

# The Wisconsin Open Meetings Law: Essentials

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

Office of the Commissioner of Insurance

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# Introduction



# 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)



# 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.
- ▶ Bottom Line: The purpose of the open meetings law is to ensure openness.
  - ▶ Only a few limited exemptions permit confidentiality



# Wisconsin Open Meetings Law

- ▶ 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.

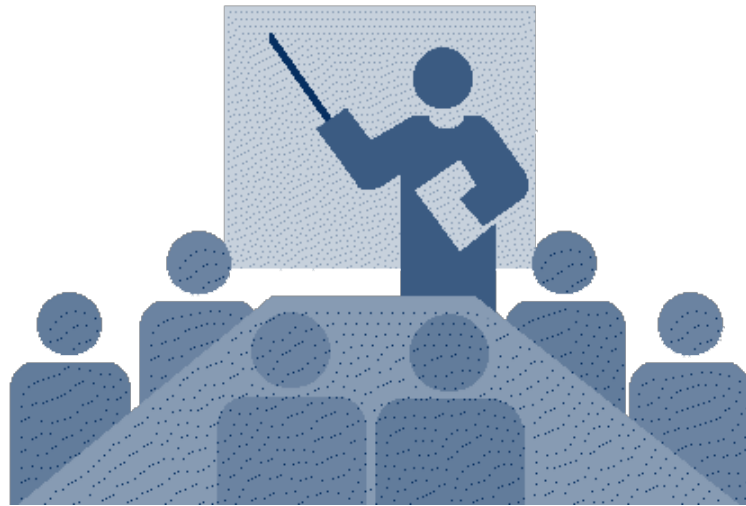


# Meetings



# 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).
- ▶ 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 | *Showers* Test: “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 | *Showers* Test: “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 | *Showers* Test: “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 communication that should be conducted at public meetings
- ▶ Courts will likely consider:
  - ▶ Number of participants
  - ▶ Number of communications
  - ▶ Time frame
  - ▶ Extent of conversation-like interaction
- ▶ To minimize the risk of violations, **caution is advised**:
  - ▶ 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 body members.
  - ▶ 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
- ▶ 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).



# 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
  - ▶ News media that have filed a written request for notice
  - ▶ The official newspaper for the community in question
    - ▶ If none, then a news medium likely to give notice in the area

**NOTICE**



# Timing and Content 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.
- ▶ The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting. Wis. Stat. § 19.84(2).
  - ▶ Including the subject matter of any contemplated closed session
  - ▶ Notice should not use generic, uninformative subject-matter designations, such as:
    - ▶ Old or new business
    - ▶ Agenda revisions
    - ▶ Miscellaneous business, etc.



# 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



# 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).



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



# Closed Sessions | Authorized Subjects (continued)

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).
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).



# Closed Sessions | Authorized Subjects (continued)

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.
  - ▶ 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.



# Further Information

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