

# Records Retention Requirements and Strategies

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## Statutory Requirements:

- ▶ **s. 19.21(1)** Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from the officer's predecessor or other persons and required by law 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.



## Statutory Requirements:

- ▶ **s. 19.21(2)** Upon the expiration of each such officer's term of office, or whenever the office becomes vacant, the officer, or on the officer's death the officer's legal representative, 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 said receipt, as the case may be, in the office of the secretary of state, county clerk, town clerk, city clerk, village clerk, school district clerk, or clerk or other secretarial officer of the municipality or district, respectively; but if a vacancy occurs before such successor is qualified, such property and things shall be delivered to and be receipted for by such secretary or clerk, respectively, on behalf of the successor, to be delivered to such successor upon the latter's receipt.



## Statutory Requirements:

- ▶ **s. 19.21(3)** Any person who violates this section shall, in addition to any other liability or penalty, civil or criminal, forfeit not less than \$25 nor more than \$2,000; such forfeiture to be enforced by a civil action on behalf of, and the proceeds to be paid into the treasury of the state, municipality, or district, as the case may be.



## Statutory Requirements:

- ▶ **s. 19.21(6)** A school district may provide for the destruction of obsolete school records. Prior to any such destruction, at least 60 days' notice in writing of such destruction shall be given to the historical society, which shall preserve any records it determines to be of historical interest. The historical society may, upon application, waive the notice.
- ▶ The period of time a school district record shall be kept before destruction shall be not less than 7 years, unless a shorter period is fixed by the public records board under s. [16.61 \(3\) \(e\)](#) and except as provided under sub. [\(7\)](#). This section does not apply to pupil records under s. [118.125](#).



## Statutory Requirements:

- ▶ **s. 19.21(7)** Notwithstanding any minimum period of time for retention set under s. [16.61 \(3\) \(e\)](#), any taped recording of a meeting, as defined in s. [19.82 \(2\)](#), by any governmental body, as defined under s. [19.82 \(1\)](#), of a city, village, town or school district may be destroyed no sooner than 90 days after the minutes have been approved and published if the purpose of the recording was to make minutes of the meeting.



## What is a “record”?



- ▶ “Record” means 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 or is being kept by an authority.



## What is a “record”?

- ▶ The definition of “record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved.
- ▶ In other words, a “record” is any information created or kept in connection with the official purpose or function of the school district.



## What is a “record”?

- ▶ Not all documents or information constitute a public record.
- ▶ A record does not include (for example):
  - Drafts, notes, preliminary documents and similar materials prepared for the originator’s personal use . . .
  - Published material available for sale or at the library.
  - Material with access limited due to copyright, patent, or bequest.
  - An identical copy of an otherwise available record.



## What is a “record”?

- ▶ An email that is purely personal in nature is a “record” and may or may not be subject to retention and disclosure requirements.
  - If an email becomes a part of an investigation as to whether an employee or local public official violated the law or policy, personal emails will become records subject to retention and disclosure requirements.
  - *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86.



## How should we maintain records?

- ▶ School districts should adopt a records retention schedule that covers all of the different types of records and records retention requirements.
- ▶ The Department of Public Instruction (DPI) and the Wisconsin Public Records Board have developed a records retention schedule specifically for school districts that covers the retention of both electronic and hard copy records.



## Records Retention Schedule for School Districts

- ▶ This Wisconsin School District Records Retention Schedule (WSDRRS) provides recommended retention periods for records common to all school districts, denotes records of historical importance, and describes a process for transfer of records to the Wisconsin State Historical Society as well as a procedure whereby the Wisconsin State Historical Society may waive the notice requirement.



## Records Retention Schedule for School Districts

- ▶ Adoption of the WSDRRS will:
  - Enable disposal of some records in less time than the seven years generally required by the statutes;
  - Provide guidance regarding those school district records that should be preserved locally or are of interest to the Wisconsin State Historical Society; and
  - Eliminate paperwork for both the school district and the Wisconsin State Historical Society.



## Records Retention Schedule for School Districts

- ▶ **District Options:** The Schedule serves as a guidepost against which to check the individual needs of each school district. A school district may adopt the entire Schedule, individual sections, or a modified version.
- ▶ The Public Records Board along with the Wisconsin Department of Public Instruction recommends that school districts adopt the WSDRRS and submit the Notification Form to the Wisconsin State Historical Society.



## Records Retention Schedule for School Districts

### ▶ To Adopt the Schedule

- School districts are advised to adopt the Schedule even though they may not have all the records listed in it.
- A school district may adopt the entire schedule, individual sections, or a modified version.



## Records Retention Schedule for School Districts

### ▶ To Adopt the Schedule

- A school district may develop a Schedule with different retention periods from those listed. For records to be retained less than seven years, the school district may not adopt a retention period shorter than that indicated in the Schedule without the approval of the Public Records Board.
- A new Schedule, or list of modifications, must be sent with the Notification Form. Specific school district records can be listed in **Section 6, Miscellaneous Records**. An adopted Schedule becomes the district's policy on record retention, destruction, and local preservation and/or transfer of records to the Wisconsin State Historical Society.



## Records Retention Schedule for School Districts

### ▶ Additional/Miscellaneous Records

- School districts may have records that are not on the WSDRRS - many older records do not conform to the record types listed in the schedule.
- To prevent the accidental destruction of historically significant records, school districts should notify the State Historical Society prior to the destruction of any record more than 50 years old, whether listed in the schedule or not.



## Records Retention Schedule for School Districts

### ▶ Additional/Miscellaneous Records

- School districts may destroy records that do not appear on the schedule any time after seven years and be in compliance with s. 19.21(6) provided that 60 days written notice is given to the State Historical Society.
- If the school district wishes to destroy a record before seven years have elapsed, it must obtain approval from the Public Records Board. Districts should contact the Executive Secretary of the Public Records Board for information on how to submit schedules to the Board for its review.



## Records Retention Schedule for School Districts

### ► Record Destruction:

- Records may be delayed from destruction, but only under the following conditions:
  - Records are required for an IT system, business program, performance, financial, or security forensic audit;
  - Records are relevant to an actual or imminent legal proceeding; or
  - A relevant public record request has been received and not completed.



## Records Retention Schedule for School Districts

### ► Record Destruction:

- Before disposing of a record, the office managing the record must determine if an audit, litigation, or public record request is pending. And notably, after a public records request has been filed, Wisconsin law forbids the destruction of any relevant record until the request is granted, or at least 60 days after the request is denied, and court orders may extend this time period. Wis. Stats. § 19.35(5).
- If an authority receives written notice that an action relating to a record has been commenced under s. [19.37](#), the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.



## Records Retention Schedule for School Districts

### ▶ WSDRRS Organization:

- The schedule is divided into 8 sections and covers:
  - Administrative (Board) Records
  - Finance Records
  - Personnel Records
  - Student Records
  - Special Education Records
  - Miscellaneous Records
  - Electronic Records
  - Emails



## Records Retention Schedule for School Districts

### ▶ WSDRRS Highlights:

- Examples of records that must be retained permanently pursuant to the WSDRRS:
  - School board meeting minutes and agenda packets
  - School board committee meeting minutes
  - Referendum results
  - School district boundaries and plats, including acknowledgments of changes
  - Annual audit reports



## Records Retention Schedule for School Districts

### ▶ WSDRRS Highlights:

- Examples of records that can be retained for fewer than 7 years under the WSDRRS:
  - Citizens advisory committee meeting minutes and management team meeting minutes (3 years)
  - Reports to the board (3 years)
  - Election notices, petitions, poll lists, and registrations (2 years)
  - Newsletters/Bulletins (1 year)



## Records Retention Schedule for School Districts

### ▶ WSDRRS Examples of Potential Concerns:

- Agenda packets (permanent)
- Legal opinions (7 years)
- School board policies and procedures (until superseded)
- Management guidelines (until superseded)
- Complaints to the school board (3 years)
- Tools and equipment inventory (until superseded)



## Records Retention Schedule for School Districts

### ▶ WSDRRS Examples of Potential Concerns:

- Surveillance video (?)
- Social media posts (?)
- Text messages (?)
- Voicemails (?)
- Photographs (?)



## Electronic Records

### ▶ Records retained in an electronic format only must meet the requirements of [ADM 12.05](#) of the Wisconsin Administrative Code:

- Social media posts
- Emails
- Voicemails
- Text messages
- Website records
- Others?

### ▶ Public Records Board Guidance:

[http://publicrecordsboard.wi.gov/docs\\_all.asp?locid=165](http://publicrecordsboard.wi.gov/docs_all.asp?locid=165)



## Electronic Records

- ▶ Social media/website considerations:
  - Who may post, manage, or control?
  - Who is responsible for ensuring that records are archived?
  - How are the records archived so that retention requirements and periods are met?
  - Are third-party messages or posts considered records?
  - Does the district have a social media or website policy?



## Electronic Records

- ▶ Disclosure of electronic records:
  - If an electronic record is subject to disclosure pursuant to a public records request, the district is required to provide a copy of the electronic record that is “substantially as good” as the original.
  - In one case, a court concluded that providing an analog copy of a digital recording was not sufficient.
  - Consequently, retention measures must take into account not only the district’s duty to retain the records, but also the ability provide access to, or copies of, those records in a manner consistent with the public records law.



## Education/Pupil Records

- ▶ “Education records” are those records that are directly related to (contain personally identifiable information about) a student and that are maintained by the district (with exceptions).
- ▶ A district may not disclose or provide access to personally identifiable information that is derived from educational records without written parental (or adult student) consent (many exceptions apply).
- ▶ As such, pupil record retention systems must have appropriate safeguards to ensure that only those district officials who have a legitimate educational interest in the records (i.e., need access to fulfill professional responsibilities) have access to them.



## Education/Pupil Records



- ▶ Pupil record retention systems must also allow relevant personnel to quickly access the records. For example:
  - Upon receiving a parent’s request to review the pupil records of his/her child, the district must provide access to the records within 45 days of receiving the request.
  - Under 2017 WI Act 251, when a pupil is changing schools, school districts are required to transfer all pupil records relating to the specific pupil to the pupil’s new school or school district ***no later than the next working day*** after the transferring school or school district receives any of the following:
    - 1. written notice from an adult pupil, or from the parent or guardian of a pupil who is minor, that the pupil intends to enroll in another school or school district;
    - 2. written notice from the other school or school district that the pupil has enrolled in that school or school district; or
    - 3. written notice from a court that the pupil has been placed in a juvenile correctional facility, as defined in s. 938.02 (10p), or a secured residential care center for children and youth, as defined in s. 938.02 (15g).

## Education/Pupil Records



### ► Retention periods:

- “Progress records” are those pupil records which include the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record, the pupil's immunization records, any lead screening records required under s. [254.162](#) and records of the pupil's school extracurricular activities.
- Progress records must be retained for at least 5 years after the student graduates or leaves the school system.

## Education/Pupil Records



### ► Retention periods:

- “Progress records” are those pupil records which include the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record, the pupil's immunization records, any lead screening records required under s. [254.162](#) and records of the pupil's school extracurricular activities.
- Under the WSDRRS, student school extracurricular activities, degrees/awards, report cards, and transcripts are all classified as progress records and are all retained permanently.

## Education/Pupil Records



### ► Retention periods:

- “Behavioral records” are those pupil records that include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual pupil's behavior, tests relating specifically to achievement or measurement of ability, the pupil's physical health records other than his or her immunization records or any lead screening records required under s. [254.162](#), law enforcement officers' records obtained under s. [48.396 \(1\)](#) or [938.396 \(1\) \(b\) 2.](#) or [\(c\) 3.](#), and any other pupil records that are not progress records.
- Behavioral records must be retained for no more than 1 year after the student graduates or leaves the school system unless the period is extended by mutual consent.

## Education/Pupil Records



### ► Retention periods:

- Note that the WSDRRS contains much more specific categories than just “progress” or “behavioral” records and sets in some circumstances different retention periods for patient health care records and some special education records for audit purposes.
- According to the WSDRRS, there are no legal provisions explicitly addressing the period of time patient health care records must be maintained or when they must be destroyed. The general practice is to maintain these records as long as similar non-student records, e.g., accident reports, employee health records, are maintained, which is typically 5-7 years. The department recommends that a school district consult with its legal counsel and medical advisor to develop policies regarding the maintenance and destruction of pupil records that must be treated as patient health care records.

## Education/Pupil Records

- ▶ Question: Are we allowed to maintain special education records in a student’s cumulative file?
  - The IDEA does not require the district to keep special education records separate from the cumulative folder, but best practice may be to do so – why?
    - Restrict access to special education records to only those school officials with a legitimate educational interest in those records.
    - Special education records may contain patient health care records that the district is prohibited from disclosing without informed consent.



## Education/Pupil Records

- ▶ One approach – a two-file system for SPED records:

Primary File	Secondary File
<ul style="list-style-type: none"> <li>• Access log</li> <li>• Early intervening docs</li> <li>• Referral form</li> <li>• Consent to evaluation/re-evaluation</li> <li>• Multidisciplinary team report – eligibility determination</li> <li>• Current IEP</li> <li>• Initial permission for placement</li> <li>• Current written notices and meeting notices</li> </ul>	<ul style="list-style-type: none"> <li>• Parent correspondence</li> <li>• Written notices over one year old</li> <li>• Outdated IEPs</li> <li>• Test protocols</li> <li>• Annual review minutes</li> <li>• Student work samples</li> <li>• Written correspondence</li> <li>• Discipline notices</li> <li>• Three-year evaluation documentation</li> </ul>

## Education/Pupil Records

- ▶ The DOE recommends that the primary file is kept with the main service provider or case manager and contains the essential compliance documents and current IEP.
- ▶ The primary file contains a limited amount of information and is bound in chronological order.
- ▶ At the end of the school year, outdated information, such as the old IEP and written notices, are sent to the special education director's office to be filed in the secondary file.



## Personnel Records



- ▶ What is a personnel record? Examples include:
  - Application materials:
    - Application form, resume, letters of reference, transcripts, etc.
  - Employment contracts/letters of assignment
  - Evaluations
  - Letters of performance expectations
  - Plans of improvement
  - Complaints, investigatory, and disciplinary documents
  - Accident reports, injury, and workers compensation documents

## Personnel Records



### ▶ Retention considerations:

- Confidentiality – many personnel records are confidential and may not be released to, or accessed by, unauthorized individuals, including in some cases, the employee who is the subject of the personnel file or record.
- For example, an employee does not have a right to access:
  - Records relating to the investigation of possible criminal offenses committed by that employee.
  - Letters of reference for that employee.
  - Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.

## Personnel Records



### ▶ Retention considerations:

- A member of the public does not have a right to access, for example, an employee's:
  - Home address
  - Home/cell phone number
  - Home email address
  - Financial information
  - Social security number
  - Evaluations conducted pursuant to educator effectiveness standards
  - Current/ongoing investigation documents regarding potential employee misconduct

## Personnel Records



- ▶ Retention periods:
  - Retention periods for personnel documents will vary depending upon subject matter or type of record.
  - WSDRRS examples:
    - Evaluations (6 years after retirement, resignation, or termination)
    - Injury claims (5 years after settlement)
    - Health/dental insurance waivers (3 years after retirement, resignation, or termination)
    - Grievance files (10 years after date of resolution)

## Personnel Records



- ▶ Retention periods:
  - Retention periods for personnel documents will vary depending upon subject matter or type of record.
    - For application materials, the bare minimum is one year from the date on which a position is filled.
    - Under the WSDRRS, application materials are retained for 6 years after retirement, resignation or termination for those individuals who were hired and 3 years for the application materials of individuals who were not hired.
    - Many attorneys believe that districts are not required to retain unsolicited application materials for positions that are not vacant if the board has a policy in which that stance is clearly communicated.



## Final Thoughts

Most districts do not have a dedicated records retention policy, but such a policy and corresponding administrative rules would help assign responsibilities to relevant administrative staff and employees, grant authority to those individuals to carry out their duties, create consistency with respect to the retention and destruction of records, and document the board's positions with respect to its records retention responsibilities.

## Questions?

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*\* Note: The information contained herein is subject to change, presented for informational purposes only, does not create an attorney-client relationship, and should not be construed as, or considered to be, legal advice. For legal advice, please contact your attorney.*



## Presenter Bio

Ben Richter is a WASB staff counsel and directly represents many school districts across the State of Wisconsin on employment, human resources and school law matters. Ben also provides general legal information to all WASB member school districts.

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