

Wisconsin's Public Records & Open Meetings Laws



Practical information for
University of Wisconsin Chairs

Public Policy and Purpose

“[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”

Construction of the Law

Public records and open meetings laws should be construed with a presumption of complete public access.

The Public Records Law

Two distinct concepts:

(1) Public access.

(2) Record retention.

Discovery

In the event of a lawsuit, applicable discovery rules apply to the disclosure of documents and not the public records law. Many documents that would be confidential under the public records law must be released in discovery.

Who may request public records?

Anyone, including anonymous persons, except persons confined to prison or other institutions.

Note well: The identity or motive of the requestor is legally irrelevant.

Is the Request Sufficient?

- Does not have to be in writing. Can be submitted by email.
- No “magic words” required; request is sufficient if it reasonably describes the record. § 19.35(1)(h).
- No requirement to respond to a “continuing request.”

Burdensome Requests

The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be significantly impaired, nor does it require expenditure of excessive amounts of time and resources.

Time required for response

A custodian must respond “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a).

Ten days is the rule of thumb for a simple request.

Definition of Records

Records are not:

- 1) Notes, drafts, or preliminary computations prepared for the personal use of the originator.
- 2) Personal property.
- 3) Material to which access is limited by copyright, patent, or bequest.
- 4) Published material available for sale or at the public library.

Records that must be released

- Individuals are entitled, with limits, to records containing their own personally identifiable information.
- Employees have a right of access to their own personnel records.
- Students have rights of access to their own records under both federal and state law.

Records that must be withheld

- Computer programs (but not the input data), trade secrets, certain financial information like bank account numbers.
- Student identifying information except where subject to the directory exception under FERPA and Wisconsin State Law, or where the information relates to student participation in governance.
- Patient health care information. Wis. Stat. § 146.82 and related statutes.

Employee Records

Employers must (or should) withhold certain employee information such as SSI #, home address & phone, pending investigation of employee, names of job applicants (except for non-classified finalists), employment examinations.

Notice to Employees

Notice must be given to an employee who is the subject of a request before release of completed investigations of employment violation or disciplinary matter.

See Wis. Stat. sec. 19.356 for specific details.

The Balancing Test

If the strong public interest in disclosure of the record is outweighed by the public interest favoring nondisclosure, then the record should be withheld.

Specific Reasons to be Provided

Policy reasons specific to the request at issue must be provided to a requestor. Blanket rules are insufficient.

Balancing test assertions likely to be upheld

- Risk to public or personal health or safety
- Attorney-Client privilege
- Highly sensitive private matters
- Purely personal communications (email)

Balancing test assertions unlikely to be upheld

- Poor affect on employee morale
- Anything appearing to be a “cover-up”
- Reputation of individuals holding positions of public trust
- Legal agreements and settlement documents

Assembling the response

- The response should be in writing. Give specific reasons for any information withheld.
- If portions of a document may be released, then a custodian is obligated to provide those portions and redact those matters that may not be released.

Digital Records

- A requester may be entitled to request documents in digital format if they are kept in such format, but the authority need not provide the computer program, just the data. *See WireData, Inc. v. Village of Sussex*, 2008 WI App 22, 298 Wis. 2d 743.
- Meta-data may be like a draft and not subject to disclosure. It is a good practice to use pdf format when providing documents in electronic form.
- If computer programming is necessary to produce the records requested, a locator fee may be charged.

Fees

- Copying fees (recommend no more than 25 cents per page, \$1 for CD-ROM) may be charged, and may be charged in advance if cost exceeds \$5. Authorities should establish a policy for copying fees.
- “Actual, necessary and direct cost of location” may be charged if the cost exceeds \$50. Wis. Stat. § 19.35. You must charge the hourly rate of the person who normally performs records location work.

Enforcement

A records requester who believes that a request was denied in error may ask the local district attorney or the Attorney General to bring an action in court, or may file a private action. Damages of up to \$100, attorneys fees, and a potential for forfeitures or punitive damages exists.

Open Meetings

Wisconsin's Open Meetings Law requires “governmental bodies” to conduct official business in open session and post in advance public notices of the meetings. Wis. Stat. sec. 19.81-19.98.

Definition of Governmental Body

A governmental body is defined as a “state . . . board, commission, committee, council, department . . . created by constitution, statute, ordinance, rule or order.” Wis. Stat. sec. 19.82(1).

Note that a governmental body is defined by the manner created NOT the authority possessed.

UW “Governmental Bodies”

- The Board of Regents and its committees;
 - Campus bodies that the Board creates, such as faculty senates, academic staff assemblies, departments and executive bodies;
 - Subunits created by formal action of these bodies, including tenure review committees.
- Wis. Stat. sec. 19.82(1).

Non-subject UW bodies

The Open Meetings Law does not apply to committees or regular meetings attended by persons appointed by individuals such as chancellors, departmental chairpersons, or deans. Such groups or committees have not been created by formal action of a government body.

Definition of a “Meeting”

- A meeting occurs whenever a governmental body convenes for the purposes of conducting business.
- A social or chance gathering or conference is not a meeting so long as business is not discussed.

Quorums

If the number of individuals present constitute a sufficient number to advance or block official action, then a “quorum” exists. A gathering of sufficient individuals to constitute a quorum with the purpose of discussing business is a meeting.

Walking Quorum

A “walking quorum” exists when a series of communications (either in person, by email, or by telephone) by sufficient numbers to create a quorum leads to an element of agreement to act uniformly. For example, a member may not individually poll other members to figure out how each would vote on a measure before the measure is brought forth in a formal meeting.

Written Correspondence

A one-way flow of information (whether by email or otherwise), e.g. the Department chair sending out material, does not constitute a convening of members.

Conference calls or email discussions

- A telephone conference call is treated the same as an in-person discussion. If a quorum exists and if the purpose is to conduct business, then a meeting has occurred.
- Written communications by email that become more of a discussion, rather than a one-way communication can become a meeting. This type of communication should be avoided by groups subject to the open meetings law.

Requirements for an Open Meeting

- Advance public notice.
- Conduct business in open session, unless closed session is permitted.

Notice Requirements

The chief presiding officer must give notice of each meeting to:

- 1) The public (via a public posting in areas the public would be likely to see)
- 2) Any members of the media who have submitted a written request.
- 3) The local newspaper (but the body is not required to pay and the newspaper is not required to publish).

Contents of the Notice

- Time, date, place and subject matter of the meeting.
- “Subject matter” means identification of the general topic of items to be discussed. Purely generic topics listed (e.g. “new business”) would be insufficient.

Timing for Notice

- At least 24 hours in advance of meeting (Sundays and Holidays excluded). Three days is preferred.
- A separate notice for each meeting is required.

UW Department Exemption

UW Departments and their subunits are exempt from the specific notice requirements in Wis. Stat. § 19.84(1)-(4).

Instead, Departments are simply required to provide notice “which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.” Wis. Stat. § 19.84(5).

Compliance with Notice

- Address only topics reasonably related to those within the notice.
- Sticking to the agenda order not necessarily required (but deviations cannot be unreasonable). The body may postpone or omit discussion of an item.

Public Participation

Members of the public (including students and other UW employees) are granted the right to attend and observe open meetings, but not to speak.

Members of the public may tape record or video tape so long as they do not disrupt the meeting.

Votes must be Recorded. Minutes are not Required.

- No secret ballots are permitted.
- Motions and roll call vote must be recorded.
- Consensus or show of hand voting is permitted only where unanimous.

Otherwise no other formal or more detailed minutes are required.

Closed Session

All meetings must convene in open session with a motion made, and recorded, to enter into closed session for a permitted purpose.

Examples of permitted closed session topics

- Quasi-judicial hearings (but parties may have the right to request open session).
- Personnel actions
- Compensation or performance evaluation discussions
- Conferring with legal counsel

Tenure Review

Under Wis. Stat. § 19.85(1)(b), a closed session may be held when “considering the grant or denial of tenure for a university faculty member,” but the tenure candidate must be notified that he or she “has the right to demand that the *evidentiary hearing or meeting* be held in open session.”

General Counsel Advice on Tenure Review Meetings

Notwithstanding the apparent distinction in the statute between the evidentiary “hearing” on tenure and the deliberations, the General Counsel advises continuing the long-standing practice of holding open sessions for the entire departmental review process, including deliberations and the tenure vote, where the tenure candidate so requests. To change would be to risk treating some candidates differently from others.

Enforcement of Open Meeting Laws

If the district attorney refuses to commence an open meetings law violation complaint, an individual may commence one.

Penalties include forfeitures (if the DA brings the case), and attorneys fees.

Resources

UW Office of General Counsel FAQ's and other resources: www.uwsa.edu/gc-off.

State Public Records Board, and Records Center, web links at www.doa.state.wi.us.

Wisconsin Department of Justice guides to the Open Meetings and Public Records Laws, web links at www.doj.state.wi.us.