 a circuit court judge had issued a domestic abuse injunction against the requester. In 2009, he pled guilty to two counts of violating that injunction and served nine months in the House of Correction. The court determined that it was "plain from Ardell's history with the MBSD employee that his purpose in requesting the employment records was not a legitimate one; rather, his intent was to continue to harass and intimidate the MBSD employee. In committing acts of violence against the MBSD employee and ignoring the domestic abuse injunction, he forfeited his right to the documents he requests." The court qualified its decision by noting that these particular facts were "exceptional.").

5. A municipal employer cannot agree through collective bargaining to change its obligations to disclose employee info under the public records law, ***Milwaukee Journal Sentinel v. Wisconsin Department of Administration* 2009 WI 79, 319 Wis. 2d 439, 768 N.W. 2d 700.**

6. Law enforcement personnel records may be partially exempt from access if:

a. Disclosure would inhibit ability to testify;

b. Police are to be protected from harm and threats;

c. It would chill effective law enforcement;

d. Evaluations might be less candid;

***Law Offices of Pangman v. Zellmer*, 163 Wis. 2d 1070, 473 N.W.2d 538 (App. 1991).** ***Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (App. 1991).** ***Law Offices of Pangman v. Stigler*, 161 Wis. 2d 828, 468 N.W.2d 784**

(App. 1991).

e. law enforcement personnel files may not be exempt when the issues are:

i. Police officers charged with misconduct, ***Youmans, supra* 28 Wis. 2d 672**;

ii. Correctional officers suspected of misconduct, ***Ledford v. Turcotte,* 195 Wis. 2d 244, 536 N.W.2d 244 (App. 1995) rev. denied.**

7. Applicants for public employment may receive anonymity on written request. **Wis. Stat. § 19.36(7).**

a. However municipality must provide access to any record revealing "final candidate" for any "local public office".

8. Request for names, addresses and phone numbers of prison staff properly denied, **State ex rel Morke v. Record Custodian, 159 Wis. 2d 722, 465 N.W.2d 235 (App. 1990).**

D. Social Security numbers collected after 10/01/90 may not be disclosed**. 42 U.S.C. § 405(c)(2)(C)(VII).**

1. The disclosure of Social Security numbers with proof of injury or damage may create a claim for damages, ***Doe v. Chao,* 540 U.S. 614 (2004).**

2. Disclosure of patients' and employees' social security numbers through records of the Veterans Administration may be a violation of the **Privacy Act of 1974, 5 U.S.C. § 552(1), *Schmidt v. U.S. Dept. of V.A.*, 218 F.R.D. 619, (ED Wis. 2003) [see also, 222 F.R.D. 592 (ED Wis. 2004)].**

E. Litigation and Negotiation

1. Competitive or bargaining reasons may bar disclosure until deal is done. **Wis. Stat. § 19.85(1)(e), 81 O.A.G. 139 (1994).**

2. Settlement agreements are accessible, ***Jessup v. Luther,* 227 F.3d 926, (7th Cir. 2002). *Journal Sentinel v. Shorewood School Bd.,* 186 Wis. 2d 443, 521 N.W.2d 165 (App. 1994) rev. denied**.

3. Conferring with counsel regarding strategy for litigation exempt. **Wis. Stat. § 19.85(1)(g).**

4. Attorney-client privilege protects confidential legal communications. **Wis. Stat. § 905.03.**

a. Zoning Board's consultation with the Town's attorney protected from disclosure under attorney/client privilege, ***GPS, Inc. v. Town of St. Germain*, 2004 WI 81, 273 Wis. 2d 103, 681 N.W.2d 533**;

b. Attorney's report from investigation into potential suit is work-product and not disclosed, ***Seifert v. Sheboygan Falls Sch. Dist.*, 2007 WI App 207, 305 Wis.2d 582, 740 N.W. 2d 177;**

c. Attorney's bills, without further justification (privilege, work product) may be disclosed, ***Juneau County Star-Times v. Juneau County*, 2013 WI 4, ___ Wis. 2d ___, ___ N.W.2d ___.**

5. Documents prepared in anticipation of litigation may be protected. **Wis. Stat. § 804.01(2)(c)(1).** ***Lane v. Sharp Packaging*, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788** [may include attorney billing records];

a. But closed session discussions may be open to disclosure to a civil litigant. ***Sands v. Whitnall Sch. Dist.*, 2008 WI 89, 312 Wis.2d 1, 754 N.W.2d 439**.

6. No exemption from obligation to respond to request merely because records are available in civil discovery during litigation, ***State ex rel Lank v. Rzentkowski*, 141 Wis. 2d 846, 416 N.W.2d 635 (App. 1987) rev. denied.**

7. A party to a civil proceeding is not entitled to the medical records of a witness, ***Winnebago County DSS v. Harold W.*, 215 Wis. 2d 521, 573 N.W.2d 207 (App. 1997).**

8. The unfiled pretrial discovery materials generated in a civil action between private parties are not public records, ***State ex rel Mitsubishi v. Circuit Court*, 2000 WI 16, 233 Wis. 2d 1, 605 N.W.2d 868.**

a. Is a transcript of a closed arbitration a public record? ***Zellner v. Herrick*, 2009 WI 80, 319 Wis. 2d 532, 770 N.W. 2d 305.**

9. Disclosure of information on pending claims can hinder the

municipality if litigation should result. ***George v. Records Custodian*, 169 Wis.2d 573, 581, 485 N.W.2d 460 (App. 1992).**

F. Law Enforcement

1. Some law enforcement records are not to be disclosed when required by federal law. **Wis. Stat. §§ 19.36(2), 905.09** (i.e. "criminal history").

a. The existence or non-existence of a criminal history record may not be disclosed except to agencies eligible to receive such information. **28 CFR 20.20(c)(2).**

2. Juvenile law enforcement records exempt. **Wis. Stat. § 938.396;**

a. Information regarding weapons, drugs or sex offenses may be disclosed to school officials for limited purposes. **Wis. Stats. § 118.127.**

3. Records exempt when part of an **active, ongoing investigation**. **Wis. Stats. § 19.35(1)(am)(1).**

a. However, a law enforcement agency cannot deny request merely because it has forwarded document to District Attorney, ***Portage Daily Register v. Columbia Co. Sheriff*, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W. 2d 525;**

b. Documents regarding issuance of search warrant before executed, confidential. **Wis. Stat. § 968.21;**

c. Information gained through electronic surveillance exempt until prosecution. **Wis. Stat. § 968.29;**

d. Documents integral to criminal investigation and prosecution may be withheld, ***Nichols v. Bennett*, 199 Wis. 2d 268, 544 N.W.2d 428 (1996)** (D.A.'s files);

e. Police reports may be withheld from the defendant prior to preliminary hearing. ***State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W. 2d 457;**

f. Under Wis. Stats, § 345.421 pretrial discovery, in traffic cases barred (except for the testing of blood alcohol devices);

g. Coroner's blood test protected. **Wis. Stat. § 346.71(2);**

h. Consider victims' rights in the balancing. **Wis. Stats. Chap. 950. Wis. Constitution Art I, § 9m.**

4. Informants

a. Information which identifies informant should be deleted or if cannot be deleted may not be disclosed. **Wis. Stat. § 19.36(8) and § 905.10(1);**

b. Those to whom information given under a clear pledge of confidentiality are protected. **60 O.A.G. 284 (1971). 63 O.A.G. 400 (1974);**

c. Access limited for information which would identify informant. **Wis. Stat. § 19.35(1)(em).**

5. Inmate medical information: Wis. Stat. § 302.388 requires the disclosure of inmate medical condition and history when inmates are transferred.

6. Firearms: law enforcement may not request or disclose records from the Department of Justice on those licensed to carry a concealed weapon except: 1) to confirm the person holds a valid license; 2) to investigate whether the license was obtained legally or 3) for purposes of prosecution where license is relevant. **Wis. Stat. § 175.60 (12)(12g).**

7. Records which are available for disclosure:

a. Traffic reports. **Wis. Stat. § 346.70(4) [exceptions: § 346.73];**

b. Mug shots. ***Borzych v. Paluszcyk*, 201 Wis.2d 523, 549 N.W.2d, 253 (App. 1996;**

c. Traffic citations. ***Coalition for Clean Govt. v. Larsen*, 166 Wis.2d 159, 479 N.W.2d 576 (App. 1991);**

d. Radio logs and department memos. **67 O.A.G. 12 (1/25/78);**

e. Jail records and logs. **Wis. Stat. § 59.27;**

f. Arrest records may be disclosed. ***Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979);**

g. Investigation records for which there is no enforcement

action may be disclosed. ***Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811;**

h. Requests for public records. ***Nichols v. Bennett, supra*;**

i. Reports regarding discharge of weapons and use of deadly force accessed (but not conclusions or recommendations regarding discipline). ***State ex rel Journal/Sentinel v. Arreola*, 207 Wis. 2d 496, 558 N.W.2d 670 (App. 1996). [but see *Kroeplin*, Sec. V (c)(1)].**

G. Children

1. Records regarding abused and neglected children exempt. **Wis. Stat. § 48.981.**

2. Peace officers records of children accused of wrongdoing as well as child victims and witnesses exempt. **Wis. Stat. § 938.396; 77 O.A.G. 42 (1988).**

a. <u>exceptions</u>:

i. News media who will not disclose identity; victim-witness coordinator; victim's insurer; school officials or social service agencies; the juvenile or parent; juveniles waived into adult court **(Wis. Stat. §§ 938.396, 938.183);**

ii. Court must do in-camera review before juvenile record disclosed**, In Re: *Termination PR to Caleb JF*, 2004 WI App 36, 269 Wis. 2d 709, 676 N.W.2d 545.**

3. Adoption. **Wis. Stat. § 48.93.**

4. Childcare agencies. **Wis. Stat. § 48.78 and § 938.78.**

H. Medical Records, access limited for:

1. Healthcare records. **Wis. Stat. §§ 146.81; 146.82; 146.83.**

2. Medical assistance recipients. **Wis. Stat. § 49.45(4).**

3. Vocational rehabilitation records. **Wis. Stat. § 47.02(2).**

4. Residential healthcare facilities**. Wis. Stat. § 50.09(1).**

5. Mental health records**. Wis. Stat. § 51.30(4). *Milwaukee Deputy Sheriffs v. City of Wauwatosa,* 2010 WI App 95, 327 Wis. 2d 206, 787 N.W. 2d 438. rev. denied.**

6. Emergency detention reports under Chap. 51**, *Watton v. Hegerty* 2008 WI 74, 311 Wis.2d 32, 751 N.W.2d 369.**

7. Protective placement information**. Wis. Stat. § 55.06(17).**

8. Sexually transmitted disease reports. **Wis. Stat. § 252.11(7).**

9. EMT and ambulance records. **Wis. Stat. §§ 146.82, 146.83 and 146.50(12).**

10. Drug and alcohol treatment records. **Wis. Stat. § 51.30(4)(c) and 21 U.S.C. § 1101, et seq.**

11. Disclosure of HIV test. **Wis. Stat. § 252.15(5).**

12. Wis. Stats. § 905.04 makes privileged records regarding physician-patient communications;

a. However, there may be no physician-patient privilege for information concerning assaultive or disruptive behavior by a patient and contained in medical records; ***Crawford v. Care Concepts, Inc.*, 2001 WI 45, 243 Wis. 2d 119, 625 N.W.2d 876.**

13. Privacy standards are created under HIPAA;

a. Privacy standards are created under HIPAA (42 U.S.C. 201) which mandate that: patients get a clear explanation how information is used; information can be used for health purposes only; and health plans must adopt written privacy procedures, train employees and designate a privacy offer.

14. Privacy rights of survivors may be considered in requests to disclose autopsy photos**, *Office of Independent Counsel v. Favish*, 541 U.S. 157 (2004)** [considering disclosure standards under the FOIA].

I. Library

1. Public libraries may not release the identity of individuals who borrow or use services, except: per court order or to other libraries for purposes of borrowing. **Wis. Stat. § 43.30(1).**

a. Surveillance recordings may be disclosed to law enforcement investigating criminal conduct at the library. **Wis. Stats. § 43.30(5);**

b. Children's use may be disclosed to custodial parents or guardians. **Wis. Stats. §43.30(lm).**

2. Published materials for sale or inspection at the public library are exempt. **Wis. Stat. § 19.32(2).**

3. The USA Patriot Act amended the Foreign Intelligence Surveillance Act (FISA) to allow the FBI to apply for a court order requiring the "production of any tangible things (including books, records, papers, documents and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment…";

a. It is illegal to disclose to any other person (other than those persons necessary to produce the tangible things sought in the warrant) that the Federal Bureau of Investigation has sought or obtained records or other items under the Foreign Intelligence Surveillance Act (FISA).

J. Financial

1. Trade secrets not public record. **Wis. Stat. § 19.36(5) [defined § 134.90(1)(c)].**

2. Materials to which access is limited by copyright, patent or bequest is not public record. **Wis. Stat. § 19.32(2).**

a. Information in databases created for property tax information even when beyond that kept in assessor's "property cards" was not protected as copyrighted, ***Assessment Technologies of Wisconsin v. WireData, Inc.*, 350 F.3d 640 (7th Cir. 2003);**

b. Public access may constitute "fair use" which is an exception to copyright protection, ***Zellner v. Cederburg School Dist.*, 2007 WI 53, 300 Wis.2d 290, 731 N.W.2d 240.**

3. Tax records protected: **Wis. Stat. §§ 71.11** [income]; 72.06 [estate]; 77.61 [sales and use]; 78.80 [fuel]; 139.36 [cigarettes]; 139.82 [tobacco].

4. Public records law not applicable to records that have been or will be published and offered for sale or distribution, **Wis. Stats. § 19.35(1)(g).**

K. Schools

1. Pupil records protected [grades, behavior, health, progress], **§ 118.125(2). *State ex rel Blum v. Bd/Dist of Johnson Creek*, 209 Wis. 2d 377, 565 N.W.2d 140 (App. 1997) rev. denied.**

2. List of school parents names may be disclosed to teachers organizations, ***Hathaway v. Joint School Dist.*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984).**

3. Student disclosures to school counselor regarding drug and alcohol use protected. **Wis. Stat. § 118.126.**

4. Disclosure of student information may be barred by federal law 20 **U.S.C. § 1232. (FERPA).**

a. However, test scores, rank, grade point, race and socio-economic summaries which do not identify students personally may be disclosed, ***Osborn v. Board of Regents*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158;**

b. Tests graded by peer students are not "maintained" per this section and disclosure is not barred, ***Owasso School District v. Falvo*, 534 U.S. 426 (2002).**

L. Environmental

1. Pollution monitoring reports. **Wis. Stat. § 147.08(2).**

2. Solid waste facility reports. **Wis. Stat. § 144.433(2).**

M. Assessor

1. Personal property tax returns. **Wis. Stat. § 70.35(3).**

2. Real estate transfer returns. **Wis. Stat. § 77.265.**

a. Exceptions: local assessors, chief elected official of municipality in legal proceedings.

3. Taxpayer income and expense information. **Wis. Stat. § 70.47(7)(af).**

N. Social Service

1. Recipients of welfare, AFDC, Wisconsin Works, social services, support Wis. Stat. § 49.83.

2. Incompetency findings. **Wis. Stat. § 880.33(6).**

3. Elder abuse and neglect. **Wis. Stat. § 46.90(6).**

O. Highway Accident Investigations

1. Materials compiled and collected under 23 U.S.C. § 152 for accident reports at certain intersections are privileged and not subject to disclosure, ***Pierce County v. Guillen,*** **537 U.S. 129 (2003).**

P. Prosecution Files

1. District attorney files may be exempt from access as favoring broad prosecutorial discretion in making charging decisions, ***State ex rel Richards v. Foust,*** **165 Wis. 2d 429, 477 N.W.2d 608 (1991) [before or after trial].**

2. However, documents normally subject to disclosure will not be exempt simply by placing them in the D.A.'s file**,** ***Nichols v. Bennett,*** **199 Wis. 2d 268, 544 N.W.2d 428 (1996).**

X. ENFORCEMENT AND PENALTIES

A. Mandamus

1. Action for mandamus may be brought after a written request and authority withholds or delays access. **Wis. Stat. § 19.35(1)(h). § 19.37(1).**

a. Individual may bring own action. **Wis. Stat. § 19.37(1)(a);**

b. Requester may ask district attorney or attorney general to pursue. **Wis. Stat. § 19.37(1)(b).** [In Milwaukee County, the Corporation Counsel enforces, **§ 59.42(2)(b)(4)].**

2. Incarcerated persons can bring no mandamus action:

a. Later than 90 days after request denied. **Wis. Stat. § 19.37(1m);**

b. Until after exhausted administrative remedies available in

D.O.C. rules, ***Moore v. Stahowiak*, 212 Wis. 2d 744, 569 N.W.2d 711 (App. 1997).**

B. Damages and Fees

1. For a requester who "prevails in whole or in substantial part", the court is to award fees and damages of $100.00 minimum. **Wis. Stat. § 19.37(2).** except: the minimum does not apply to incarcerated persons or those subject to civil commitment. **Wis. Stat. § 19.37(2).**

2. Damages including attorney fees available even if records disclosed after action filed but before disposition, ***State ex rel Vaughan v. Faust,* 143 Wis. 2d 868, 422 N.W.2d 898 (App. 1988).**

a. Fees available for action under open records law (§ 19.37) but not for action to receive "personally identifiable information" **[§ 19.35(1)(am)].**

3. Punitive damages are available if court finds action was arbitrary and capricious; punitives and/or a forfeiture of $1,000.00 is an available sanction. **Wis. Stat. §§ 19.37(3) and (4).**

a. Punitive damages available only as part of a mandamus claim to seek enforcement***, Capital Times v. Doyle,* 2011 WI App 137, ____ Wis. 2d ____, ____ N.W. 2d _____ (September 28, 2011)**

C. Any person who with intent to injure or defraud, destroys, damages, removes or conceals any public record may be guilty of a Class D felony. **Wis. Stat. § 946.72(1).**

XI. RECORDS RETENTION

A. Pending Open Request/Lawsuit:

1. Pending Open Records Request: No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record until after the request is granted or until at least 60 days after the date that the request is denied. **Wis. Stat. § 19.35(5)**.

2. Pending Litigation: If an authority receives written notice that a public records lawsuit has been commenced, 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. **Wis. Stat. § 19.35(5)**.

B. Record Retention

1. Generally: Officials must keep and preserve records and transfer to successor. **Wis. Stats. § 19.21**. Municipalities must retain records for 7 years unless some other time period is required by statute. **Wis. Stat. §§ 19.21(4)-(5)**.

a. The records retention provisions of Wis. Stat. § 19.21 are not part of the public records law. ***Gehl,* 2007 WI App 238, ¶¶ 1, 13** ("County's alleged records retention violations cannot be reached through a claim under the public records law."); **see also *Wisconsin Carry, Inc. v. City of Milwaukee,* 35 F.Supp.3d 1031 (E.D. Wis. 2014)** (a plaintiff may only recover damages if the requester prevails in a mandamus action. The open records law does not authorize a claim for damages on its own.).

b. 90 days for tape recording of a public meeting. **Wis. Stat. § 19.21(7)**.

2. Review prior to destruction. Prior to the destruction of any record, a municipality must give the Historical Society 60 days' notice so that it may determine which may be preserved for historical interest. **Wis. Stat. § 19.21(4)** (cities, villages, towns) & **(5)** (counties). Upon application, the Historical Society may waive this requirement.

3. Local record retention policies: Municipality may enact ordinance for the destruction of public records. **Wis. Stat. § 19.21(4)(a)**.

a. A municipality may, by ordinance, set a record retention policy but the period a record must be kept may not be less than 7 years (2 years with respect to water stubs, receipts of current billings and customer's ledgers of any municipal utility) without first receiving approval for a shorter time period from the State Public Records Board. ***See* Wis. Stat. § 19.21(4)(b)**;

b. Wisconsin Department of Administration ("DOA") has statutory rule-making authority to prescribe standards for

storage of optical disks and electronic records. **Wis. Stat. §§ 16.611 and 16.612**;

c. The Records Disposition Authorization Committee (RDA Committee) of the Public Records Board is responsible, subject to final Board approval, for review and approval of minimum periods of retention for certain local government records as specified in **Wis. Stat. § 16.61(e)**, upon application to the Board pursuant to **Wis. Stat. § 19.21(4)(b)**, **(5)(c)**, **(6)** and **(8)**;

d. Resources on record retention and specifically electronic records retention can be found in the Document Library of the Public Record Board at: **http://publicrecordsboard.wi.gov/docs_all.asp?locid=165.** Recommended schedules for the retention and destruction of common municipal records are available from the Wisconsin Public Records Board at **www.doa.state.wi.us.; Wis. Stat. § 16.61.**

e. With regard to public records stored exclusively in electronic format, which local governments may not be obligated to do, the following standards shall be followed per **Wis. Admin. Code Ch. 12.04 and 12.05** (provisions for management of records stored exclusively in electronic format by local agencies):

i. Maintain electronic public records that are accessible, accurate, authentic, reliable, legible, and readable throughout the record life cycle;

ii. Document policies, assign responsibilities, and develop appropriate formal mechanisms for creating and maintaining electronic public records throughout the record life cycle;

iii. Maintain confidentiality or restricted access to records or records series maintained in electronic format, limiting access to those persons authorized by law, administrative rule or established agency policy;

iv. Utilize information systems that accurately reproduce the records they create and maintain;

v. Describe and document public records created by

information systems;

vi. Document authorization for the creation and modification of electronic public records and, where required, ensure that only authorized persons create or modify the records;

vii. Design and maintain new information systems so that these systems can provide an official record copy for those business functions accomplished by the system;

viii. Develop and maintain information systems that maintain accurate linkages, electronically or by other means, to transactions supporting the records created where these linkages are essential to the meaning of the record;

ix. Utilize information systems that produce records that continue to reflect their meaning throughout the record life cycle;

x. Utilize information systems that can delete or purge electronic records created in accordance with the approved retention schedule;

xi. Utilize information systems that can export records that require retention to other systems without loss of meaning;

xii. Utilize information systems that can output record content, structure and context;

xiii. Utilize information systems that allow records to be masked to exclude confidential or exempt information.

XII. ELECTRONIC AGREEMENTS

A. Electronic Signatures in Global and National Commerce Act ("E-SIGN") **15 USC. S. 7001 et. seq.**

1. The E-SIGN law prohibits federal and state governments from denying the legal effect of certain documents on the grounds that: (1) the document is in electronic format; or (2) the endorsement is in electronic format.

2. The effect on records requests is that some documents, contracts or agreements will not be "maintained" at the municipality but be "accessible" on-line:

a. Could include anything from checks to bond documents or insurance agreements;

b. Electronic copies of the document will satisfy the laws requiring an "original" copy;

c. Parties to electronic agreements usually specify the acceptable technology to store, retrieve and "sign".

B. Wisconsin law authorizes but does not require electronic agreements. **Wis. Stat. § 137.13 (1)**.

1. With consent, a record may be received and signed electronically. **Wis. Stat. §§ 137.13 – 137.16**.

2. Documents may be notarized by electronic signature. **Wis. Stat. § 137.19**.

3. Accessible, final electronic records may satisfy requirements of evidence and audit. **Wis. Stat. § 137.20**.

XIII. CLOSED SESSION AND PUBLIC RECORDS IMPLICATIONS

A. Presumptive Right to Records. "Except as otherwise provided by law, any requester has a right to inspect any record." **Wis. Stat. § 19.35(1)(a).**

B. Limited Exceptions: Exemptions to the requirement of a governmental body to meet in open session are "indicative of public policy." **Wis. Stat. § 19.35(1)(a)**.

1. Exemptions for closed session **under Wis. Stat. § 19.85** may be used as grounds for denying public access to a record only if the authority or legal custodian 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.

2. Custodian must do more than merely recite the exemption under Wis. Stat. § 19.85 for which the meeting was closed. ***Zellner v. Cedarburg Sch.*, 2007 WI 53, ¶ 54, 300 Wis.2d 290, 731 N.W.2d 240,** ("Section 19.35(1) does not mandate that, when a meeting is closed under § 19.85, all records created for or presented at the

meeting are exempt from disclosure.")

3. **Balancing Test.** When a statutory or common-law exception does not apply, "the balancing test must be applied in every case in order to determine whether a particular record should be released." ***Woznicki v. Erickson*, 202 Wis.2d 178, 183, 549 N.W.2d 699 (1996)**. The balancing test inquires "whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." ***Woznicki*, 202 Wis. 2d at 183-84**.

4. **Authority Does not Have Unfettered Discretion**. Must do more than offer an assertion that the reasons for closure still exist. "The custodian must state specific public policy reasons for the refusal." ***Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).**

5. **Materials produced or created for closed mediation?** Section 904.085(3) exempts from public disclosure under the Open Records Law any "oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party. . . ." Purpose behind the statute is "to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled." **Wis. Stat. § 904.085(1)**. ***See Zellner v. Cedarburg Sch*., 2007 WI 53, ¶ 48, 300 Wis.2d 290, 731 N.W.2d 240** ("The Journal argues that the CD and memo were not created for the purpose of mediation and that, therefore, § 904.085(3) is inapplicable, and we agree.").

C. **Personnel Matters:** § 19.35(1)(a) and § 19.85 do not create "clear statutory exception" forbidding the release of all public employee disciplinary records; rather, the statutes simply require the custodian to pay proper heed to the expressed policies in allowing or denying public access to a record. ***Wis. Newspress, Inc.* v. *Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 779, 546 N.W.2d 143, 148-49 (1996).**

1. ***Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985)**: Oshkosh Library Board met in closed session pursuant to sec. 19.85(1)(c) seven times to consider a "personnel matter." The Oshkosh Northwestern Newspaper requested access to any motions and roll call votes which occurred in the closed sessions. The following response justifying the denial was deemed insufficient: "[T]he Library Board has denied access pursuant to Section 19.35(1)(a), Wis. Stat. in that the meetings were exempted from being public pursuant to

Section 19.85(1)(c), Wis. Stat. and that the reason for the exemption of the meeting carries over to the exemption of the records."

2. ***Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis.2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990)**: Allegation of nepotism in violation of the state administrative code involving state university professors led to requests for associated reports. "We conclude the trial court properly found that meetings held pursuant to the investigation could be convened in closed session under sec. 19.85(1)(f). But, "[i]t does not follow that, simply because meetings were properly closed under sec. 19.85(1)(f), Stat. documents compiled in conjunction with those meetings are exempt from disclosure under sec. 19.35(1)." The court held: "We recognize the public interest in conducting closed meetings to investigate allegations of misconduct against specific persons which, if discussed in public, would be likely to have a substantial adverse effect upon their reputation. Sec. 19.85(1)(f), Stats. There may be instances where the public interest in maintaining the confidentiality of documents compiled in conjunction with an investigation of a specific person outweighs the public interest in openness and public scrutiny…. This is not such a case. Al Yasiri is a university official subject to close public scrutiny. By accepting appointment as dean of a department of a state university, Al Yasiri voluntarily took a position of public prominence. He has, for the most part, relinquished his right to keep confidential activities directly related to his employment."

3. ***Zellner v. Cedarburg Sch.*, 2007 WI 53, ¶¶ 8-9 and 54, 300 Wis.2d 290, 731 N.W.2d 240:** CD and memo containing forensic and other information associated with teacher's use of school computer to view adult websites were subject to access. Court rejected arguments that, because records were presented in closed meetings, any records created for the purpose of such meeting should not be disclosed.

4. ***Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 48 n. 12, 312 Wis.2d 1, 728 N.W.2d 15, 754 N.W.2d 439** ("Sands urges us similarly to 'refuse to create a new privilege for what is said in closed session meetings, just as it has refused to privilege what is written for closed sessions.' We agree that the same principle applies: it does not follow that simply because meetings are closed under Wis. Stat. § 19.85, the contents of such meetings are exempt from disclosure in response to discovery requests, just as they are not automatically exempt from open records requests. The clear policy of discovery statutes, open records laws, and open meetings laws

alike is transparency and access.").

D. Civil Discovery

1. Closed session discussions may be open to disclosure to a civil litigant. ***Sands v. Whitnall Sch. Dist.*, 2008 WI 89, 312 Wis.2d 1, 754 N.W.2d 439** (rejecting "deliberative process privilege" in Wisconsin nor any other privilege implicit in Wis. Stat. § 19.85 shielding the contents of closed sessions from discovery).

2. Is a transcript of a closed arbitration a public record? ***Zellner v. Herric*k, 2009 WI 80, 319 Wis. 2d 532, 770 N.W. 2d 305** (circuit court ruled that transcript was not subject to release because the public's interest in the release of the transcript was outweighed by the public policy favoring privacy in an alternative dispute resolution such as arbitration; Supreme Court reviewed matter on other procedural grounds)