

LEGAL ISSUES FACING WISCONSIN TECHNICAL COLLEGES

PUBLIC RECORDS LAW AND OTHER LEGAL TIPS

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CHECK LEGAL REQUIREMENTS BEFORE REQUESTS ARE RECEIVED

1. Make sure that you meet the mandatory posting requirement.

Wis. Stat. §19.34 states that every public authority shall adopt and display a notice containing a description of its organization and the established times and places the public may obtain information and access to records. The notice must specify how the public can make requests for records and the costs of obtaining those records. The notice must also identify each position of the authority that constitutes a local public office.

CHECK LEGAL REQUIREMENTS BEFORE REQUESTS ARE RECEIVED

2. Have records retention and records request policies that comply with state law.

CHECK LEGAL REQUIREMENTS BEFORE REQUESTS ARE RECEIVED

3. Review your retention policies and verify that you have what you think you do (e.g., the Public Records Board schedule for record retention/destruction).

Wis. Stat. §19.21(6) provides that a school district may provide for the destruction of obsolete school records. However, the district must give 60 days' notice in writing of any such destruction to the state historical society (the historical society may waive this requirement upon application). A school district must retain records for not less than seven years, unless a shorter period is fixed by the Public Records Board; however, to rely on a shorter period established by the Public Records Board, the school district must adopt the Public Records Board schedule.

A tape recording of a meeting of a governmental body may be destroyed no sooner than 90 days after the minutes have been approved and published, if the purpose of the recording was to make minutes of the meeting. Otherwise, the general records destruction timetable applies.

CHECK LEGAL REQUIREMENTS BEFORE REQUESTS ARE RECEIVED

4. Inservice and share information about record making and retention practices, to minimize the likelihood that records will be created that are not necessary and that you would not wish to disclose (e.g., employment investigations).

GOALS FOR PUBLIC RECORDS REQUESTS RESPONSES

1. Provide an accurate and complete response that complies with the law.
2. Track the actual, reasonable, and necessary costs of locating, duplicating, and mailing records to requesters.
3. Communicate effectively with requesters to avoid misunderstandings and claims of, e.g., failure to disclose or undue delay.
4. Get to the bottom of public record requests whenever possible so that processing requests does not paralyze the institution.

WHAT TO DO WHEN YOU RECEIVE A PUBLIC RECORDS REQUEST

1. Confirm the request.

Confirm that a request has been made, the date on which it was made, and what the requester is seeking.

In some situations, it is important to have the requester begin by putting his/her request in writing before confirming its receipt, while in others it is best to simply acknowledge the request through a written confirmation.

WHAT TO DO WHEN YOU RECEIVE A PUBLIC RECORDS REQUEST

2. Clarify the request, if necessary.

Some requests cannot be understood or can be taken to have more than one meaning.

In some situations we need to tell a requester that their request will involve far more extensive searching and much higher costs if it is taken literally, and we need to be sure of our interpretation before proceeding with record location initiatives and charging the requester accordingly.

For example, if someone requests “any and all” records anywhere in the district that meet a particular description, this literally would require a dragnet review of records in every building. Such a request requires clarification.

WHAT TO DO WHEN YOU RECEIVE A PUBLIC RECORDS REQUEST

3. Determine if responding in batches is appropriate.

The law requires prompt responses to record requests and, in some cases, a request has parts that are easy to fulfill and parts that will take much more work.

If you wait until you have everything, you will often be accused of undue delay. Don't wait for requesters to tell you what they want; ask them.

WHAT TO DO WHEN YOU RECEIVE A PUBLIC RECORDS REQUEST

4. Make an initial assessment about waiving assessment of costs.

Some requests are very small and easy to fulfill on a same day basis. In these cases, the custodian of records should affirmatively decide if waiving the fees/costs is in the public interest. This helps to make certain that the manner in which the request is processed won't result in its own claims (e.g., of discriminatory treatment).

Waiving charges for media representatives can be a wise choice in media relations if the cost isn't too high. However, this decision should be made on a case by case basis, not by policy.

EVALUATING A PUBLIC RECORDS REQUEST

1. Determine whether the records exist.

Be careful to conduct a proper institutional inventory. Sometimes, the records are kept in the records custodian's office. However, sometimes the records that have been requested could be in any number of places, which affects location time and costs, and the speed of any response.

Communicating with requesters about this can influence the request or at least blunt claims of undue delay.

EVALUATING A PUBLIC RECORDS REQUEST

2. Determine whether the records meet the definition of “records.”

Most recorded information is a “record” under the law, but there are materials that are excluded from the definition. Wis. Stat. § 19.32(2). Examples include:

- a. Drafts, notes, preliminary computations and like materials prepared for the originator’s personal use.
- b. Personal property unrelated to the custodian’s office.

EVALUATING A PUBLIC RECORDS REQUEST

3. Decide whether an exclusion applies that would prevent disclosure of a record.

Some things meet the definition of “record,” but can’t or don’t have to be disclosed. Examples include:

- a. A record containing personally identifiable information that is collected or maintained in connection with a complaint or investigation leading to certain types of legal proceedings. Wis. Stat. § 19.35(1)(am) 1.
- b. A record containing personally identifiable information that, if disclosed, would endanger life or safety, identify a confidential informant, or endanger the security of certain, specified institutions. Wis. Stat. 19.35 § (1)(am)2.

EVALUATING A PUBLIC RECORDS REQUEST

- c. A record for which the statute limits access (examples include records made confidential by statute, law enforcement records, contractor records computer programs and data trade secrets, and law enforcement informants). See Wis. Stat. § 19.36 for a more complete listing.

“Employee personnel records” are included in this category and cannot be disclosed if they concern things like home addresses, social security numbers, annual evaluations, or current investigations of crimes or employment misconduct. Wis. Stat. § 19.36(10)

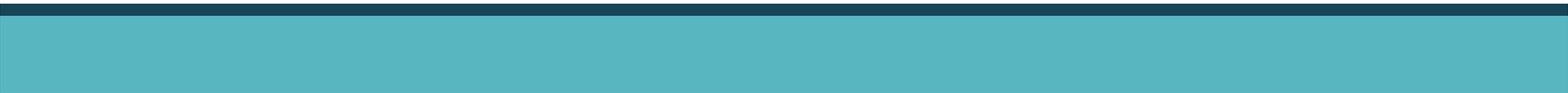
EVALUATING A PUBLIC RECORDS REQUEST

4. Determine whether a statute or court decision indicates that the record must be disclosed or, alternatively, cannot be disclosed.

EVALUATING A PUBLIC RECORDS REQUEST

5. Conduct the required “balancing test” to determine if the public interest in disclosure of a record outweighs the public interest in non-disclosure.

This is almost never a completely certain analysis, but issues that figure into the balancing test might include, e.g., a record that would be confidential under exemptions to the requirement that a governmental body meet in open session.

- a. Examples of grounds for maintaining the confidentiality of a record include competitive or bargaining reasons, or employee confidentiality.
 - b. Remember, it is the competing public interests in play that one must balance and account for.
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RESPONDING TO A PUBLIC RECORDS REQUEST

1. Decide whether the record requested concerns a “record subject” and if they are entitled to notice that record will be released.

Notice is generally required where employees are concerned for the following types of records:

- a. Records related to the investigation of an employee for certain purposes.
- b. Records obtained through subpoena or search warrant
- c. Records prepared about an employee by someone other than the authority.

NOTE: A record subject’s rights to advance disclosure and the right to augment is not limited to these categories when the records concern a subject that holds a local or state public office.

RESPONDING TO A PUBLIC RECORDS REQUEST

2. If the record requested concerns a “record subject” and they are entitled to notice, determine the type of record subject(s) that is/are involved.

These situations bring other procedures into play that have to be accounted for as part of responding to the request.

- a. Types of record subjects and related records include:
 - i. A record containing information about an employee that is the result of an investigation into a disciplinary matter.
 - ii. A record containing information about an employee that is a “local public office” holder.
 - iii. A student or pupil record. These records are generally confidential under FERPA and/or Wis. Stat. § 118.125. They also are usually handled differently than records that we redact as part of the process of providing access to public records. Wis. Stat. § 19.36(6), citing, Wis. Stat. § 19.35(1)(a) or (am).

EVALUATING A PUBLIC RECORDS REQUEST

- b. Employees and employees that qualify as local public office holders have procedural rights that have to be accounted for before records in which they are record subjects can be disclosed.
 - i. Before permitting access and within 3 days of deciding to provide access to a record, the authority shall serve written notice on the record subject (by certified mail or personal service). The notice shall describe the record and the recipients rights under the statute. See Wis. Stat. § 19.356(2)(a) and (9)(a).
 - ii. Employees have 5 days to notify the authority that they intend to start an action to prevent disclosure and 10 days to actually commence the action. Wis. Stat. § 19.356(3) and (4).
 - iii. A public entity cannot provide access to a record within 12 days of sending a notice under Wis. Stat. §19.356(2)(a).
 - iv. Employees that are also “local public office holders” have 5 days to “augment” the record to be released. Wis. Stat. § 19.356(9)(b)

RESPONDING TO A PUBLIC RECORDS REQUEST

3. Determine the cost of fulfilling your request.
 - a. Actual, necessary costs of duplication (\$5.00 prepayment).
 - b. Location charges (\$50.00 prepayment).
 - c. Evaluation, redaction, preparation (\$0.00)

COMMUNICATING THE DECISION

1. Every request gets an answer.
2. Every denial (whether full or partial) has to provide all grounds for the denial.
3. Every denial must provide notice of the requester's right to apply to the district attorney or attorney general for review, or to seek review by mandamus.
Wis. Stat. § 19.35(4)(b).
4. Requesters should be notified if separate notices must be provided to record subjects.