

WCA / LGE TRAINING

2020 COUNTY OFFICIALS WORKSHOPS (COWS)



Extension

**UNIVERSITY OF WISCONSIN-MADISON
LOCAL GOVERNMENT EDUCATION**

ZOOM WEBINARS

**Monday,
June 8, 2020**

9:00 am - 10:30 am

- Who We Are
- Roles & Responsibilities for County Officials

Monday, June 15, 2020

9:00 am - 10:30 am

- Wisconsin's Open Meetings Law
- Agendas & Minutes

Monday, June 22, 2020

9:00 am - 10:30 am

- Running Effective Meetings
- County Budgeting

Monday, June 29, 2020

9:00 am - 10:30 am

- Wisconsin's Public Records Law
- Ethics and Conflicts of Interest

Public Records County Officials Workshop

June 29, 2020

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University of Wisconsin – Madison
Division of Extension,
Local Government Education

Acknowledgements: Office of Open Government, Wisconsin Department of Justice;
Philip Freeburg, Esq. UW - Division of Extension, Local Government
Center;
Claire Silverman, Esq. League of Wisconsin Municipalities



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Public Records – Today's Goals

- Policy
- Terms & Concepts
- Notice & Hours Policy
- Requests, Response and Costs
- Enforcement
- Record Maintenance & Retention
- Additional Resources



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Policy - *Wis. Stat. § 19.31*

- The goal of an informed public requires giving the public ... the greatest possible information regarding affairs of government...”
- Presumption – Complete access
 - Consistent with the conduct of government business
- Denial of access –
 - Contrary to public interest
 - Only in exceptional cases



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“Authority” - *Wis. Stat. §19.32(1)*

- Any of the following have custody of a “**record**”
 - State or Local Office
 - Elected Official
 - Agency
 - Board, Commission, Council or Department
 - Quasi Governmental Corporations
 - Sub-units



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Custodian – *Wis. Stat. § 19.33*

- Maintains Records and makes decisions regarding access
- Elected officials are custodians unless an employee has been designated
- If none, highest rank officer or chief administrative officer
- Statutes designates clerks as record keepers
 - Custodial Services
 - Other Authority staff may participate or assist
- Recommend establishing an “internal records procedure”



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Definition “Public Record” – *Wis. Stat. § 19.32(2)*

- A public record is a “**record**” of an “**authority**”



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“Record” - Wis. Stat. §19.32(2)

Any material...

- on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved
- regardless of physical form or characteristics
- Which has been created by or kept by an **authority**



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For the “Record” ...

- Contractor Records produced and collected under contract with an **authority** are public records
- Law covers access to records, *not* answers to questions
- *Reminder:* Content and substance control, not location and format



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Not a Record – *Wis. Stat. § 19.32(2)*

- Drafts, notes, preliminary computations
 - prepared by originator for their own use or prepared by employee for someone for whom they work
 - Not a draft if used for purpose for which it was commissioned
 - One cannot indefinitely qualify a document, simply labeling it “draft” or preventing final corrections from being made
- Purely personal property that does not relate to custodian’s office
 - Example, Personal email
- Exceptions are narrowly construed



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Personal and Business Email, etc.

- Personal email, calls, and documents on an authority’s account:
 - Email sent and received on an authority’s computer system is a record
 - Includes purely personal email sent by authority’s officers or employees
 - Disclosure generally not required
 - *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
- Government business emails, calls, and documents on private accounts:
 - These materials may be records
 - Content determines whether something is a record, not the medium, format, or location
 - Personal materials on the private accounts are not subject to disclosure
- Recommendation:
 - Conduct a careful search of all relevant accounts



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Employee Records - *Wis. Stat. § 19.36(10)*:

- Generally, access not permitted for information related to:
 - Employee's home address, email, phone number, SSN
 - Current investigation of possible criminal offense or misconduct connected with employment
 - Employee's employment examination, except the score
 - Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
 - Other personnel-related records, including disciplinary records may be subject to disclosure
 - Notice to employees is required in certain circumstances - See Wis. Stat. § 19.356



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Electronic Records

- Social media accounts created or maintained by an authority
- Cell phone content, including content on phones issued by an authority and possibly content on personal phones used for government business
- Phone call records, text messages, app content
- It is important to check cell phones when gathering records in response to public records requests



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Electronic Databases



- Direct access to electronic databases not required
- Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- Wis. Stat. § 19.36(4): computer program is not subject to examination or copying. However, the following is:
 - Input: Material used as input for computer program
 - Output: Material produced as product of computer program
- Requester, within reasonable limits, may request a data run to obtain requested information
- Good rule of thumb: content determines whether it is a record, not the format



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Metadata

- Metadata is data that describes other data
- Three main types of metadata
 - **Descriptive** metadata describes a resource for purposes such as discovery and identification, like title, author and keywords
 - **Structural** metadata indicates how compound objects are put together, like how pages are ordered to form chapters
 - **Administrative** metadata provides information to help manage a resource, like when and how it was created, file type and other technical information and who can access it
- Wisconsin Court of Appeals
 - Lueders v. Krug (Wis. App. 2019) found that metadata, contained in the electronic version of an email, has additional information not found in the printed version. This metadata is a part of the record and should be provided, when requested.



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Notice & Hours

- Records Request Notice - Wis. Stat. § 19.34 (1)
 - Custodian identity
 - Times and locations to inspect records
 - No regular hours, advance notice required to inspect
 - Costs
- Hours – Wis. Stat. § 19.34 (2)(a)
 - Anytime if regular hours
 - No regular hours:
 - at least 2 hours per week; or permit access on 48 hours notice
- Consider Internal Procedures Manual
 - Electronic record requests – what is provided and its form
 - Working with Requestors on records requests



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Request – *Wis. Stat. § 19.35*

- Any person can request inspection of or a copy of record
- Need not identify self, purpose or motive
- Oral or written
- No specific form required



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Sufficient Request – *Wis. Stat. § 19.35*

- Inspection - *Wis. Stat. § 19.35(1)(a)*
- Reasonably describe the record or information - *Wis. Stat. § 19.35(1)(h)*
- Reasonable as to time and subject matter
- Custodian should not have to guess
- Cannot so burden custodian so that normal office function are impaired



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Responding to Request

- “As soon as practicable and without delay” - *Wis. Stat. § 19.35(4)*
 - Office of Open Government DOJ recommends 10 days for simple response
- Penalties for “arbitrary and capricious delay”
- Only records that exist at time of request required to be produced
- No requirement to respond if no record exists
 - DOJ Office of Open Government suggests a Local Government responds that the requested record(s) does not exist



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Responding to Request

- Records; not answers to questions
- May transcribe audio records
- May provide a photocopy or allow inspection
- No provision in Law for continuing requests
- OOG suggests communication with a record(s) requestor
- Communication will:
 - to understand the request
 - whether the record exists
 - record format
 - request response time and updates



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Format of Records

- Wis. Stat. § 19.35(1)(b), (c), (d): a copy substantially as readable/audible/good as the original
- *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
 - Whether records must be produced in requested format not squarely addressed
 - PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester
 - Sufficient to provide a copy of relevant data in an appropriate format



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Personally Identifiable Information

- Rights if record contains your Personally Identifiable Information
 - Exceptions for investigations, security concerns or records in un-indexed series
- Ability to request correction of personal information or file statement
- Public employees and officials right to notice of release of certain records



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Limits on Access

- Statutes
- Published Court Decisions
- Balancing Test
- If parts of record are not subject to disclosure, but other parts are,
 - the other parts must be disclosed
 - Remove/redact parts not subject to disclosure



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Request Analysis

1. Does a responsive record exist?
2. Is there an absolute right to access?
3. Is access absolutely denied?
4. Apply balancing test.

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Step 1: Does the Record Exist?

- Generally, only **records that exist** at the time of the request must be produced
 - To respond, an authority **need not create** new records
 - Public records law does **not require** answering questions
- However, if a request asks a question and an existing record answers the question, provide the record or inform the requester
 - Continuing requests are not contemplated by the public records law
 - If there are no responsive records, inform the requester



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Steps 2 & 3: Absolute Right/Denial

- Absolute Right: Not many exist:

- Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
- Daily arrest logs or police “blotters” at police departments



- Absolute Denial:

- Can be located in public records statutes:
 - Information related to a current investigation of possible employee criminal conduct or misconduct
 - Plans or specifications for state buildings
- Can be located in other statutes or case law:
 - District Attorney case records
 - Patient health care records
 - Pupil records



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Step 4 - Balancing Test

- Does public interest in nondisclosure outweigh public interest in disclosure
- Specific policy reason
- Closed session exceptions possible policy reasons
- Case-by-case
 - No “Bright Line Rules”



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Denial of Access

- Oral request may be denied orally
 - Unless demand made for reasons in written statement
 - Due 5 days
- Written Request denial
 - Required in writing
 - Explain reasons
 - Advise denial is subject of court review



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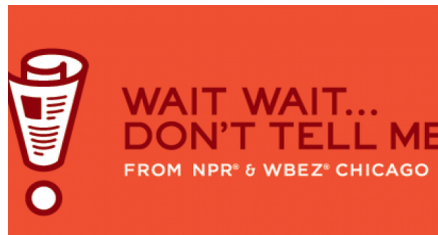


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Denial Explanation

- Sufficient under Public Records Law
- Specific enough for requester to understand
- Basis *and* Limit of Court Review



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Charging Fees - Office of Open Government

- An authority may only charge a fee for the actual, necessary, and direct costs of four specific tasks - *Wis. Stat. § 19.35(3)*
 1. Reproduction and transcription
 2. Photographing and photographic processing
 3. Locating (IT staff or others)
 4. Mailing or shipping
- Staff Time:
 - the rate for an actual, necessary, and direct charge should be based on the pay rate of the lowest paid employee capable of performing the task
- Pre-payment for Costs over \$5.00
- An authority may not charge for the time it takes to redact records - *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65
- OOG Fee Schedule



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Enforcement

- Court ordered disclosure
 - Mandamus Action
- Possible payment of requestor's attorney fees and costs
- Punitive damages for arbitrary delay or denial
- Loss of public confidence in unit of government



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Wisconsin Municipal Records Retention Schedule

- Overview
 - The Wisconsin Municipal Records Schedule (WMRS) is an adoptable general record retention schedule, approved by the Public Records Board in 2018
- Adoption of the WMRS or Other Approach
 - The WMRS or local ordinance must be adopted before a local government may destroy its record(s) – see WMRS form at <https://publicrecordsboard.wi.gov/Documents/PRB-002%20FINAL%2011-2017.pdf>
 - WCA's record retention Model Ordinance tailored to County records. https://www.wicounties.org/uploads/legislative_documents/records-retention-model-ordinance.pdf
- Destruction of Records - *Wis. Stat. § 19.21(4)(a)*
 - Notify Wisconsin Historical Society 60 days prior to ANY public records destruction.



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Open Record Issues - *Two Views*

- WI Freedom of Info Council
 - Long wait for records request
 - cost to comply
 - communication between record holder and requestor
 - provide electronically
- Attorney General
 - Compliance Time,
 - Fees (new OOG guidance)
 - Electronic Records
 - Communication between record holder and requestor
 - 80% of AG training is on Public Records



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Additional Resources

- WCA's 2020 County Officials Handbook, Pages 85-102
- UWEX Local Government Center, <https://lgc.uwex.edu/open-government/>
 - *Fact Sheet 7* - In your materials
- Department of Justice, Office of Open Government
Paul M. Ferguson
Wisconsin Department of Justice, Office of Open Government
608-267-2220
P.O. Box 7857
Madison, WI 53707-7857
<https://www.doj.state.wi.us/office-open-government/office-open-government>
- Wisconsin Historical Society, <https://www.wisconsinhistory.org/Records/Article/CS3806>
- Wisconsin Public Records Board,
<http://publicrecordsboard.wi.gov/docview.asp?docid=28661&locid=165>
- Wisconsin Statutes, <https://docs.legis.wisconsin.gov/statutes/prefaces/toc>



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Thank You!

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Ethics & Conflicts of Interest



Attorney Philip Freeburg
Distinguished Lecturer
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Objectives

- Policy
- Code of Ethics for Local Government Officials
- Private Interest in Public Contract Prohibited
- Incompatible Offices and New Offices
- Resources



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Why did voters elect you to be a County Official?

- A. They trust me
- B. They think I am reliable
- C. They believe I put the County first
- D. A bit of A, B & C
- E. I ask myself this everyday

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Special Integrity

- "Elected officials, their appointees, and government workers are expected to perform their public acts with honesty, openness, diligence, and special integrity."
 - Ronald Reagan
 - 1977 Speech

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Policy

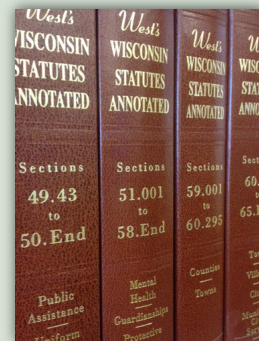
- Limit self-dealing
 - Not profiting from holding Public Office
- Avoid Conflicts between Personal Interest & Public Responsibilities
 - Preserve the Integrity of Governmental Decision Making
- Preserve public confidence
 - Avoid the Appearance of Impropriety

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Code of Ethics for Local Government Officials

- General Ethics Code
 - Wis. Stat. § 19.52
- Definitions
 - Wis. Stat. § 19.42



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Local Ethics Code Basics

- Private Gain
- Influence and Reward
- Conflicting Interest
- “Pay to Play”

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Private Gain

Wis. Stat §19.59(1)(a)

- Prohibits using Public Office
- To obtain financial gain, *or*
- Anything of substantial value
- For Private Benefit of:
 - The official,
 - Immediate family members, *or*
 - Organization associated with the official

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“Immediate Family”

The Official’s:

- Spouse, or
- Relative by marriage, or Lineal Descent
 - Who, directly or indirectly:
 - Receives more than 50% of their support from the Official, *or*
 - Provides 50% of the Official’s support [§19.41(7)]

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Ethics Commission Opinion: Local Official may participate even if has a substantial financial interest if:

- The official’s action affects a whole class of similarly-situated interests;
- The official’s interest is insignificant when compared to all affected interests in the class; and
- The official’s action’s effect on the official’s private interests is neither significantly greater nor less than upon other members of the class

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Exercise



- Fromage County Board elected Sid Carlton its chair.
- When the welcome page of the County web site was updated, the Chairman picture shows Carlton in his work clothes in his office
 - Sid has his own dental practice in the county seat
- The picture caption and a message from the chair both state his name as **“Board Chair Dr. Sydney Carlton, D.D.S.”**

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Do you have any concern about Carlton's photo on the county Web site?



- A. No, as long as he does not have his dental office's information with the photo
- B. No, he just happens to be a dentist
- C. Yes, he is using the county web site to promote his dental practice
- D. Yes, the county looks bad, because nobody likes dentists
- E. No, it is good for the county to have a doctor as chair

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Abstaining from Official Action

- Removing yourself from the decision making process or the information exchange in your official capacity.
- Not just voting “Abstain”

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Influence and Reward *Wis. Stat. §19.59(1)(b)*

- No local public official
- May solicit or accept
- Anything of value
- If it could reasonably be expected to influence the official’s judgment
- Or could reasonably be considered a reward for official action.

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Definition: “Anything of Value”

- Money
- Property
- Favor
- Service
- Payment
- Advance
- Forbearance
- Loan
- Promise of Future Employment

- Wis. Stat. § 19.42 (1)

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“Anything of Value” - Exceptions

- Compensation and expenses paid by governmental unit
- Items of nominal or inconsequential value
- Hospitality extended by a person for purposes unrelated to government business
- Legally reported Campaign Contributions
- Outside Employment is *not* prohibited

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Exercise



- County Supervisor Kate Nickelby is drinking an old fashioned with her family while waiting for her table in the bar of a local supper club.
- The bartender gives her another old fashioned saying “The man over there bought this for you.” He points to someone at the bar
- Kate is not sure, but she thinks she saw the man before at a Forestry and Zoning Committee meeting

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What should Kate do with the old fashioned?

- A. Ask if rail brandy was used or not
- B. Take the drink; anyone that knows her knows she is not impressed by just one old fashioned
- C. Politely decline the drink
- D. Give the drink to her spouse
- E. Down the drink before anyone notices

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“Anything of value” not always hard to determine



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Bottom Line

- *Cannot* accept gifts because you are a public official
- *May* receive gifts unrelated to public office
- *May* receive gifts on behalf of the governmental unit

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Conflicting Interests - Affecting Financial Interest



Wis. Stat. 19.59(1)(c)(1)

- No local public official
- May take any official action
- Substantially affecting a matter
- In which the official, the official's immediate family, or an organization with which the official is associated
- Has a substantial financial interest.

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Conflicting Interests - Producing Financial Benefit



Wis. Stat. 19.59(1)(c)(2)

- No local public official
- May use their public office
- To produce or assist in the production
- Of a substantial benefit
- For the official, the official's immediate family, or an organization with which the official is associated

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“Organization”

Any:


- Corporation
- Partnership
- Proprietorship
- Firm
- Enterprise
- Franchise

- Association
- Trust, or
- Other legal entity
 - But not an individual or body politic

• §19.42(11)

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“Associated”

- When the official or a member of the official’s immediate family is either:
 - Officer
 - Director
 - Owns at least 10% of an organization, *or*
 - Authorized representative or agent
- *Membership or employment* with an organization ***does not*** constitute being “associated” with the organization

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Abstain from County Highway project?



- A. Yes
- B. No
- C. Abstain from voting, but it is acceptable to take part in discussions

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“Pay to Play” Restrictions

Wis. Stat. § 19.56(1)(br)

- May not use office to obtain political contribution, service or anything of value for a candidate, party, political committee, or persons that communicates for them.

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Enforcement

- \$1,000 forfeiture
- Void Action or Restitution of wrongful gains
- \$5,000 fine and 1 year imprisonment
- Removal from Office

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Prohibited Interest in Public Contract

- Criminal Statute
- Strict Liability
- Conduct in a **Private** Capacity
 - *and*
- Conduct in **Official** Capacity
 - - Wis. Stat. §946.13(1)(a)&(b)

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Prohibited Interest in Public Contract - Private Capacity

- County Officer or Employee In **Private Capacity** cannot
 - Bid for, negotiate or enter into a contract with their County
 - In which they have a direct or indirect financial interest, and
 - The officer or employee is *authorized* or *required* to participate in the making of the contract

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■ Wis. Stat. §946.13 (1)(a)

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Abstaining is **NOT** a defense for County Official or Employee

- Because the statute requires only that you are *authorized* or *required* to participate in making contracts
 - Statute covers private business conduct of an official or employee, not conduct on behalf of County
 - Irrelevant that choose not to participate
 - Impossible to abstain from your private interest in a contract

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Prohibited Interest in Public Contract - Public Capacity

- Violated when
- Official or Employee has a direct or indirect interest in a private contract
 - And
- Participates in the making of the contract or performs any function requiring discretion
 - Votes, Discuss, Investigate or Recommends
 - Official Action in other words
 - Wis. Stat. §946.13 (1)(b)

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Exemptions

- Contract(s) does not exceed **\$15,000** in any year
 - Calendar year
 - Limit is cumulative

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\$15,000 Exemption only applies to Private Interest in Contract

- In **Official Capacity** still must abstain or exercise no discretion
- Must also abstain under **Ethics Code**

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More Exemptions

- Wildlife damage compensation, tax credits for farmland preservation and others
- Bankers
 - Contracts for depositing funds in public depository
 - Loans for temporary borrowing or 10 year promissory notes, State bonds
 - Other exemptions
- Officials who are Lawyers with law firm providing the County legal service who have less than 2% interest in firm

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Penalties Prohibited Interest in Public Contract - Class I Felony

- Up to 2 Years imprisonment, \$10,000 fine or both
- Contract is void

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Supervisor Eligibility for other Jobs with County

- Cannot take job if created by board during your term of office
 - Even if you abstain
 - Can take job with County for existing position
 - Must first resign from Board before applying
- Wis. Stat. § 66.0501(2)

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Incompatible Offices



1. Where one office is superior to another in some respect so that duties under each conflict to the public detriment
2. Nature of duties of two offices for public policy reasons it is improper one person do both
 - Wisconsin Law Common Law
 - *State v. Jones*, 130 Wis. 572 (1907)

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1. One office superior to the other



- Conflict as to some or all duties to public detriment
- Example:
 - City Alderperson and City Employee
 - Alderperson votes on terms of employment: wages, hours, benefits
 - *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984).

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2. Contrary to public policy

- Nature and duties of 2 offices makes it improper, for reasons of public policy for one person to hold both
 - Not necessary one be superior to the other
- Example
 - Sheriff and Town Supervisor
 - Sheriff and Coroner
 - Town Assessor and Board of Review

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Holding Two Incompatible Offices Vacates First Office

- First office is automatically vacated upon taking incompatible office
 - *State ex rel. Stark v. Hines*, 194 Wis. 34 (1927)
- If resign, the second office is not automatically restored to first office
- Acts done in *good faith* in first office are valid
 - *73 Opinions of the Attorney General 83 (1984).*

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Statutes Modifying Incompatible Offices Rules



- Exceptions provide for limitations and conditions to protect the public interest
- These exceptions should be narrowly construed
 - *Waukesha County v. Johnson*, 107 Wis.2d 155 (Wis. App., 1982)

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Other Boards, Committees or Commission



- May serve representing the town on other boards or commission
 - No additional compensation unless authorized by statute
 - May receive per diem if every other member of the board or commission is eligible for per diem
 - Wis. Stat. § 66.0501 (2).
- Town Supervisor, Alderperson or Village Trustee can serve on County Board
 - Wis. Stat. § 59.10 (4).

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Other Ethics Laws

- Bribery - Wis. Stat. § 946.10
- Misconduct in Office - § 946.12
- Bias denying Due Process in Quasi-Judicial Hearings and Decision - See *Keen v. Dane County*, 269 Wis. 2d 488 (Ct. App. 2003).
- Campaign Finance & Prohibited Election Practices - Wis. Stats. Ch. 11 & 12

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Tools *Not* Rules

- Help with building and maintaining Leadership
 - Trust
 - Reliability
 - Integrity

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To Learn More

- County Officials Handbook , 7th Edition
- localgovernment.extension.wisc.edu
 - Ethics & Conflicts of Interest- FAQ
- ethics.wi.gov

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Ethics & Conflicts of Interest

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