



**Wisconsin  
Open Meetings Law**

October 17, 2014  
American Family Training Center--Auditorium  
Building A, 6000 American Family Drive  
Madison, Wisconsin

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Assistant Attorney General  
Wisconsin Department of Justice



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**Additional Open Meetings Resources**

- Consult legal counsel
- Download DOJ Outline and other resources free of charge, at [www.doj.state.wi.us](http://www.doj.state.wi.us)
- Call Connie Anderson, (608) 266-3952
- Write to: Attorney General J.B. Van Hollen  
Department of Justice  
Post Office Box 7857  
Madison, WI 53707-7857



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**PUBLIC POLICY**

**“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”**

—(Justice) Louis D. Brandeis  
*Other People’s Money and How the Bankers Use It* (1914)  
Ch. 5, p. 92



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"In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."  
Sec. 19.81(1), Wis. Stats.

"This subchapter shall be liberally construed to achieve the purposes set forth in this section. . . ."  
Sec. 19.81(3), Wis. Stats.



2010 OML Guide, p.1

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### What does the law require? Sec. 19.83(1)

- All **meetings** of all **governmental bodies**:
- must be preceded by **public notice**
- must be held a place **open** to the public
- must be held in a **reasonably accessible** place
- except where statutes specifically authorize a closed session



2010 OML Guide, p.1

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### GOVERNMENTAL BODIES



2010 OML Guide, p.1

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“Governmental body’ means a state or local agency, board, commission, council, department or public body corporate and politic **created by constitution, statute, ordinance, rule or order**; a governmental or **quasi-governmental corporation . . .** or a **formally constituted subunit** of any of the foregoing. . . .”

Sec. 19.82(1), Wis. Stats.

2010 OML Guide, p.2

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### Governmental Bodies: What’s in?

- the necessary minimum: (1) determinate membership; (2) responsibility for aspect of government business; (3) expectation of collective action
- manner of creation, not nature of authority matters
- “created by . . . order.” sub-units, advisory bodies
- the legislature – when it chooses
- governmental and quasi-governmental corporations; e.g., “Friends of . . .” organizations; economic development corporations

2010 OML Guide, p.2-6

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### Quasi-Governmental Corporations

*State v. Beaver Dam Area Development Corp.*,  
2008 WI 90, 312 Wis.2d 84, 752 N.W.2d 295

- fact-specific inquiry
- totality of the circumstances are relevant
- case-by-case analysis of multiple factors
- circumstances influence weight of each factor

2010 OML Guide, p.4-5

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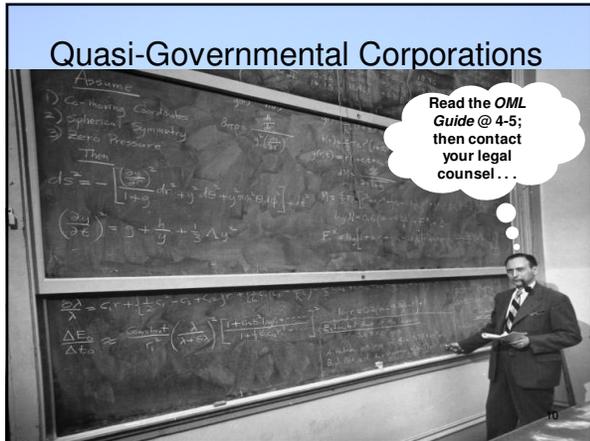
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### Quasi-Governmental Corporations



Read the *OML Guide* @ 4-5; then contact your legal counsel...

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### Governmental Bodies: What's out?

- groups of government agency employees – most of the time
- “ad hoc” groups: self-created; discussion of topics of mutual interest; indeterminate membership
- bodies meeting for the purpose of collective bargaining
- bodies created by the Wisconsin Supreme Court
- offices held by a single individual



2010 OML Guide, p.5-6

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### MEETINGS



2010 OML Guide, p.6-10

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“Meeting” means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, power or duties delegated to or vested in the body. If **one-half or more** of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any **social or chance gathering or conference** which is not intended to avoid this subchapter. . . .”

Sec. 19.82(1), Wis. Stats.

2010 OML Guide, p.6

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### Meetings: Key Concepts: “Purpose” Requirement

- “governmental business” an expansive concept
- formal or informal action or discussion
- information gathering on subject within authority
- interaction among members not necessary
- exclusions: “social” or “chance” gatherings; conferences not intended to avoid the law

2010 OML Guide, p.6-7

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### Meetings: Key Concepts: “Numbers” Requirement

- how many?: enough to determine course of action
- majority of membership; negative quorums
- purpose presumed where half of members present

2010 OML Guide, p.7, 9-10

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**Meetings: Key Concepts:  
“Convening” of Members**

- critical question: how much does a particular communication resemble a face-to-face exchange?
- written correspondence? no.
- telephone conference calls? yes.
- electronic communications? maybe . . . .
  - number of participants;
  - number of communications;
  - time frame of communications;
  - extent of conversation-like interactions

2010 OML Guide, p.7-8



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**Meetings: Key Concepts:  
“Convening” of Members (cont’d)**

- walking quorums or serial quorums
- multiple or overlapping meetings

2010 OML Guide, p.9



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**Meetings of Government Bodies:  
What does the law require?**

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**Notice, Open Sessions**

2010 OML Guide, p.10-17



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**Every meeting** of a governmental body shall be **preceded by public notice** . . . , and shall be held in **open session**. At any meeting of a governmental body, **all discussion** and **all action** of any kind, formal or informal, shall be initiated, deliberated upon, and acted upon **only in open session** except as provided in s. 19.85.

Sec. 19.83(1), Wis. Stats.



2010 OML Guide, p.10 19

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### Meeting Notices Who? When? What?

- **Who #1:** public, by posting or paid publication
- **Who #2:** media who have requested notice
- **Who #3:** official paper or other area news medium
- **When:** 24 hours before meeting starts
- **When:** “good cause” 2 hour minimum
- **What:** time, date, place, and **subject matter**



2010 OML Guide, p.10-11, 13-14 20

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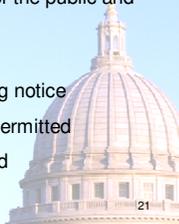
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### Meeting Notices Meeting Notice Content

- “Every ... notice ... shall set forth the ... **subject matter** of the meeting, including that intended for consideration at any **contemplated closed session**, in such form as is **reasonably likely to apprise** members of the public and the news media thereof.”

Sec. 19.84(2), Wis. Stats.

- presiding officer is responsible for meeting notice
- general subject matter designations not permitted
- “bright line” vs. “reasonableness” standard



2010 OML Guide, p.11-13 21

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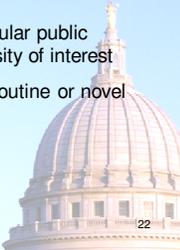
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### Meeting Notices

#### "Reasonable" subject descriptions

*State ex rel. Buswell v. Tomah Area School District,*  
2007 WI 71, 301 Wis. 2d 176, 732 N.W.2d 804

- factor #1: the burden of providing more detailed notice; specificity must be compatible with the conduct of government affairs
- factor #2: whether the subject is of particular public interest; measured by breadth and intensity of interest
- factor #3: whether subject involves non-routine or novel action beyond public's anticipation

2010 OML Guide, p.11-12 

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### Meeting Notices

#### "Reasonable" subject descriptions

*State ex rel. Buswell v. Tomah Area School District,*  
2007 WI 71, 301 Wis. 2d 176, 732 N.W.2d 804

- fact-specific inquiry
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2010 OML Guide, p.4-5 

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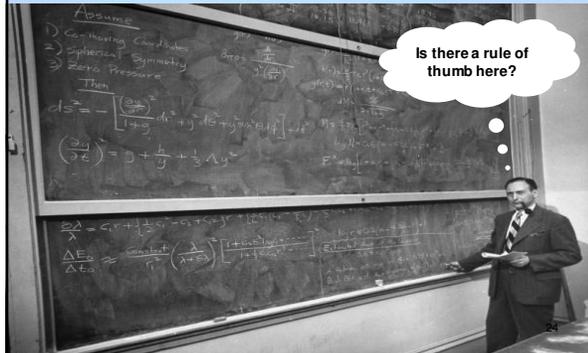
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### Meeting Notices

#### "Reasonable" subject descriptions



Is there a rule of thumb here?

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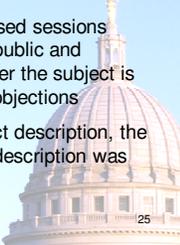
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**Meeting Notices**  
**Dept of Justice Guidance**

- DOJ’s “rule of thumb:” The drafter should ask, “Would a person interested in a particular subject be aware from reading the meeting notice that the subject would be discussed?”
- subject descriptions for contemplated closed sessions must contain enough information for the public and members of the body to determine whether the subject is authorized by one of the closed session objections
- the more specific and accurate the subject description, the less likely a court will determine that the description was unreasonable

2010 OML Guide, p.12 25



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**Open Session Requirements**

- “Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times....”  
Sec. 19.82(3), Wis. Stats.
- **Accessibility:** location; room characteristics; physical accessibility; persons with disabilities
- **Recording:** must be accommodated in open session
- **Citizen participation:** permitted; not required
- **Recordkeeping:** motions, roll-call votes, announcements of closed session business

2010 OML Guide, p.14-17 26



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**CLOSED SESSIONS**

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2010 OML Guide, p.17-23 27



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### Closed Session Procedure Sec. 19.85(1)(a)

- **Motion**
  - + **Announcement (statute + nature of business)**
  - + **Roll Call Vote (unless unanimous)****= Procedurally adequate closed session**
- presiding officer's announcement must be made part of meeting record
- DOJ advises to use closed sessions sparingly

2010 OML Guide, p.18



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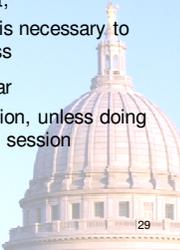
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### Closed Sessions: Attendance, Voting

- **Who may attend a closed session?**
  - all members of the body, including members of parent body, if meeting is of subunit;
  - whoever else the body determines is necessary to conduct the closed session business
- **Closed session voting:** propriety unclear  
DOJ advises bodies to vote in open session, unless doing so will compromise the need for a closed session

2010 OML Guide, p.22



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### Closed Session Justifications: Judicial or Quasi-judicial Deliberation

- **19.85(1)(a):** "deliberating concerning a **case** which was the subject of any **judicial or quasi-judicial** trial or hearing before **that** governmental body"
- "**case**" contemplates a controversy among parties who are adverse to one another
- a body may not deliberate in secret about "legislative-type" controversies; e.g., permits, zoning appeals, property tax appeals

2010 OML Guide, p.18-19



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Closed Session Justifications:  
Employment and Licensing Matters:  
Two related but distinct provisions

- **19.85(1)(b):** “considering **dismissal, demotion licensing or discipline** of any **public employee or person licensed** by a [body], or considering . . . tenure for a university faculty member, and the **taking of formal action** on any such matter. . . .”
- **19.85(1)(c):** “considering **employment, promotion, compensation, or performance evaluation data** of any **public employee** over which the governmental body **has jurisdiction or exercises responsibility.**”

2010 OML Guide, p.19-20  31

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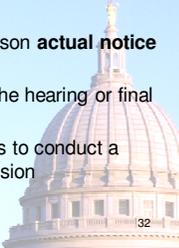
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Closed Session Justifications:  
Sec. 19.85(1)(b)

- **section applies** when the body plans to:
  - conduct a closed session **evidentiary hearing**; or
  - plans to take **formal action** in a closed session
- where the section applies,
  - the body must give the affected person **actual notice** of the closed session;
  - affected person may demand that the hearing or final action take place in open session
- **section does not apply** if the body plans to conduct a hearing or take formal action in open session

2010 OML Guide, p.19  32

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Closed Session Justifications:  
Sec. 19.85(1)(c)

- **section applies** to public employees and appointed officials over whom the body exercises responsibility; section allows closed session interviews of candidates
- body not required to give affected person(s) actual notice of the discussion
- **section does not apply to:**
  - elected officials,
  - body’s consideration of candidates to fill member vacancy
  - discussions involving **positions of employment** rather than specific persons

2010 OML Guide, p.19-20  33

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### Closed Session Justifications: Sensitive Reputation Information (1)

**sec. 19.85(1)(f):** “considering **financial, medical, social or personal histories** or disciplinary data of **specific persons**, preliminary consideration of **specific personnel problems** or the investigation of charges against specific persons . . . which, if discussed in public would be likely to have a **substantial adverse effect** upon the reputation of **any person referred to** in such histories or data, or involved in such problems or investigations.”

2010 OML Guide, p.20

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### Closed Session Justifications: Sensitive Reputation Information (2)

- section applies **only** where a member of the body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved
- section not limited to discussions about public employees
- section allows closure only for those parts of the discussion that involve the reputationally sensitive information

2010 OML Guide, p.20

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### Closed Session Justifications: Competitive/Bargaining Interests (1)

- **sec. 19.85(1)(e):** “**deliberating or negotiating** the **purchasing** of public properties, the **investing** of public funds, or conducting **other specified business**, whenever competitive or bargaining reasons **require** a closed session.”
- *Citizens for Responsible Development* case: “require” means that body’s competitive or bargaining interests leave the body with **no option** other than to close the meeting.
- the **body has the burden** to justify closure; conclusory assertion in announcement that matter will involve competitive issues is insufficient

2010 OML Guide, p.21

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### Closed Session Justifications: Competitive/Bargaining Interests (2)

- DOJ: direct and substantial affect on negotiations **vs.** one of several indirect influencing factors
- DOJ: mere inconvenience, delay, embarrassment, frustration or speculation about the probability of success **not** sufficient justification
- *CRD* case: insufficient justifications:
  - developer requested confidentiality;
  - public statements might attract competing developers;
  - public statements might give third parties incentive to find better deal elsewhere.

2010 OML Guide, p.21

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### Closed Session Justifications: Conferring With Legal Counsel

- **sec. 19.85(1)(g)**: "conferring with legal counsel for the governmental body who is rendering oral or written **advice concerning strategy** to be adopted by the body with respect to litigation in which it **is or is likely to become involved.**"
- government body may rely on legal counsel's opinion as to whether litigation is "likely" enough
- most often, specific legal matter should be identified in meeting notice; sometimes, strategic reasons for not identifying specific matter

2010 OML Guide, p.21-22

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### Closed Session Justifications: The rest of the story

- seven other specific closed session justifications listed on page 22 of the 2010 Open Meetings Law Compliance Guide
- public acceptance of legitimacy of closed sessions depends on:
  - sparing use of closed sessions;
  - quality of presiding officer's announcement of nature of closed session business;
  - Closed session discussion does not go beyond business announced

2010 OML Guide, p.22

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**VIOLATIONS &  
ENFORCEMENT**

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2010 OML Guide, p.23-26

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**Enforcement Alternatives**

- district Attorney, county where violation occurred, after receiving verified complaint from individual
- private individual, after verified complaint filed with district attorney and no enforcement action filed after 20 days
- expiration of 20-day period does not extinguish DA's right to commence an enforcement action
- Attorney General, where matter is statewide concern



2010 OML Guide, p.23-24

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**Enforcement: Violations**

- only members of the body have potential liability
- **violation #1: "knowing" attendance** at meeting held in violation of open meetings law
- "*knowing*" means positive knowledge of illegality or awareness (or conscious avoidance of awareness) that probability of illegality is high
- **violation #2: other violations** of open meetings law, even if not "knowing;" e.g., insufficient meeting notices; improper closed session procedures



2010 OML Guide, p.24-25

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### Enforcement: Defenses

- no member is liable for attendance at unlawful meeting if the member made or voted in favor of a motion to prevent the violation
- case law supports view that liability can be avoided for members who openly and in good faith seek and rely on the advice of the body's legal counsel

2010 OML Guide, p.25

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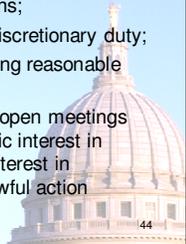
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### Enforcement: Remedies

- civil forfeiture for each violation: \$25 - \$300
- non-forfeiture relief:
  - declaration that law was violated;
  - injunction to prevent future violations;
  - order to perform mandatory, non-discretionary duty;
  - actual costs of prosecution, including reasonable attorneys fees;
  - voiding action taken in violation of open meetings law where court finds that the public interest in enforcing the law outweighs any interest in maintaining the validity of the unlawful action

2010 OML Guide, p.24-25

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