

OPEN GOVERNMENT IN WISCONSIN: THE OPEN MEETINGS LAW AND THE PUBLIC RECORDS LAW

**Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government**
Statewide Prosecutor Education and Training (SPET)
December 15, 2016



Office of Open Government

- Interpret and apply the Open Meetings Law, Public Records Law and other open government statutes and rules
- Develop open government policies
- Legal counsel to DOJ and clients
- Manage the PROM help line and respond to citizen correspondence concerning open government issues
 - Wis. Stat. §§ 19.39 and 19.98
 - Any person may request AG's advice

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WISCONSIN OPEN MEETINGS LAW



Introduction



Wisconsin Open Meetings Law

- Wis. Stat. §§ 19.81 to 19.98
- Generally, the open meetings law requires that all meetings of governmental bodies:

- must be preceded by **public notice**;

AND

- must be held in a place that is **open** and **reasonably accessible** to all members of the public;
- except in limited situations in which a **closed session** is specifically authorized.



Public Policy

“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.**”

— Wis. Stat. § 19.81(1)



Governmental Bodies



Governmental Body

- “‘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” Wis. Stat. § 19.82(1).
- Translation:
 - Any kind of collective governmental entity (state or local level).
 - Created by constitution, statute, ordinance, rule or order.
 - Without regard to what that entity is called (*i.e.*, a board, commission, committee, council, etc.).



Collective Governmental Entity

- Must be a **group** of people.
- Does not include a single, individual government official.
- Must have a collective identity and purpose.
- A group with a determinate membership and an expectation that it will act collectively in relation to some subject of governmental business.
- Does not include an *ad hoc* gathering.
- Includes subunits, advisory bodies, and governmental or quasi-governmental corporations.



Meetings



Meeting

- “Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(1).



Meetings | Key Concepts: The *Showers* Test

- Two-part test:
 - Members convene for the **purpose** of conducting governmental business,
 - AND
 - The **number** of members present is sufficient to determine the body's course of action.
 - Includes quorum and negative quorum
- *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).



Meetings | Key Concepts: “Convening” of Members

- Members must convene for there to be a meeting.
- Not limited to face-to-face gatherings.
- Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority.
 - Written correspondence, telephone and video conference calls, and email and other electronic messaging
- Does not include a **social or chance gathering** unless the gathering is intended to avoid compliance with the law.
- A single gathering may include a “meeting” of more than one governmental body.



Meetings | Key Concepts: “Walking” Quorum

- A “meeting” can sometimes result from a series of gatherings among members of a body.
 - When this occurs, it is known as a serial or “walking” quorum.
- Elements of a “walking” quorum:
 - A series of gatherings among groups of members
 - Each smaller in size than a quorum
 - Agreement to act uniformly
 - In sufficient number to control the body



What Does the Law Require?

Notice



General Notice Requirement

- “Every meeting of a governmental body shall be preceded by public notice” Wis. Stat. § 19.83(1).
- Notice must be communicated to:
 - The **public**
 - By posting in one or more places likely to be seen by the public, or
 - By paid publication in a medium likely to give notice in the area
 - **News media** that has filed written request for notice
 - **Official newspaper** for the community; if none, then to news medium likely to give notice in the area



Content and Timing of Public Notice

- Content:

- The meeting notice must reasonably inform the public of the **time**, **date**, **place**, and **subject matter** of the meeting.

- Timing:

- Notice must be given **at least 24 hours** before the meeting.
- Shorter notice may be given only if, for good cause, 24-hour notice is impossible or impractical.
- In no case may less than 2 hours notice be given.



What Does the Law Require?

Open Sessions



Open Session Requirements

- “[A]ll meetings of all state and local governmental bodies shall be **publicly held in places reasonably accessible** to members of the public and **shall be open** to all citizens at all times **unless otherwise expressly provided by law.**” Wis. Stat. § 19.81(2).
- “‘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” Wis. Stat. § 19.82(3).
- Public accessibility has three aspects:
 - Physical location in the community
 - Room size and acoustics
 - Physical accessibility



Open Session Requirements | Key Provisions

- **Voting:** Generally, no secret ballots may be used except for electing officers of the body.
- **Record Keeping:** All motions and roll call votes must be recorded and preserved.
 - Open meetings law does not require minutes to be kept.

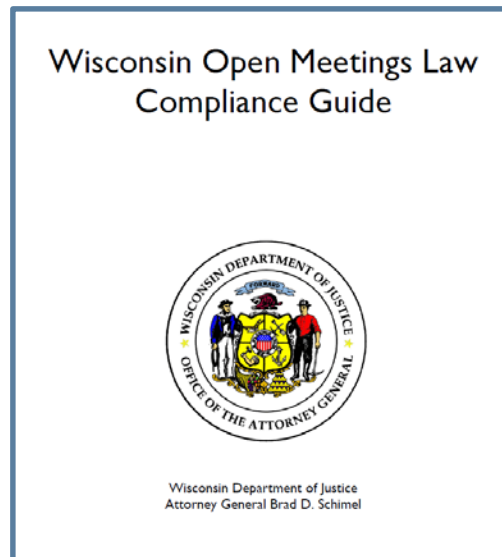


Closed Sessions



Closed Sessions | Authorized Subjects

- The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).
- For a more complete discussion of this topic, see DOJ's *Wisconsin Open Meetings Law Compliance Guide*.



Closed Sessions | Procedure and Scope

- Every meeting must begin in open session.
 - To go into closed session, a motion must be made and carried in open session.
- When a governmental body is in closed session, it must limit its discussion:
 - to the specific business for which the closed session was authorized

AND

- and may not take up any other matters.



Enforcement



Enforcement Options

- The enforcement provisions of the open meetings law are found in Wis. Stat. § 19.97:
 - By the attorney general
 - By the local district attorney
 - By a private relator



Enforcement Options | Attorney General

- Generally, considers only complaints presenting novel issues of law that coincide with matters of statewide concern
- Local complaints should be filed with the local district attorney
- Complaints to the Attorney General should be submitted via U.S. Mail.



Enforcement Options | District Attorney

- The district attorney of the county in which the alleged violation occurred
- The district attorney may enforce only after receiving a verified complaint
- A verified complaint must be written, signed, and sworn (i.e., notarized).



Enforcement Options | Private Relator

- If district attorney fails to act within **20 days** of receiving a verified complaint
 - District attorneys have discretion to pursue enforcement actions
 - District attorney may still pursue an enforcement action after 20 days has passed
- The complainant may commence an enforcement action on behalf of the state as a private relator
- If successful, the relator may recover attorney fees
- Wis. Stat. § 19.97(4)



Enforcement | Penalties

- Civil forfeiture of \$25 to \$300 per violation for any **member** of a governmental body who:
 - **Knowingly** attends a meeting held in violation of the open meetings law
 - Otherwise violates the law
- A member is **not** liable for attending an unlawful meeting if s/he makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.
- Members of a body who—acting openly and in good faith—seek and rely upon the advice of the body’s official legal counsel may not be found liable for any violation.



Enforcement | Alternative Remedy

- An **action** taken at an unlawful meeting may be **voidable** if:
 - the court finds that the public interest in the enforcement of the open meetings law outweighs the public interest in sustaining the validity of the action.

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Enforcement | Informal Alternatives

- A phone call to the governmental body (or their counsel) alleged to have violated the law
- A letter explaining the law
- Informal mediation



WISCONSIN PUBLIC RECORDS LAW



Introduction



Wisconsin Public Records Law

- Wis. Stat. §§ 19.31 to 19.39
- Objectives:
 - Shed light on workings of government and acts of public officers and employees
 - Assist public in becoming an informed electorate
 - Serve a basic tenet of our democratic system by providing opportunity for public oversight



Presumption

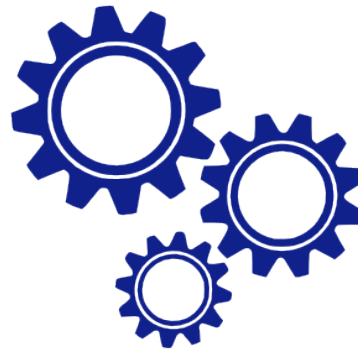
The public records law “shall be construed in every instance with a **presumption of complete public access, consistent with the conduct of government business.** The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Public Records Request Process

- PRR received and forwarded to authority's records custodian
- Authority begins search for records
- Any responsive records are reviewed:
 - Does a statute or the common law prohibit disclosure?
 - Authority applies public records balancing test
- Records are released with letter explaining any redactions



Public Record Roles



“Authority” and “Legal Custodian”

- “Authority” – defined in Wis. Stat. § 19.32(1): any of specified entities having custody of a record
 - Very similar to “governmental body” in Open Meetings Law
- “Legal Custodian” – defined in Wis. Stat. § 19.33: vested by an authority with full legal power to render decisions and carry out public records responsibilities



“Requester”

- Defined at Wis. Stat. § 19.32(3)
 - Generally, any person who requests to inspect or copy a record
- More limited rights for persons committed under mental health laws or incarcerated
 - Must be requesting records containing specific references to themselves or minor children
- Wis. Stat. § 19.35(1)(am)
 - A requester has greater rights to inspect personally identifiable information about himself or herself



Who Can Request?

- Requester need not state the purpose of the request
- Requester generally need not identify himself or herself
- Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, 354 Wis. 2d 471: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test

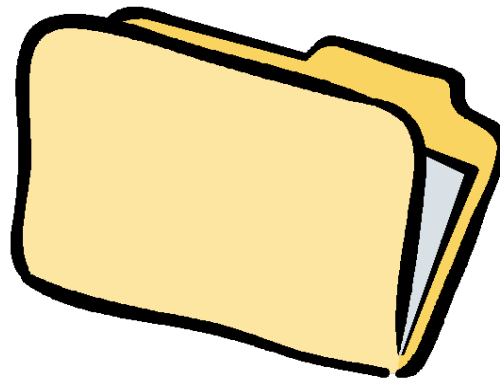


Records



“Record”

- “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.” Wis. Stat. § 19.32(2).
- Content not format determines if something is a record.



Is it a Record?

- Yes:

- Not created by the authority but in the authority's possession
- Data in a database, social media, contractors' records
- Police body camera and dash camera video
- Personal email, texts, calls, etc. on an authority's accounts
- Business email, texts, calls, etc. on a personal accounts



Is it a Record?, continued

- No:
 - Drafts, notes, and preliminary documents
 - Purely personal property
 - Published material available for sale or at library
 - Material with limited access rights, such as copyrights or patents



Receiving a Request



Sufficient Request

- Form of a request:
 - A request need not be in writing; it may be verbal
 - An authority may not require the use of a form
 - “Magic words” are not required
- Content of a request:
 - Reasonably describes the information or records requested
 - Reasonably specific as to time and subject matter
 - Custodian should not have to guess what records the requester wants



Processing a Request



Evaluating a Request

- Carefully assess to determine what is needed to respond
- Don't understand the request?
 - Contact the requester; request clarification
- Maintain an open line of communication with requester



Does the Record Exist?

- Generally, only records that exist at the time of the request must be produced
 - To respond, an authority need not create new records
- Public records law does not require answering questions
- The law does not contemplate continuing requests
- Search for records that might be responsive
 - If there are no responsive records, inform the requester



Access: Absolute Right/Denial

- **Absolute Right** – Not many exist:

- Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
- Daily arrest logs or police “blotters” at police departments

- **Absolute Denial**

- Can be located in public records statutes
 - Information related to a current investigation of possible employee criminal conduct or misconduct
 - Plans or specifications for state buildings
- Can be located in other statutes or case law:
 - Patient health care records; pupil records



The Balancing Test

- Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
- Fact intensive; “blanket rules” disfavored
- Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- Identity of the requester and the purpose of the request are generally not part of the balancing test



Some Sources of Public Policies

- Policies expressed in other statutes
 - E.g., patient health care records, student records
- Court decisions
- Exemptions to open meetings requirements in Wis. Stat. § 19.85(1)
 - Only if there is a specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
- Public interest in protecting privacy of individuals



Law Enforcement Considerations

- Crime victim rights expressed in statutes, constitutional provisions, and case law
 - Consideration of family of crime victims
- Protection of witnesses
 - Including “chilling” future cooperation with law enforcement
- Children and juveniles
- Safety of law enforcement officers and their families



Special Issues

- A prosecutor's files are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991).
 - Law enforcement records: balancing test must be applied on a case-by-case basis
- Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise



Special Issues, continued

- Records related to children or juveniles:
 - Wis. Stat. ch. 48: Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 48.396.
 - Wis. Stat. ch. 938: Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 938.396.
 - Access to other records regarding or mentioning children subject to general public records rules



Redaction



Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, that part must be disclosed
 - Non-disclosable portions must be redacted
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information**
 - Therefore subject to review by mandamus

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Responding to a Request



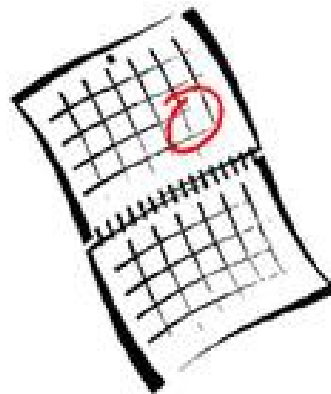
Written Response?

- A written request requires a written response, if the request is denied in whole or in part
 - Must inform requestor that denial is subject to review in an enforcement action for mandamus under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney General
- Reasons for denial must be specific and sufficient
 - Reviewing court usually limited to reasons stated in denial
- Availability of same records from other sources generally not a sufficient reason



Timing of Response

- Response is required, “as soon as practicable and without delay”
- **No specific time limits**, depends on circumstances
- DOJ policy: 10 business days generally reasonable for response to simple, narrow requests
- May be prudent to send an acknowledgement
- Penalties for arbitrary and capricious delay



Notice Before Release

- Required by Wis. Stat. § 19.356(2)(a)1
 - Records information resulting from closed investigation into a disciplinary matter or possible employment-related violation of policy, rule, or statute
 - Records obtained by subpoena or search warrant
 - Records prepared by an employer other than the authority about employees of that employer
 - “Record subject” can try to stop disclosure in court
- Required by Wis. Stat. § 19.356(9)—officer or employee holding state or local public office
 - OAG-07-14 (October 15, 2014)
- Courtesy notice



Costs



Costs

- Generally, only **actual, necessary, and direct** costs
 - Copying and reproduction
 - Photographing
 - Location, if costs are \$50.00 or more
 - Mailing/shipping to requester
- Authorities **may not** charge for redaction costs
- Prepayment may be required if total costs exceed \$5.00



Enforcement



Enforcement

- Wis. Stat. § 19.37
- Mandamus action to challenge:
 - Withholding a record or part of a record
 - Delay in granting access to record or part of record



Remedies

- Authority may be ordered to release records
- Attorney's fees and costs may be awarded if mandamus action was a cause of the release
- If a denial, delay or charge of excessive fees is found to be arbitrary and capricious:
 - Court may award punitive damages
 - Authority may be required to forfeit not more than \$1,000
 - Forfeitures enforced by action on behalf of state by the attorney general or district attorney



Other Statutes

- Wis. Stat. § 946.72: Tampering with public records and notices
- “Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony.”



Enforcement | Informal Alternatives

- A phone call to the authority (or their counsel) alleged to have violated the law
- A letter explaining the law
- Informal mediation



Record Retention



Record Retention

- Wis. Stat. § 19.35(5) - after receiving a request:
 - No destruction until request granted or until at least 60 days after request is denied
 - 90 days if requester is committed or incarcerated
 - No destruction during enforcement action
- Records retention laws
 - State authorities: Wis. Stat. § 16.61
 - Local authorities: Wis. Stat. § 19.21
- Record Retention Schedules (RDAs)



Further Information

- Consult legal counsel
- Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Call the Office of Open Government: (608) 267-2220
- Write to: Office of Open Government
 Department of Justice
 P.O. Box 7857
 Madison, WI 53707-7857



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