OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

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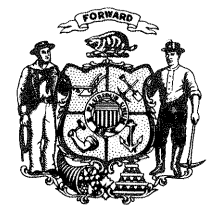
BRONSON C. LA FOLLETTE

ATTORNEY GENERAL



MADISON, WISCONSIN
1976

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PREFACE

Open Meetings; Anti-Secrecy; Legislation; Wisconsin's Open Meetings of Governmental Bodies Law, secs. 19.81 through 19.98, Stats., discussed. OAG 77-76

September 30, 1976.

DISTRICT ATTORNEYS AND CORPORATION COUNSELS
State of Wisconsin

Wisconsin's new Open Meeting Law became effective July 2, 1976. Chapter 426, Laws of 1975, repealed sec. 66.77, Stats., and created subch. IV of ch. 19 of the statutes consisting of secs. 19.81-19.98, Stats. The legislation is intended to strengthen and clarify provisions, to aid in interpretation and application, to gain a fuller measure of compliance, through voluntary means in most instances, and through judicial proceedings voiding acts of governmental bodies and imposing forfeitures for violations where necessary.

Duties of the Attorney General

Section 19.98, Stats., provides that "Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances."

This provision is intended to be primarily an educational and preventive measure rather than a remedial one. If timely advice is sought and the members of a governmental body are alerted to the provisions of the law there will be less need for prosecution in the courts. Since advice is necessarily conditioned on a given set of facts, requests should normally be made in writing. The request should set forth all material facts and circumstances. Response will be made in writing as rapidly as possible. Occasionally it will be necessary to respond to telephone inquiries because of emergency situations. Advice given in response to such inquiries is inherently less reliable than written responses. Consequently, such oral advice will not be considered by this office to be the equivalent of the written legal opinions issued to persons authorized by statute to request such opinions.

Duties of District Attorneys, County Corporation Counsels, and Other Governmental Counsel

The provisions of this section do not displace the duty of the district attorney or the corporation counsel to advise county officers and agencies with respect to the law. Members of county governmental bodies should seek the advice of their district attorney or corporation counsel rather than that of the Attorney General. District attorneys and corporation counsels should feel free to seek the advice of this office where they are unable to advise with confidence in any given situation. See sec. 165.25 (3), Stats. In like vein, members of non-county governmental bodies should seek and rely upon the advice of their respective town, city, village, school board or local governmental attorney with respect to legal advice necessary to carry out their duties under the law.

Enforcement

Section 19.97, Stats., places the burden of enforcement on the Attorney General and on the district attorney of the county in which a violation is alleged to have occurred. Enforcement at the local level has the best chance of proving violations. Actions in most cases have to be brought in the county or circuit court in the county of residence of the alleged violator. The differences between procedures of the various courts, pretrial conferences, need for intensive preliminary investigation and the assembling of witnesses and material evidence necessitate that enforcement in most cases should take place at the county level. The new law provides additional incentive in that where the district attorney brings the action, "the court shall award any forfeiture recovered together with reasonable costs to the county."

Before a district attorney can institute an action for forfeiture, some person must file a verified complaint with such officer. Published herewith is a form of verified complaint which may be used by any person, or which you may make available to any person so that such person may sign and file the same with you in proper case. Section 19.97 (1) and (4), Stats., governs forfeiture actions to some degree. However, they are also governed by ch. 288, Stats., to which your attention is directed. Also see *State v. Roggensack* (1962), 15 Wis. 2d 625, 113 N.W. 2d 389.

Section 19.97 (2), Stats., permits the Attorney General or district attorney to seek supplementary legal or equitable relief, in addition to forfeiture, by mandamus, injunction or declaratory judgment. Whereas such relief can be sought in conjunction with a forfeiture action, it is recommended that, in most circumstances, it be sought separately. This recommendation is based in part on the rule of strict construction which is applicable where penal statutes are involved, and sec. 19.81 (4), Stats., provides that such rule shall not apply where enforcement by forfeiture is not involved, but that in such case the subchapter shall be liberally construed to achieve the purposes set forth in sec. 19.81, Stats.

Section 19.97 (3), Stats., provides that any action taken at a meeting held in violation of the subchapter is voidable and that the Attorney General or district attorney may bring such action. The section requires a court to weigh the circumstances and equities involved in each case before holding any action void.

Section 19.97 (4), Stats., permits any person, who has made a verified complaint to the district attorney, to bring a *State ex rel.* action, for forfeitures or to void action taken at a meeting held in violation of the law, where the district attorney refuses or fails to commence an action to enforce the law within 20 days after receiving a verified complaint. In such case, any forfeiture would go to the state, but a court could award costs including reasonable attorneys fees to the person bearing the burden of prosecution, if prosecution were successful.

District attorneys and the Attorney General are empowered to exercise reasonable discretion in enforcing the law, including discretion as to the type of legal action to be brought, if any. Court proceedings should not be instituted on mere suspicion of a violation. Appropriate action should be commenced if there is apparent material and wanton violation and if there are credible witnesses and evidence available to prove the necessary elements of the violation.

Elements of Violation, Complaint, Burden of Proof

Section 19.96, Stats., provides for an increased penalty, in the nature of a forfeiture, of not less than $25 nor more than $300 for violation. To prevail in a forfeiture action against a violator it is necessary to establish that a member of a governmental body

"*knowingly*" *attended* a meeting of such body *held in violation* of the chapter. It is necessary to prove scienter under that portion of the provision. It is my opinion that proof of scienter is not necessary where it can be proven that a member in his official capacity "otherwise violates this subchapter by some act or omission." Failure of a chief presiding officer or his designee to give the public notice required under sec. 19.84, Stats., would be a type of omission which would be prosecutable. Section 19.96, Stats., contains certain defenses a member may raise even where it can be proven that he knowingly attended a meeting held in violation of the subchapter. It is my opinion that it is not necessary to allege that a member did not do the acts necessary to avoid liability, in the complaint. Prosecutors should be aware of these defenses, however, should investigate the minutes or available witnesses to ascertain whether the defenses may be available, and should not bring actions for forfeitures against members who apparently can establish such defenses.

The standard or burden of proof in forfeiture cases for violation of the Open Meeting Law is proof "to a reasonable certainty, by the greater weight of the credible evidence ...," the ordinary burden, rather than the higher standard applicable to traffic regulation cases, set forth in sec. 345.45, Stats., or certain other civil cases, such as those involving fraud.

> "By the greater weight of the evidence is meant evidence which when weighed against that opposed to it has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief." See Wis. Jury Inst.-Civil 200, and *Kuehn v. Kuehn* (1960), 11 Wis. 2d 15, 104 N.W. 2d 138.

In certain situations the marshalling of witnesses necessary to prove a violation will be difficult. Reliance may have to be placed on testimony of one or more of the members who attended a meeting and who, themselves, may be subject to an action for forfeiture. Defendant members may be called to testify adversely. In my opinion, they cannot refuse to testify on the basis of the self-incrimination provision where such claim is made on the basis of prosecution or potential prosecution under this statute alone as the statute is not criminal.

Comments on the New Law

This memorandum is not intended to interpret each and every provision of the law. In the main, the provisions are set forth in clear and concise language. Many of the provisions are similar to those contained in former sec. 66.77, Stats., and opinions of this office and of the Supreme Court construing that statute will continue to serve as valid research tools. All of the provisions of the new law cannot be set forth in this memorandum and your attention is directed to the provisions of the law itself. Your attention is directed to the following major changes:

A. *Strict v. Liberal Construction*

Section 19.81 (4) provides that the rule of strict construction in favor of the accused, where construction is necessary, applies only where prosecutions for forfeitures are involved and not to other actions brought under the subchapter or interpretations thereof. In most cases the language and intent are clear. However, even in cases where statutory construction is necessary, a statute imposing a forfeiture, though strictly construed against the state, must be construed so as to carry out the legislative intent. *State v. Peterson* (1930), 201 Wis. 20, 229 N.W. 48.

B. *Convening In Open Session*

Section 19.83 requires that *every meeting* shall be preceded by public notice and shall initially be convened in open session. It provides that all discussion and action, formal or informal be initiated, deliberated and acted upon in open session except where the meeting has been closed, with announcement made for purposes permitted by sec. 19.85.

C. *Public Notice*

Section 19.84 now requires the giving of any notice required by other statute *plus* notice to the public, to news media members who have filed written request *and* to the official newspaper, or, if there is none, to a news medium likely to give notice in the area. State governmental bodies must give notice to the Wisconsin State Journal. Notice to the public can be given by posting in one or more public places, by timely paid or otherwise sufficient newspaper publication, or other means. Written or telephonic communication to members of the news media or official newspaper is sufficient. All notices must

meet the content requirements of subsection (2). In most cases notice must be given at least 24 hours prior to the commencement of the meeting. Even in emergency cases, at least 2 hours' notice is required. The shorter notice can only be used where it is "impossible or impractical" to give the "at least 24 hours" notice.

Section 19.84 (4) requires a separate and complete notice for *each meeting* at a time and date reasonably proximate, and subsection (2) requires that the notice of a meeting include any special subject matter intended for consideration at a contemplated closed session.

Section 19.84 (6) absolves formally constituted subunits from the stricter notice requirements for the purpose of meeting during a recess or after a meeting of the parent body, provided that they meet to discuss or act upon a subject which was a subject of *that* meeting of the parent body. The chief presiding officer of the parent body must make public announcement of the time, place and subject matter of the subunit, at the meeting of the parent body. In my opinion, such announcement would have to include notice of a contemplated closed session of the subunit and the members of the subunit would have to convene in open session and vote to go into closed session with additional public announcement.

D. *Closed Sessions - Procedure*

Section 19.85 (1) states that a motion with majority vote is required to close. The vote of each member must be recorded and the minutes preserved. The chief presiding officer must make public announcement of the nature of business to be discussed and the specific statutory subsection under which the closed session is claimed to be authorized. Only business which relates to the subject matter set forth in the announcement made by the chief presiding officer can be considered. The statute no longer permits a chief presiding officer to call a closed session with or without notice. In each case an open session must be convened on notice, such notice to include notice of any contemplated closed session and subject matter, and vote must be taken to go into closed session with proper additional announcement. A closed session can no longer precede an open session held on the same date.

E. *Specific Exceptions To Open Meetings*

Section 19.85 (1) (a) continues the exemption for deliberating after quasi-judicial trial or hearings. The word "any" has been

added. Argument can now be made that a governmental body can meet in closed session to deliberate after a judicial or quasi-judicial trial or hearing conducted by a different governmental body or court. In my opinion this position is untenable and this exemption should continue to be limited to situations in which the body itself has held the quasi-judicial trial or hearing.

Section 19.85 (1) (b) and (c) divide former sec. 66.77 (4) (b) into two subsections. Subsection (b) is now concerned only with dismissal, demotion, licensing, discipline or tenure. The section permits preliminary discussion and investigation without the necessity of giving actual notice to the individual involved. Before any evidentiary *hearing* can be conducted or formal action taken, notice must be given to the specific person involved so that he may exercise a right to require an open session for those purposes. Exception (c) now covers consideration of employment, promotion, compensation or performance evaluation of any public employe. Notice to the specific individual is not required. However, when considering performance evaluation data, care should be taken to avoid matters covered in (b).

Section 19.85 (1) (d) relates to probation, parole, crime detection or prevention. However, the new language limits discussion or action with relation to probation and parole to specific applications and would not include broad policy discussions.

Section 19.85 (1) (e) is the same as former sec. 66.77 (4) (d).

Section 19.85 (1) (f) exempts discussions of financial, medical, social or personal histories or disciplinary data. The subsection is now limited to specific persons. The words "substantial adverse effect upon the reputation of any person referred to" replace the former words "unduly damage reputations." The change may broaden the exception to some degree, but cannot be relied upon to close a meeting where exception (b) applies and where the employe or person licensed requests that an open session be held.

Section 19.85 (1) (g) continues the exemption for conferences with legal counsel but is more restrictive. Any closed conference must relate to situations where there is present or prospective litigation directly involving the governmental body and the legal counsel must be giving or preparing to give oral or written advice thereto.

Section 19.85 (1) (h) is new and relates to requests for confidential written advice from the state or local ethics board.

Section 19.85 (2) is the same as former sec. 66.77 (5). This section prevents the reconvening into open session within 12 hours after closed session unless public notice of subsequent open session was given at the same time and manner as was required for original open session.

Section 19.85 (3) is new and specifically requires final ratification or approval of collective bargaining agreement to be at open session.

F. *Notice Of Collective Bargaining Negotiations*

Section 19.86 is new. It requires the employer to give notice of contract reopening as provided in sec. 19.84 (1) (b).

G. *Legislative Meetings*

Section 19.87 is new. It makes this subchapter applicable to both houses of the legislature, and committees, subcommittees and subunits thereof. Section 19.87 (1) exempts such bodies from notice requirements of sec. 19.84 where the sole purpose is scheduling business before the senate or assembly. Section 19.87 (2) provides that provisions of this subchapter do not apply to the legislature or subunits where there is a joint rule or rule of either house and meetings are conducted in compliance with such rule.

Section 19.87 (3) also relates to legislative sessions. Partisan caucuses of the *senate* or *assembly* are excepted from the provisions of the law unless otherwise provided by legislative rule.

H. *Ballots, Votes and Records*

Section 19.88 (1) provides that except as otherwise provided by statute, no secret ballot may be used to determine any election or decision, except the *election* of the officers of *such body*. In my opinion this exception should be applied narrowly and would not permit a governmental body to elect by secret ballot, members of committees, officers of the governmental unit such as department heads, or fill vacancies on the body itself.

Section 19.88 (2) retains the right of any member to require that a vote be taken in such manner that the vote of each member is ascertained and recorded except where the election of officers of *such body* is involved.

Section 19.88 (3) is *extremely important*. It applies to *both open* meetings *and closed sessions* and requires that "The motions and roll call votes of each meeting ... shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21." Where closed meeting is held for proper purpose the custodian may refuse to permit inspection of such records if the need for secrecy continues, and if sufficient reason is given in accordance with prior opinions of this office and relevant Supreme Court cases. The refusal could be tested in proper mandamus action. Other statutes require some governmental bodies to keep minutes of *all* meetings, both open and closed sessions.

I trust that the foregoing will aid you in understanding the new law and in taking such measures as you deem necessary to aid governmental bodies entitled to your advice and to take prompt enforcement action if circumstances so require.

BCL:RJV

Verified Complaint To Enforce
Forfeiture Under Secs. 19.46-
19.97 and Ch. 288, Wis. Stats.

OPEN MEETING LAW

Now comes the complainant _____and as and for a verified complaint pursuant to secs. 19.96, 19.97 and 288.02, Stats., alleges and complains as follows:

1. That __he is a resident of the _____ of _____, State of Wisconsin, and that (his)(her) Post Office Address is _____ _____ Street, _____, Wisconsin _____.
   (Zip)

2. That _____ whose Post Office Address is _____ Street, _____, Wisconsin _____ was on the _____ day of _____ 197____ , a [member or chief presiding officer] of _____
   _____

(School Board of School District No. _____ Town of _____ , _____ County, WI, or County Board of Supervisors of _____ County, or designate official title of other governmental body)
and that such _____ is a governmental body
(Board or Committee)
within the meaning of sec. 19.82 (1), Wis. Stats.

3. That said _____ on the _____ day of _____, 197___ , at _____, County of _____, Wisconsin, did knowingly attend a meeting of said governmental body at which a quorum was present and that said meeting was held in violation of secs. 19.96 and _____ [cite other applicable section] in that [set out every act or omission constituting the offense charged]:

_____
_____
_____
_____
_____
_____
_____
_____
_____

and that [such acts so done and performed or such failure to perform such acts] were and are contrary to the form of the statute in such case made and provided.

4. That by reason of said _____ [acts or failure] contrary to and in violation of said statute, said ___ _____ became indebted to the _____ _____ [County of _____ or State of Wisconsin] for the amount prescribed therefore in sec. 19.96, Stats., in the sum of $300.00.
5. That this complaint is made to the District Attorney for _____ County under the provisions of sec. 19.97, Stats., so that such officer may bring an action to recover the forfeiture provided in sec. 19.96, Stats.

WHEREFORE, complainant prays that the District Attorney for _____ County, Wisconsin, timely institute an action against said _____ to recover the forfeiture provided in sec. 19.96, Stats., together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN)
) SS
COUNTY OF _____)

_____ being first duly sworn on oath deposes and says that ___ he is the complainant above named, that ___he has read the foregoing complaint and knows the contents thereof and that the same is true of (his) (her) own belief except as to those matters therein alleged to be on information and belief and as to those matters __ he believes the same to be true.

_____
COMPLAINANT

Subscribed and sworn to before me
this _____ day of _____, 197___.

_____

Notary Public, _____ County, Wisconsin
My Commission expires _____

ADDENDA

Partial statement of types of violations:

___ "The governmental body went into closed session for a purpose not within the exemptions set forth in sec. 19.85 (1), Stats.," giving details.

___ "The governmental body went into closed session for the avowed purpose of discussing _____ citing the exemption in sec. 19.85 (1) (___), Stats., but discussed and acted upon other business, to-wit:" giving further details.

___ "The meeting had not been preceded by the public notice required by sec. 19.84, Stats.," citing failure, etc.

Witnesses who can testify to act or omission:

Name	Address	Telephone

Documentary evidence available:

_____

_____

_____

_____

_____

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 65

Anti-Secrecy; Public Records; Pupil information which local education agencies are required to release to the Department of Public Instruction under the reporting provisions of ch. 89, Laws of 1973, may be provided, with or without permission, without violation of the state or federal confidentiality statutes, sec. 118.125 (e), Stats. and sec. 438, P.L. 93-380. OAG 2-76.

February 2, 1976.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You have asked my opinion regarding the extent to which the flow of information from local to state education authorities is restricted by sec. 438, P.L. 93-380, known as the Family Education Rights and Privacy Act, and by sec. 118.125, Stats., which regulates the dissemination of student records in Wisconsin. In particular, you wish to know whether local authorities may be compelled to release to the Department of Public Instruction information concerning children receiving special education services under ch. 89, Laws of 1973, when permission for such release has been granted in accordance with the provisions of the above cited confidentiality statutes.