

Christa Westerberg

From: Christa Westerberg <westerberg@benderwesterberg.com>
Sent: Tuesday, January 5, 2016 2:53 PM
To: DOA Public Records Board Comments
Subject: Comments for Jan. 11 meeting/transitory records
Attachments: Comments to PRB, 1.5.16.pdf

Please see the attached.

Christa Westerberg

****Please note my new contact information below****

Bender Westerberg LLC

10 East Doty Street, Suite 800

Madison, WI 53703

office ph 608/310-3564

cell ph 608/438-6666

fax 608/441-5707

westerberg@benderwesterberg.com

January 5, 2016

Via Email

Wisconsin Public Records Board
Matt Blessing, Chair
PublicRecordsBoardComments@Wisconsin.gov

Re: "Transitory Records" and General Records Schedule for Administrative Records

Dear Mr. Blessing and Members of the Public Records Board:

I write these comments as an attorney in private practice who frequently deals with the Wisconsin Public Records law, Wis. Stat. § 19.31 *et seq.* I am also co-Vice President of the Wisconsin Freedom of Information Council. I am unable to attend your January 11, 2016, meeting in person, but wish to comment on agenda items 2, 5, and 6, relating to the Public Records Board's ("Board's") actions last August related to "transitory records."

At its August 24, 2015, meeting, the Board modified the General Records Schedule for "Administrative and Related Records," including what it calls "Records Disposal Authorization" ADM00011 for "Transitory Records." According to the revision history¹ for this General Records Schedule, the Board expanded the definition of "transitory records," "so RDA is no longer limited to correspondence records only. RDA now includes all transitory records." As you know, under the Board's guidance, transitory records are deemed of such "temporary usefulness" that they require no retention period at all. In other words, they may be instantly deleted by the recipient or creator.

I oppose the Board's vote to expand the term "transitory records," and the existence of a "transitory records" category at all. Allowing records custodians to instantly delete records permits improper and incorrect judgment calls, invites excessive destruction, and undermines the public's right to know as guaranteed in Wis. Stat. § 19.31. If records are not retained, they cannot be requested, and once deleted, the public has almost no recourse to obtain this lost information. As we have seen in recent media reports, state agencies have relied on the Board's definition of "transitory records" to destroy records of visitors at the Governor's mansion, as well as text messages between agency staff and an applicant for a half-million dollar state loan. These records are of clear public interest, and may only represent a fraction of records that have been deleted since the Board's actions. "Instant

¹ See <http://publicrecordsboard.wi.gov/docview.asp?docid=15863&locid=165>

delete” and expanding the definition of “transitory records” deprives the public of knowing or understanding the basis for agency interactions and decisions.

More fundamentally, the Board lacks authority to allow instant deletion of state records. Retention of records is the rule, and destruction is the exception under the limited circumstances allowed by Wis. Stat. § 16.61. *See* Wis. Stat. § 16.61(4)(a). The statute does not characterize any records as “transitory” or allow for records to be instantly deleted. To the contrary, Wis. Stat. § 16.61(4)(b) suggests that records must be retained for one year before records retention schedules—which would allow for destruction—can even be proposed to the Board. The Board cannot authorize state agency employees to simply delete records as they are created. The “transitory records” definition also effectively creates a category of records that are exempt from production under the Open Records law, a change only the Legislature can make.

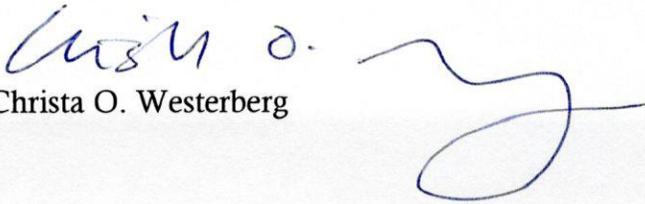
Thus, while I appreciate that the Board is revisiting its August 24, 2015, decision, the Board should rescind its decision and the entire category of “transitory records” in ADM00011. I understand that some records are of less value than others, but I cannot see how maintaining all records for some minimum period, such as the one year envisioned in statute, harms the State and its interests. Meanwhile, retaining records supports the public’s right to know and fosters confidence in government.

Finally, as you likely know, the Wisconsin Freedom of Information Council filed a verified Open Meetings Complaint with the Dane County District Attorney related to the un-noticed and un-recorded vote of the Board on August 24, 2015, to approve changes to the General Records Schedule and transitory records definition. While that Complaint speaks for itself, I would encourage the Board to look at the way it makes record destruction decisions and otherwise exercises its authority. Much of what the Board does and how it operates is a mystery to the public, hidden behind acronyms, jargon, confusing tables, and unwritten policies and procedures. The Board has rulemaking authority but has only used it, decades ago, to create microfilm standards, Wis. Admin. Code § PR 1 (last modified Aug. 1989). The Board should use notice and comment rulemaking to create transparent processes and standards for exercising its authority, so the public (and the Board itself) are not caught off-guard again.

Thank you for your consideration of these comments. I hope the Board takes this opportunity to weigh these issues and the public comments it receives, and not simply vote to reaffirm its August 24, 2015 decision, pro forma, at the January 11, 2016, meeting.

Sincerely,

BENDER WESTERBERG LLC


Christa O. Westerberg