2016 OPEN GOVERNMENT ROAD SHOWS: WISCONSIN OPEN MEETINGS LAW

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
2016 Open Government Road Shows
Madison, October 12, 2016
Green Bay, October 26, 2016

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 t**he 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)

Public Policy, continued

- The open meetings law is to be broadly interpreted to promote the policy of openness. *See* Wis. Stat. § 19.81(4).
- On close questions, courts will prefer an interpretation of the law that favors open government.
- Courts disfavor any interpretation that would facilitate evasion of the policy of openness.

When Does the Open Meetings Law Apply?

- It applies to **meetings of governmental bodies**.
- The key terms, "governmental body" and "meeting," are defined in Wis. Stat. § 19.82.

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.

Creation

- "[C]reated by constitution, statute ordinance, rule or order . . . ."
  - Refers not to the kind of power wielded by a governmental body, but rather to how the body is created.
- How to determine whether a body is created by constitution, statute, ordinance or rule?
  - Look it up.

Governmental Bodies Created by Order

- An order can include any directive—whether formal or informal—that creates a body and assigns it some governmental responsibilities. *See* 78 Op. Att'y Gen. 67 (1989).
  - Such a directive may be issued by any governmental official or entity that has the power to delegate the governmental responsibilities in question.
- **Warning**:
  - This is a very fact-specific standard, so there are no bright-line rules.
  - DOJ's *Wisconsin Open Meetings Law Compliance Guide* contains lists of some of the kinds of entities that DOJ has advised are created by constitution, statute, ordinance, rule, or order.

Advisory Bodies

- The definition of "governmental body" includes purely advisory bodies. *See State v. Swanson*, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).
- A governmental body does not have to possess final decision-making power in order to be subject to the open meetings law.
- What usually matters is the manner in which the body was created, rather than the nature of its authority.

Administrative Staff

- A governmental body generally does not include a group of administrative staff of a government agency.
- This is a highly fact-specific issue. It is discussed further in DOJ's *Wisconsin Open Meetings Law Compliance Guide*.

Subunits of Governmental Bodies

- Formally constituted subunits of a governmental body are also subject to the open meetings law.
- A "subunit" is a body that is:
  - created by a parent body; and
  - composed exclusively of members of the parent body
  - e.g., a committee of a municipal board or a subcommittee.
  - *See* 74 Op. Att'y Gen. 38, 40 (1985).

Governmental & Quasi-Governmental Corporations

- A "governmental body" also includes governmental or quasi-governmental corporations.
  - Neither of those terms is defined in the statutes.

Governmental Corporations

- A **governmental corporation** is a corporation that:
  - has a public purpose

    AND
  - is established directly by government pursuant to some specific legislative authorization.

Quasi-Governmental Corporations

- What is a **quasi-governmental** corporation?
  - There is no simple answer to this question.
  - For discussion by the Wisconsin Supreme Court, see *State v. Beaver Dam Area Development Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295.
- Quasi-governmental corporations are private corporations that closely resemble a governmental corporation in function, effect, or status.
  - How close must the resemblance be?
    - The Wisconsin Supreme Court said that each case must be decided on its own particular facts, under the totality of the circumstances.

Quasi-Governmental Corps., continued

- Factors considered by the Wisconsin Supreme Court look at the extent to which the corporation is more public or more private with regard to its:
  - Funding
  - Functions
  - Appearance
  - Control
  - Record keeping
- The court emphasized, however, that the list of factors is open-ended and no single factor is decisive.

Governmental Bodies | Conclusion

- Determining whether a particular entity is or is not a governmental body:
  - Highly fact-specific question
  - There often is no simple, bright line answer.
- Tip:
  - Learn to identify the important issues and ask the right questions, so you can effectively seek assistance, when needed.

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

- The Wisconsin Supreme Court has established a two-part test, encompassing two requirements:
  - the **purpose** requirement

    AND
  - the **numbers** requirement.
  - *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

Meetings | Key Concepts: The *Showers* Test, continued

- A meeting occurs whenever:
  - 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.

Meetings | Key Concepts: "Purpose" Requirement

- "Conducting governmental business" is an expansive concept that is not limited to formal or final decision making.
- "Conducting governmental business" includes:
  - preliminary decisions
  - discussion
  - information gathering
  - interaction among members is **not** required
- *State ex rel. Badke v. Greendale Vill. Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

Meetings | Key Concepts: "Numbers" Requirement

- Q: How many members must gather to constitute a meeting?
  - A: A sufficient number to determine a body's course of action.
    - WARNING: This number is not necessarily equal to a majority of the membership or to a quorum of the body.

Meetings | Key Concepts: "Numbers" Requirement, continued

- A sufficient number of members to determine a body's course of action can refer to either:
  - the affirmative power to pass an action

    OR
  - the negative power to defeat an action.
    - Sometimes referred to as a "**negative quorum**."

Meetings | Key Concepts: "Convening" of Members

- Members must convene for there to be a meeting.
- Not limited to face-to-face gatherings or physical presence together.
- Includes situations in which members are able to effectively communicate with each other and exercise the body's authority.
- If members communicate without physically gathering together, the key question is:
  - To what extent do their communications resemble a face-to-face exchange?

Meetings | Key Concepts: "Convening" of Members, continued

- **Written correspondence**
  - Circulation of one or more written documents among members of a body
  - Generally, a "one-way" communication
  - Any responses are spread out over time
  - Courts are unlikely to find such written communication to be a "convening" of members.

Meetings | Key Concepts: "Convening" of Members, continued

- **Telephone conference calls, video conferences, etc.**
  - Permit instantaneous verbal interaction among members
  - For practical purposes, equivalent to a physical gathering
  - If it passes the purpose and numbers tests, then it is a "meeting." 69 Op. Att'y Gen. 143 (1980).

Meetings | Key Concepts: "Convening" of Members, continued

- **Other forms of electronic messaging**
  - Email, electronic discussion boards, instant messaging, social networking
  - May or may not implicate the open meetings law
    - Depends on how they are used
  - Technology creates a risk of private communications that should be conducted at public meetings.
    - Therefore, **caution** is advised.

Meetings | Key Concepts: "Convening" of Members, continued

- **Other forms of electronic messaging, continued**
  - Courts will likely consider:
    - Number of participants
    - Number of communications
    - Time frame
    - Extent of conversation-like interaction
  - To minimize the risk of violations:
    - Use only for one-way transmissions
    - Do not send replies or minimize their content and distribution

Meetings | Key Concepts: Serial or "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

Meetings | Key Concepts: Serial or "Walking" Quorum, continued

- The "walking" quorum concept is intended to prevent:
  - circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.
- Practical Tips:
  - "Walking" quorum issues are complex and fact-specific.
  - Be prepared to consult with your legal counsel.

Meetings | Key Concepts: Social or Chance Gathering

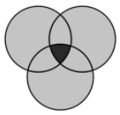
- A "meeting" does not include a **social or chance gathering** of members of a body, unless the gathering is intended to avoid compliance with the law. Wis. Stat. § 19.82(2).
- If one-half or more of the members are present at a gathering, they have the burden to prove that the gathering was social or chance and was not for the purpose of conducting governmental business. Wis. Stat. § 19.82(2).

Meetings | Key Concepts: Multiple or Overlapping Meetings

- Sometimes, a single gathering may include a "meeting" of more than one governmental body.
- Suppose members of Body "A" attend a meeting of Body "B."
  - The gathering may be considered a meeting of "A," as well as "B," if:
    - A quorum of members of "A" are present
    - The meeting involves a subject over which "A" has some authority.

Meetings | Key Concepts: Multiple or Overlapping Meetings

- Exceptions:
  - The gathering is **not** a "meeting" of Body "A," if:
    - The members of "A" are present by chance *and* did not pre-plan their attendance
    - All of the members of "A" present are also members of "B."



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).

Manner of Giving Notice | Public Notice

- Notice must be **communicated to the public**:
  - By **posting** in one or more places likely to be seen by the public.

    OR
  - By **publication** in a medium likely to give notice in the area.

Manner of Giving Notice | Public Notice, continued

- If public notice is given by **posting**, it must be posted in a place likely to give notice to the public.
  - Posting in three such places is recommended and is customary, but it is not specifically required by the open meetings law. 65 Op. Att'y Gen. 250 (1976).
- If public notice is given by **publication**, it must be paid publication.
  - This ensures that the notice is actually communicated to the public. 65 Op. Att'y Gen. 250 (1976).

Manner of Giving Notice | Notice to Requesting News Media

- News media cannot be charged a fee for meeting notices. 77 Op. Att'y Gen. 312 (1988).

Manner of Giving Notice | Notice to Official Newspaper

- Notice also must be given to the official newspaper for the community in question.
- If there is no official newspaper, notice must be given to a news medium likely to give notice in the area.
- Notice also must be given to any news media that have filed a written request for notice.
- The official newspaper is not required to print the notice and the governmental body is not required to pay for publication. *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979).
- CAUTION: **Public** notice still must be actually communicated to the public.

Responsibility for Giving Notice

- The presiding officer is legally responsible for making sure that the notice requirements are met.
- Tasks may be delegated to staff, but the presiding officer is liable for any violation of the notice requirements.

Content of Public Notice

- The meeting notice must reasonably inform the public of the **time**, **date**, **place**, and **subject matter** of the meeting. Wis. Stat. § 19.84(2).

Time

Date

Place

Subject Matter

Content of Public Notice | Subject Matter

- Q: How detailed must a notice be in describing the subjects to be considered at a meeting?
  - A: The Wisconsin Supreme Court has said that the description must be reasonable under all of the relevant circumstances of the particular case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
- Relevant circumstances include:
  - The burden of providing more detail
  - The degree of public interest in the subject
  - Whether the subject is non-routine

Content of Public Notice | Generic Agenda Items

- A notice should **not** use generic, uninformative subject-matter designations, such as:
  - Old or new business
  - Agenda revisions
  - Miscellaneous business, etc.

Content of Public Notice | Closed Session Notice

- If a possible closed session is anticipated at the time when public notice is given, then the notice must include the subject matter of the closed session.

Timing of Public Notice

- 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.

Separate Notice for Each Meeting

- Separate notice must be given for **each** meeting at a time and date reasonably close to the meeting. Wis. Stat. § 19.84(4).
- An open-session meeting can be adjourned to a later time on the same date without treating the later session as a separate meeting, if an announcement is made to those present.
- If a meeting is adjourned or recessed to a different date, then the usual notice rules apply to the later session.

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).

Open Session Requirements | Public Accessibility

- Public accessibility has three aspects:
  - Physical location in the community
  - Room size and acoustics
  - Physical accessibility

Open Session Requirements | Public Accessibility, continued

- **Location**
  - Governmental bodies should hold their meetings in places that are within the geographic area they serve.
  - Meetings may not be held on private premises unless those premises are open and reasonably accessible to the public.

Open Session Requirements | Public Accessibility, continued

- **Room Size and Acoustics**
  - Rooms must be reasonably calculated to be **large** enough to accommodate all citizens who wish to attend the meeting.
  - Where **acoustics** are poor, members must take reasonable steps to make it possible for them to be heard.

Open Session Requirements | Public Accessibility, continued

- **Physical Accessibility**
  - Whenever a meeting is in open session, the room should be **unlocked** to permit free coming and going by the public.
  - If doors must be closed to keep out noise, signs should be posted on the doors making it clear that the public may enter.

Open Session Requirements | Public Accessibility, continued

- **Accessibility for People With Disabilities**
  - **State** governmental bodies must meet in facilities that people with disabilities can access without assistance. Wis. Stat. § 19.82(3).
  - **Local** bodies are not subject to that statute, but nonetheless must provide **reasonable** access for people with disabilities.

Open Session Requirements | Citizen Participation

- The open meeting law grants citizens the right to **attend and observe** open session meetings.
- The law does **not** require a governmental body to allow members of the public to speak or actively participate in the meeting.
- However, the law **permits** a portion of an open meeting to be set aside as a **public comment period.**
  - Public comment periods are **not** required.
  - Such a period must be included on the meeting notice.
  - Wis. Stat. §§ 19.83(2), 19.84(2).

Open Session Requirements | Citizen Participation, continued

- During a public comment period, a body:
  - may **receive information** from the public

    AND
  - may **discuss** any subject raised by the public
  - but may **not** take formal action.

Open Session Requirements | Recording

- Wis. Stat. § 19.90:
  - Bodies must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session.
  - Recording or photographing activities may not disrupt the meeting.

Voting

- Unless otherwise specifically provided, no secret ballots may be used except for electing officers of the body.
- Any member may require a roll-call vote.
- Wis. Stat. § 19.88(1), (2).

Record Keeping

- All motions and roll call votes must be recorded and preserved.
  - Law does not specify a timeframe in which records of motions and roll call votes must be created.
    - However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable.
- Voting records must be open to public inspection to the extent required under the public records law.

Record Keeping, continued

- The open meetings law does not itself require bodies to keep formal minutes of meetings.
  - However, minutes are often required by **other statutes** for certain types of bodies, such as city councils, village boards, county boards.

Closed Sessions

Closed Sessions | Required Procedure

- Every meeting must begin in open session.
- To go into closed session, a motion must be made and carried in open session.
- The vote of each member must be recorded.
- Before a vote to go into closed session, the presiding officer must announce:
  - The statutory exemption(s) authorizing the closed session

    AND
  - The nature of the business to be considered.

Closed Sessions | Limited Scope

- 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.

Closed Sessions | Attendance

- A governmental body has discretion to allow anyone to attend a closed session whom the body determines to be necessary for the business at hand.
- No duly elected or appointed member of a body may be excluded from any meeting of that body—whether closed or open.
- A member also may not be excluded from a meeting of a subunit of the body, unless the body has a rule to the contrary.

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 | Authorized Subjects

1. **Deliberating about a case** that has been the subject of a judicial or quasi-judicial trial or hearing before the body. Wis. Stat. § 19.85(1)(a).
2. Considering **dismissal, demotion, licensing or discipline** of a public employee or the investigation of charges against the employee. Wis. Stat. § 19.85(1)(b).
   - If there is to be an evidentiary hearing or if action is to be taken in closed session, then the employee is entitled to actual notice and may demand that the hearing or action be conducted in open session.

Closed Sessions | Authorized Subjects, continued

3. Considering **employment, promotion, compensation, or performance evaluation data** of a public employee. Wis. Stat. § 19.85(1)(c).
   - Applies to public employees and appointed officials over whom the governmental body exercises responsibility.
   - Does not apply to elected officials. 76 Op. Att'y Gen. 276 (1987).
   - Applies to specific individuals and does not allow closed discussion of more general policies. 80 Op. Att'y Gen. 176 (1992).

Closed Sessions | Authorized Subjects, continued

4. Considering **sensitive personal information** that would be likely to have a substantial adverse effect upon an individual's reputation. Wis. Stat. § 19.85(1)(f).

5. Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting "other specified public business" whenever **competitive or bargaining reasons** require a closed session. Wis. Stat. § 19.85(1)(e).

   - The burden is on the governmental body to show that competitive or bargaining interests require confidentiality. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640.

Closed Sessions | Authorized Subjects, continued

5. **Competitive or bargaining reasons** require a closed session. Wis. Stat. § 19.85(1)(e). *(continued)*

   - The competitive or bargaining interests must belong to the government, not to a private party.
   - Only those portions of a meeting may be closed which directly impact the competitive or bargaining interests.
   - Closed discussion must be limited to matters that directly and substantially affect the government's competitive or bargaining interests.

Closed Sessions | Authorized Subjects, continued

6. **Conferring with legal counsel** about strategy related to litigation. Wis. Stat. § 19.85(1)(g).

   - The attorney must be legal counsel **for the governmental body**.
   - The attorney must be rendering advice about **strategy related to litigation** in which the body is or is likely to become involved.
   - Other discussions with counsel should be held in open session.

- For additional provisions authorizing closed sessions, see Wis. Stat. § 19.85(1) and DOJ's Compliance Guide.

Closed Sessions | Voting

- Under a prior version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, **if the vote is integral to the authorized subject of the closed session.** *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
- The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.

Closed Sessions | Voting, continued

- A body may vote in closed session if the vote is an integral part of authorized closed deliberations.
- DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.

Closed Sessions | Reconvening in Open Session

- A body can return to open session after a closed session only if the meeting notice specified this would happen.
- A body may adjourn directly from closed session without returning to open session.

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.

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

2016 OPEN GOVERNMENT ROAD SHOWS: WISCONSIN OPEN MEETINGS LAW

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
2016 Open Government Road Shows
Madison, October 12, 2016
Green Bay, October 26, 2016