The Wisconsin Public Records Law in the Animal Research Context

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PART 1: Basics of the Law
Public policy behind the law

- What is the purpose of the law?
  - Representative government is dependent upon informed electorate.
  - Public entitled to the greatest possible information regarding the affairs of government and the official acts of officers and employees.
  - The law is construed in every instance with the presumption of complete public access, consistent with the conduct of government business.
  - The denial of public access generally is contrary to the public interest, and only in exceptional cases may access be denied.
  - Law takes a cookie-cutter approach, does not acknowledge the special considerations of higher education or research.
What is covered by the law?

- **Where can I find the law?**

- **To what and to whom does it apply?**
  - “records” maintained by a “legal custodian” on behalf of an “authority”
  - “authority” includes state agencies, departments, and committees created by constitution, law, ordinance, rule or order, and formally constituted subunits of the foregoing.
Who are Custodians?

Who are considered “custodians” of research records?

- Not clearly defined, but likely the unit at the level the records are maintained (i.e., PI for lab notebooks, animal care unit for daily care logs, RARC for protocols, veterinarians for veterinary records).
- Can be important because the obligation to comply with records requests falls on the custodian of those records.
- And, a custodian can be personally liable for a forfeiture of up to $1,000 if a request is arbitrarily or capriciously denied or delayed.
Definition of “record”

“Record” includes:

- Any material on which information is recorded, regardless of physical form or characteristics.
- Maps, charts, photos, films, recordings, disks, etc.
- Information created in electronic format, including e-mails, information stored in data bases, etc.
Definition of “record,” cont.

“Record” does not include:

- Drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of the person for whom the originator is working.
- Personal property of the custodian that have no relation to his/her office.
- Materials to which access is limited by copyright, patent or bequest.
- Published materials which are or will soon be available for sale, or available for inspection at a public library.
Drafts, notes and preliminary computations

- Status as “draft,” “note,” or “preliminary computation” is lost if records are circulated beyond person(s) for whom they are prepared.

- Examples of draft: first draft of grant application maintained in PI’s computer.

- Example of notes: notes taken by PI of an ACUC discussion that are kept to refresh PI’s recollection of discussion.

- Query: how about a draft protocol prepared by PI that is not circulated beyond the ACUC reviewers?
Personal correspondence

- Wisconsin Supreme Court, in Schill case, concluded personal e-mails maintained on public IT system are not “records” because they did not have a connection with a governmental function.

- However, Court noted that even purely personal e-mails could become public records in some cases, such as in the context of an investigation of an employee for misusing IT resources.

- Remember:
  - work records maintained on a personal device are still public records; and
  - the lawyers will determine which e-mails are personal!
General exceptions

- Information exempted from disclosure by state or federal law (ex. student info under FERPA, personal health information under HIPAA)
- Trade secrets (information that derives its value by not being generally known and steps are taken to maintain confidentiality)
- Plans or specifications of state buildings
- Employee personnel records (including employment examinations, home address, home phone, etc.)
- Records regarding investigations into misconduct (can be kept confidential until investigation has concluded)
The Open Meetings law exceptions that permit closed sessions can be used to deny a records request IF the custodian makes the specific determination at the time of the request that the exception applies. Example: the Open Meetings law provision allowing closed sessions for competitive or bargaining purposes can be applied to a request for an unfunded proposal if the custodian determines that disclosure of the proposal would put the investigator at a competitive disadvantage for grant funding.

Under the common law “balancing test,” records can be withheld if the custodian determines that the public interest in disclosure is outweighed by the public interest in non-disclosure.

A custodian’s determination that an Open Meetings provision or the “balancing test” applies to a record is open to legal challenge.
What is a sufficient request?

- A request must reasonably describe the requested record (remember – the law applies to records, not information).
- A request must be reasonably limited in terms of subject matter and length of time covered.
- A custodian is not required to create a new record in response to a request (but this gets complicated for records that are stored electronically).
How much time does a custodian have to respond to a request?

- Law says only “as soon as practicable and without delay.”
- 10 business days is standard for non-complicated requests.
- Requests must be made a high priority, but there is no requirement to drop everything or disrupt functioning of the office in order to respond.
- For requests that are complicated and likely to take some time, good practice to acknowledge receipt and indicate delay in completing.
Can we charge for requests?

- Copying charges are permissible (UW standard is $0.25/page)
- Can request pre-payment if copying charges will be over $5.
- Can charge for searching for records if search fees exceed $50. Search time does not include time spent compiling or redacting.
- Rate charged for searching should be lowest hourly rate of person who can reasonably conduct the search.
- Can ask for search fees in advance.
Is a FOIA request the same as a Public Records Law request?

- No. FOIA refers to the Freedom of Information Act, which applies only to the federal government.
  
  - UW research documents in the hands of federal agencies, such as funded grant proposals and progress reports, can be obtained under a FOIA request, but the federal agency is required to notify the UW before releasing the records.
  
  - Sometimes the term “FOIA” is incorrectly used to refer to the Public Records Law.
Part 2: Processing records requests
Processing a request – first steps

- Determine if the request is formulated properly – can we tell what records they are asking for? How much of a burden will it be to locate the records?
- If not sufficiently formulated, work with Legal Services to narrow.
- If sufficiently formulated, determine estimated costs of complying. If costs are large, good indication that request is over-broad.
- Good practice to inform requester of estimated costs before conducting search.
Next steps: identify any information that can be or should be removed

- Once all fees have been paid and responsive records located, you need to determine if there is any confidential and/or proprietary information that can or must be “redacted” prior to release.

- Confidential information that must be redacted includes student educational records, patient information, employee discipline information (at least until any investigation is complete), and private information of employees such as social security numbers and home telephone numbers.

- Raw data, unpublished concepts for new research avenues, names and contact info of animal research staff, and facility information regarding locations where animals are housed and research performed have traditionally been redacted under the balancing test and other rationales.
Final steps: who must be notified when records are released?

- For industry-sponsored research, review research agreement terms to determine any non-disclosure or notice obligations.
- Good business practice is to notify the sponsor even if no contractual requirement to do so.
- Prior to release of employee disciplinary records, the law requires the employee to be given written notice and be given the opportunity to challenge the release of the records.
- If information is redacted from records that are to be released, the requester must be given a cover letter which provides ALL the specific legal bases for redaction – work with Legal Services!!!!
- If a record contains both confidential and non-confidential information, the record must be released after the confidential information has been redacted.
Part 3: Special topics
Harassment and even violence against researchers who use animals, interference with research, and damage to research facilities at the hands of animal rights extremists is a national problem, and there is a compelling public interest in protecting public employees from harassment, in permitting research to be conducted without interference, and in protecting public property from damage.

Under “balancing test,” UW redacts names of research staff and students, and locations where animals are housed or research is performed. UW does not routinely redact names of institutional officials, such as ACUC members, the IO, or the Chief Campus Veterinarian. PI names are redacted unless request asks for records by PI name.
Funded grants and contracts

- Funded grants and contracts: as general rule, the agreements and related materials from funded grants and contracts are public records.

- Caveat: some information in files of funded grants and contracts may need to be redacted from the files before release, such as information pertaining to students, employee information such as social security numbers, proprietary information supplied by the sponsor, and information supplied by other research collaborators.
Unfunded proposals

- Unfunded proposals: general rule, not subject to public records law or the federal FOIA law.

- Rationale: unfunded proposals may contain novel ideas for research designs that constitute the intellectual property of the faculty/staff, and if not funded the faculty/staff may desire to repackage and submit to a different sponsor.

- Caveat: may be required to release proposal with proprietary information redacted.

- Records requests for documents that contain information supplied by non-UW organizations such as research collaborators at another institution require special handling – good practice is to immediately inform the non-UW organization of the request.
The legal basis for withholding unpublished research data or research designs is strong:

- Unpublished research data and experimental designs frequently meet the definition of “trade secret”
- There are strong competitive and bargaining reasons for protecting unpublished data and experimental designs from premature release – publish or perish, patent protection, etc.
- The “balancing test” can recognize the compelling public interest in protecting the academic freedom of faculty to determine when and in what manner the fruits of their scholarship are disseminated.

Research data can be written, or recorded in some other form such as photographs, videos, charts, etc.

But, not all research-related records can reasonably be treated as “data” – i.e., documents created for quality control purposes.
Scholarly correspondence

- UW believes academic freedom can serve as the basis, under the “balancing test,” to protect communications between academics that are related to teaching and research – for example, e-mail exchanges between colleagues discussing potential areas of research collaboration.

- Faculty communications made for other purposes, such as shared governance, would not normally implicate academic freedom concerns.
Part 4: Compliance strategies

- Always assume your e-mails and text messages will be seen by someone else.

- Be mindful of the reason why records are being created and that certain types of records are more easily protected. For example, photographs that constitute research data are generally easier to protect from premature release than are photographs taken for other reasons.

- Be mindful of information placed on investigator or departmental websites – hard to justify redacting information from records, such as names of research staff, if this information is placed on website.

- Keep research data separate from other types of information.
More compliance strategies

- Use the telephone (or meet in person) for sensitive communications.
- For draft documents, make sure circulation is very limited.
- Do not share personal notes.
Records retention

- If we have a record in our possession, it is subject to a records request even if we didn’t need to keep it.
- So, don’t keep records unless you need to and no longer than you have to – follow records retention schedules, or create your own for special types of records.

Links to records schedules and destruction info:
http://archives.library.wisc.edu/records/handouts/crecsguide.pdf
http://archives.library.wisc.edu/records/rda.html
Final thoughts

- Most information in our possession is accessible by the public.
- There are specific procedural requirements that must be followed when releasing personnel records.
- Any decisions to deny a request require very specific written rationale.
- Be pro-active instead of waiting for a request to come before thinking about these things.