

FAILURE TO TRANSFER LOCAL GOVERNMENTAL PROPERTY OR RECORDS

GAINING COMPLIANCE FROM FORMER LOCAL GOVERNMENTAL
OFFICIALS WHO FAIL TO RETURN GOVERNMENTAL PROPERTY
OR RECORDS



LOCAL GOVERNMENT EDUCATION PROGRAM
UW-MADISON DIVISION OF EXTENSION



LOCAL GOVERNMENT EDUCATION PROGRAM

Local Government Education (LGE) Program staff within the University of Wisconsin-Madison Division of Extension have been fielding questions regarding the correct process newly elected local officials should follow to obtain property or records from outgoing government officials who fail to return local government property or records despite a request for their return. The failure to produce records includes wiping governmental laptops clean before turning the laptops over to current local government officials.



OPEN RECORDS LAW OBLIGATION TO DELIVER PUBLIC RECORDS

Wis. Stat. § 19.21(1), a provision of the Wisconsin Open Records Law, requires local government officials to maintain governmental records as follows:

Each and every officer of the state, or of any county, town, village school district, or other municipality or district, is the legal custodian of and shall keep and preserve all property and things received from the officer's predecessor or other persons and required to be filed, deposited, or kept in the officer's office, or which are in the lawful possession or control of the officer or the officer's deputies, or to the possession or control of which the officer or the officer's deputies may be lawfully entitled, as such officers.



Subsection (2) of the statute then places a legal obligation on the outgoing local government officials to return local governmental records to the appropriate local government official upon request, and reads as follows:

Upon expiration of each such officer's term of office, or whenever the office becomes vacant, the officer . . . shall on demand deliver to the officer's successor all such property and things then in the officer's custody, and the officer's successor shall receipt therefor to said officer, who shall file such receipt, as the case may be, in the office of the . . . town clerk . . . or other secretarial officer of the municipality or district . . .

OPEN RECORDS LAW PENALTIES FOR FAILURE TO PRODUCE PUBLIC RECORDS

Failure to provide the requested local governmental records could lead to the payment of penalties. Wis. Stat. § 19.21(3) provides that a former local government official "shall forfeit not less than \$25 nor more than \$2,000" for such a failure. This is in addition to any other civil or criminal penalty under other Wisconsin laws such as theft under Wis. Stat. § 943.20. The offending former local government official makes the penalty payment to the town or municipal treasury. Most likely the court will order the penalty to be paid out of the former official's personal funds.

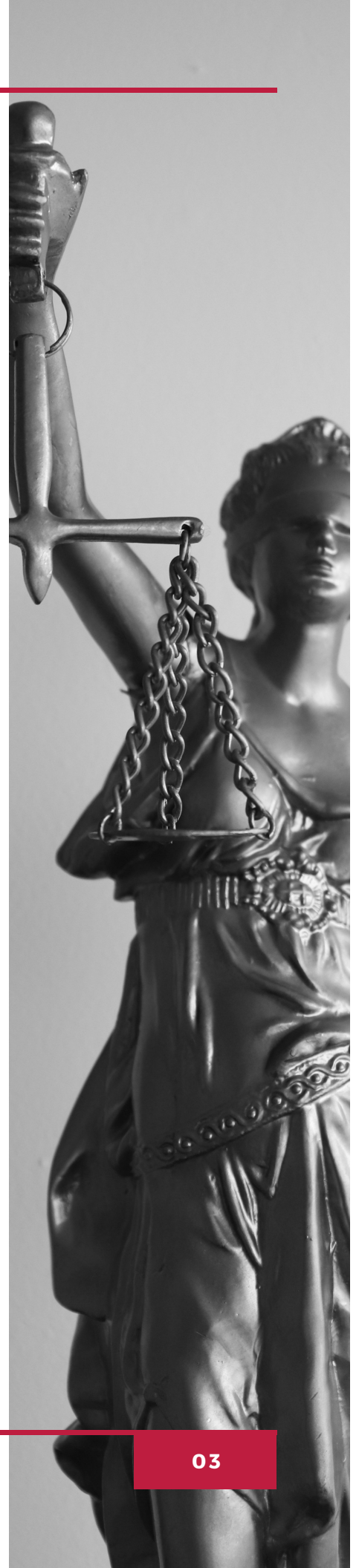
PROCEEDINGS TO COMPEL RECORD PRODUCTION

If an outgoing local government official fails to deliver the requested records to the clerk, Wis. Stat. § 19.22 sets up a process whereby the local government may seek assistance from the county circuit court. Under Subd. 1, local government officials may file a complaint with any county circuit court judge in the county in which the non-complying former official resides. The complaint should include a statement of what property or records is being sought from the former local government official, document the attempts made to gain custody of the records, and document the refusal or neglect of the former local government official to turn the records over to the appropriate local governmental official. The complaint should include an affidavit from the official who made the request(s).

Under Wis. Stat. § 19.22(1), the circuit court judge may order the production of the requested records and reads in relevant part:

If the judge is satisfied by the oath (affidavit) of the complainant (town official) and other testimony as may be offered that the property or things are withheld, the judge shall grant an order directing the person so refusing to show cause, within some short and reasonable time, why the person should not be compelled to deliver the property or things.

If, upon investigation, the circuit court judge determines the requested governmental property or records have not been returned by the former governmental official, the circuit court judge may, by warrant, order the former governmental official to be remanded by the sheriff to the county jail until the former governmental official produces the requested property or records.



The circuit court judge may also issue a warrant to the county sheriff to search the former government official's home and other designated locations to find the missing property or records. If requested records are found, the judge shall order the sheriff to bring the records to the appropriate local government official.

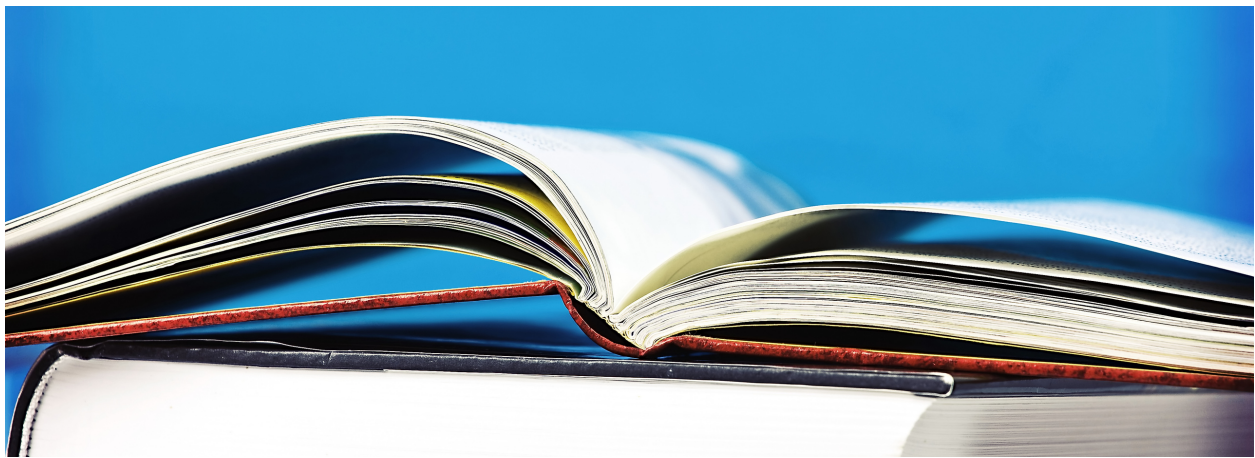
The potential jail time is in addition to the potential monetary penalties under Wis. Stat. § 19.21(3).

This Wisconsin Open Records remedy is unusual since most governmental legal actions must be brought by a district attorney who has discretion on whether to bring the requested legal action. Here, the remedy for non-compliance is for the city, village, or town to go directly to the county circuit court to obtain the appropriate order against the former local government official for failure to produce municipal property or records. The order, once again, could include incarceration in the county jail.

Finally, there is only one recorded state appellate level case relating to Wis. Stat. § 19.22. *In State ex rel. Velie v. Morgan*, 130 Wis. 293 (1907), the Wisconsin Supreme Court reviewed a former county treasurer appeal challenging a Waupaca County Circuit Court order requiring the county sheriff to jail the former treasurer until he “turned over all books, papers, and money” to the new county treasurer.

The circuit court judge also ordered the former official to pay a \$25 fine ordered by a magistrate before the former county treasurer could be released from jail. The Wisconsin Supreme Court upheld the incarceration order. However, the Court struck down the \$25 fine based on a procedural holding that the magistrate could not require the jailed former county treasurer to pay the \$25 fine as a condition of release.





This decision, over one hundred years old, does not call into question the substance of Wis. Stat. § 19.22. Therefore, both jail time and monetary penalties continue to be remedies available to the incumbent governmental board seeking to obtain Open Records Law compliance from former local governmental officials.

FULL OPEN RECORDS LAW COMPLIANCE IS THE ALWAYS THE BEST APPROACH

Based on numerous questions LGE and Wisconsin Towns Association staff received during the Spring 2023 Town Officials Workshops, former local government officials are either failing -- or even outright refusing -- to turn over governmental property or records to their successors. Unfortunately, this appears to be happening far more now than in the past. The failure to produce official governmental records includes the alleged destruction, discarding, or deletion of governmental records. In Wisconsin, under the Open Records Law, there is no place for a former government official to fail, or refuse, to turn over governmental property or records to current elected and/or appointed local government officials. Wisconsin law requires compliance and contains both an unusually direct judicial review process and the potential for substantial penalties.

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