

Responding to Requests under the Wisconsin Public Records Law

The COVID-19 pandemic has certainly created many challenges for school districts, including requiring districts to make difficult decisions on whether to have in-person instruction during the pandemic. While making these decisions, district officials have received input from various individuals, including during school board meetings and through written communications. Most districts have also created records related to their protocols and plans on addressing any potential exposure of COVID-19 within the schools. Many districts have now been receiving requests from different individuals and groups for information or records under the Wisconsin Public Records Law related to decisions made in light of COVID-19. This article will highlight aspects of the law for districts to consider when responding to these (or other) requests for records or information.

One important resource to review when considering any request is the *Wisconsin Public Records Law Compliance Guide* (2019), which is issued by the Office of Open Government at Wisconsin Department of Justice (DOJ). The DOJ provides excellent guidance and opinions on its website. The *Guide* is available at this link: <https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf>

Another important starting point for any district is the district's own policies on access to records. Every district is required to have a policy and may have other guidelines on access to records under the Public Records Law. When receiving any request, the district should forward the request to the records custodian to prepare an appropriate response.

Access to Records. When reviewing any request submitted under the Public Records Law, school district officials must recognize that the law is intended to provide access to records. To this end, the law defines a "record" broadly as any material on which information is recorded or preserved, which has been created or is being kept by the school district. As a result, if a record has been created or kept by the district, a requester may have a right to inspect that record.

For each request, a school district should examine the request to determine whether it is requesting a record. In some instances, if the request simply asks a question about a topic of interest or requests an explanation on a specific topic but does not seek a specific record, the district should consider whether the law even applies to the request or whether there is a duty to provide the information sought.

Depending on the circumstances in your district, you may want to consider providing some information or answer some questions, even if you are not required to do so under the Public Records Law. However, one of the risks of providing any information in response to some of these very broad requests is that you may

just encourage more such requests. Finding the balance between being open and transparent with the public against being overwhelmed by burdensome requests is sometimes difficult, but an understanding of the Public Records Law can be helpful.

A district should also examine the request to determine whether the request would require the district to create a record. The Public Records Law does not require a district to create a new record by extracting information from existing records and compiling the information in a new format. For example, you are not required to fill out a survey or spreadsheet with information. As a result, if a record does not exist in the district, and if the request would require the district to create a record, the district may be able to deny the request.

Scope of the Request. After receiving any request, a district should also review the request to determine whether the scope of the request is reasonable in scope. Under the law, a request for a record without a reasonable limitation as to the subject matter or length of time represented by the record does not constitute a proper request under the law. The DOJ has stated that the purpose of the time and subject limitations 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. The law is not to be interpreted to impose such a burden on a records custodian such that normal functioning of the office would be severely impaired. An insufficient request may be denied.

Any determination to deny a request on this basis should be done on a case-by-case basis. In some instances, the district may be able to deny a request that does not specify a subject matter and seeks all records over a long period of time. If so, the district should provide a specific explanation why the response does not meet these criteria.

Costs for a Request. Even if a request is reasonably limited in scope, a school district should also review the request to determine whether the district should seek any payment from the requester for costs associated with the request. A district can demand payment of fees in advance if applicable fees exceed \$5.00. Fees may not exceed the actual, necessary, and direct costs to the school district. The two most commonly applicable fees are photocopying charges and location fees. Location fees may only be charged if the total cost of location exceeds \$50.00. The DOJ has stated that “locating” a record means to find it by searching, examining, or experimenting. An authority may not charge a fee, however, for the time associated with redacting a record.

Often, the requester will specifically ask the district to inform the requester if the district believes that costs for the request will exceed a certain amount. As a result, a district likely should take steps to inform a requester if costs will be imposed before the district processes a request, considering such information about costs may influence the requester’s decision on whether to pursue the request. In some instances, if costs are involved in any request, the requester may not want to pursue the request or want to narrow the scope of the request.

Time For Responding. With any records request, a school district should also note the time requirements for responding. The Public Records Law requires a district to respond to records requests as soon as practicable and without delay. As the DOJ has stated, what constitutes a reasonable time for a response to any specific request depends on the nature of the request, the staff and resources available to process the request, the extent of the request, and related considerations. Whether the district is acting with reasonable diligence in responding to a request will depend on the circumstances surrounding the request.

The DOJ has noted that 10 working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location

or redaction of many documents, a reasonable time for responding may be longer. As a result, a requester typically cannot require a response by a specific deadline.

Further, even after identifying records that can be disclosed, a district may also need to provide notice to record subjects as required under the law before records can be disclosed. If such notice is required, this process may require the district to withhold records until this notice process is complete and will result in additional time before a response can be provided. A district may want to inform any requester of the process, so the requester understands the time required for any response.

Denying a Written Request. A final consideration for any district with any records request is that, if a district is denying a request, even in part, a denial must be sufficiently specific to allow for judicial review. Any reason supporting the denial that is not properly raised in the denial letter might not be considered in any subsequent court challenge. Any denial letter must also inform the requester that he or she may seek review of the denial through a mandamus action or by application to the attorney general or district attorney.

Conclusion. These are challenging times in every school district. The demands on district employees in many different areas is particularly time consuming. Any records request that is submitted at this time must be considered and reviewed, but the district should also understand that requests must comply with the law and that the district may be able to respond in different ways depending on the request. Of course, the overall strategy for such requests can sometimes be complicated, and as a result, the district may want to consult with their legal counsel when confronting challenging requests.

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