

Wisconsin Open Government Essentials

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

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Wauwatosa, Wisconsin



Introduction



Presentation Overview

- ▶ Provide background on DOJ's Office of Open Government
- ▶ Cover public records law essentials
 - ▶ Explain what a record is and who can request records
 - ▶ Discuss the receipt and processing of public records requests
 - ▶ Outline how to respond to public records requests
 - ▶ Detail permissible costs that may be assessed
 - ▶ Address record retention
- ▶ Outline open meetings law essentials
 - ▶ Define what constitutes a governmental body
 - ▶ Explain when a meeting occurs
 - ▶ Discuss closed sessions
- ▶ Opportunity for questions



Office of Open Government (OOG)

- ▶ Interpret and apply the Open Meetings Law, Public Records Law, and other open government statutes and rules
- ▶ Manage DOJ's public records request process
- ▶ Develop open government policies
- ▶ Provide legal counsel to DOJ and clients
- ▶ Run 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
- ▶ Provide training and open government resources



Government Transparency

- ▶ “Transparency and oversight are essential to honest, ethical governance.” *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
- ▶ **Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39**
 - ▶ Sheds light on workings of government, acts of public officers and employees
 - ▶ Assists members of the public in becoming an informed electorate
 - ▶ Serves a basic tenet of our democratic system by providing for public oversight
- ▶ **Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98**
 - ▶ The purpose of the open meetings law is to ensure openness
 - ▶ Only a few limited exemptions permit confidentiality
 - ▶ The open meetings law is to be broadly interpreted to promote openness



The Public Records Law and Record Retention



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 Record Roles



Authorities and Custodians

- ▶ **Authority:** Defined in Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
- ▶ **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
 - ▶ E.g., elective official or designee
 - ▶ Custodial services: other staff may assist
 - ▶ All records belong to the authority



Who Can Request?

- ▶ **Requester:** Defined at Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
 - ▶ Incarcerated or committed persons have more limited rights
 - ▶ Requester has greater rights to inspect personally identifiable information about himself or herself in a record. Wis. Stat. § 19.35(1)(am)
- ▶ Requester generally **need not identify** himself or herself
- ▶ Requester **need not state the purpose** of the request
 - ▶ Motive generally not relevant, but context appropriately considered

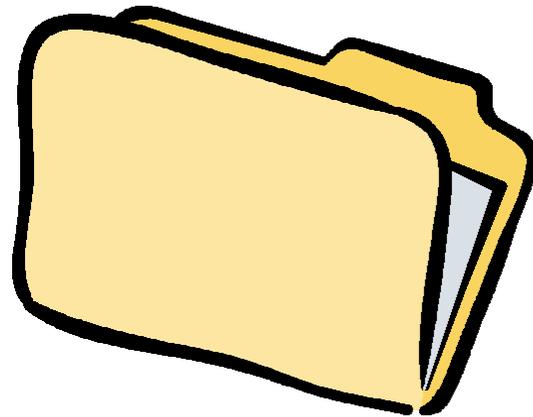


Records



Records Defined

- ▶ Wis. Stat. § 19.32(2):
 - ▶ “**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.”



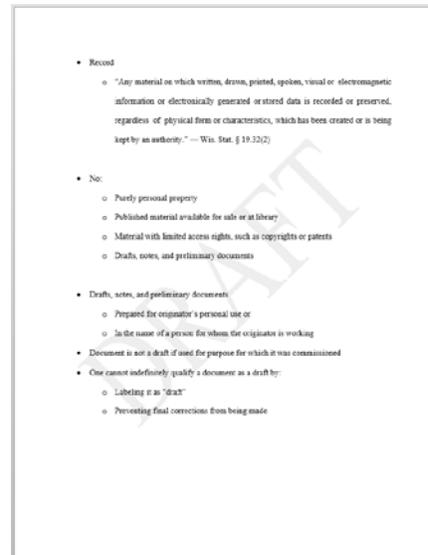
Is it a Record?

- ▶ Records **include** the following:
 - ▶ **Material not created by the authority but in the authority's possession**
 - ▶ Electronic records, including:
 - ▶ Audio and video
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Social media
- ▶ Records **do not include** the following:
 - ▶ Published material available for sale or at library
 - ▶ Material with limited access rights, such as copyrights or patents
 - ▶ Purely personal property
 - ▶ Drafts, notes, and preliminary documents



Drafts, Notes, Preliminary Documents

- ▶ Prepared for originator's **personal use** or in the name of a person for whom the originator is working
- ▶ Not a draft if used for purpose for which it was commissioned
- ▶ One cannot indefinitely qualify a document as a draft by:
 - ▶ Simply labeling it "draft" or preventing final corrections from being made
- ▶ Generally, exception is limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority



Personal and Business Email, etc.

- ▶ **Personal** email, calls, and documents on an **authority's account**:
 - ▶ Email sent and received on an authority's computer system is a record
 - ▶ Includes purely personal email sent by authority's officers or employees
 - ▶ *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
 - ▶ Generally, disclosure not required of purely personal e-mails sent or received by employees that evince no violation of law or policy
- ▶ **Government business** emails, calls, and documents on **private accounts**:
 - ▶ These materials may be records
 - ▶ Content determines whether something is a record, not the medium, format, or location
 - ▶ Personal materials on the private accounts are not subject to disclosure
 - ▶ **Recommendation**: Conduct a careful search of all relevant accounts

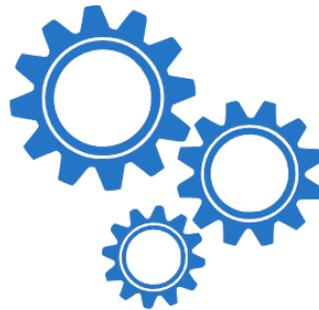


Receiving and Processing a Request



Public Records Request Process

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for records
- ▶ Any responsive records are reviewed:
 - ▶ **Presumption that they will be disclosed unless:**
 - ▶ They are exempt from disclosure pursuant to a **statute** or the **common law**
 - ▶ The **public records balancing test** weighs in favor of nondisclosure
- ▶ Records are released with letter explaining any redactions



Receiving a Request

- ▶ A request may be submitted to anyone with an authority
 - ▶ A request may be **verbal** or **in writing**
 - ▶ An authority may **not** require the use of a form
 - ▶ “Magic words” are not required
- ▶ In order to be a **sufficient request**, it must:
 - ▶ **Reasonably describe** the information or records requested
 - ▶ Be **reasonably specific as to time and subject matter**
- ▶ Custodian should not have to guess what records the requester wants



Communication with a Requester

- ▶ Don't understand the request? Contact the requester
 - ▶ Send a written summary of your understanding and request clarification
- ▶ Inform the requester about a large number of responsive records, or large estimated costs, and suggest/solicit alternatives
 - ▶ A requester may not know how many responsive records exist
 - ▶ A requester may have no interest in many "technically" responsive records
- ▶ Send the requester an acknowledgment and periodic status updates if the response will take some time



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
 - ▶ However, if a request asks a question and an existing record answers the question, provide the record or inform the requester
- ▶ Continuing requests are not contemplated by the public records law
- ▶ If there are no responsive records, inform the requester



Absolute Right and Denial of Access

- ▶ **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, for example:
 - ▶ 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, for example:
 - ▶ 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 reputation and privacy of individuals



Special Issues



Employee Records

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Unless required by Wis. Stat. § 103.13, **prohibits** the disclosure of information related to:
 - ▶ Employee's home address, email, phone number, SSN
 - ▶ **Current** investigation of possible criminal offense or misconduct connected with employment
 - ▶ Employee's employment examination, except the score
 - ▶ Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- ▶ Other personnel-related records, including disciplinary records, may be subject to disclosure
 - ▶ Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356.



DPPA

- ▶ **Driver's Privacy Protection Act (DPPA)**

- ▶ *New Richmond News v. City of New Richmond*,
2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339

- ▶ **Accident reports**: permitted to be released unredacted

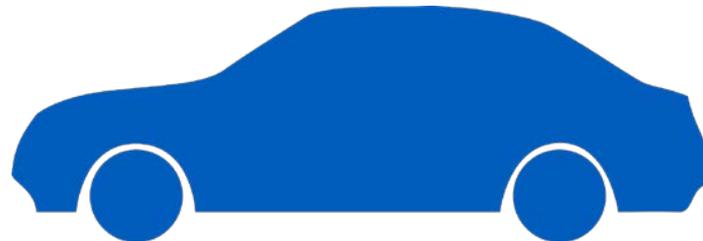
- ▶ DPPA exception allows. See 18 U.S.C. § 2721(b)(14).

- ▶ **Incident reports**: release of DMV info. prohibited unless exception applies

- ▶ Compliance with public records request not a "function"

- ▶ Information **verified** using DMV records is not protected by DPPA

- ▶ Presents problem of determining how info. was obtained



Special Issues - Law Enforcement



Prosecutor's Files v. Law Enforcement Records

- ▶ 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).
- ▶ However, for a law enforcement agency's records, the balancing test must be applied on a case-by-case basis



Law Enforcement - Key Considerations

- ▶ Crime victim rights expressed in statutes, constitutional provisions, and case law
 - ▶ Consideration of family of crime victims
- ▶ Protection of witnesses
 - ▶ Safety and security
 - ▶ “Chilling” future cooperation with law enforcement
- ▶ Confidential Informants
 - ▶ Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise
- ▶ Children and juveniles
- ▶ Officer safety
 - ▶ Including the safety of officers’ families and homes
- ▶ **Tip:** If an authority has a record that it did not create, it can reach out to the originating authority to see what concerns it may have



Law Enforcement – Questions to Ask

- ▶ Would the release endanger the safety of persons involved?
- ▶ Are there reputation and privacy interests involved?
 - ▶ The public interest is found in the public effects of failing to honor the individual's privacy interests **not** the individual's personal interests
- ▶ Do the records contain rumor, hearsay, or potentially false statements?
- ▶ Were potentially biased witnesses interviewed?
- ▶ Do the records discuss confidential law enforcement techniques and procedures?
- ▶ Is there a possibility of threats, harassment, or reprisals?
 - ▶ Against victims, witnesses, officers, others, or their families?
 - ▶ Any such possibility is accorded appropriate weight depending on the likelihood
 - ▶ Generally, there must be a **reasonable probability**
 - ▶ See *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



Mental Health Records

- ▶ Wis. Stat. § 51.30(4): Generally, **mental health registration and treatment** records are **confidential** and **privileged** to the subject individual.
 - ▶ May only release with the subject individual's **informed written consent**, court order, or other certain limited circumstances. See Wis. § 51.30(4)(b).
 - ▶ **Includes** duplicate copies of **statements of emergency detention** in the possession of a law enforcement agency, absent written informed consent or a court order. See *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
 - ▶ Supreme Court found that such records were registration records even if in the possession of the law enforcement agency.
 - ▶ Treatment records include registration records. See Wis. Stat. § 51.30(1)(b).
- ▶ Consult your legal counsel



Other Law Enforcement Special Issues

- ▶ Law enforcement records of **children and juveniles** who are the subjects of investigations and other proceedings are confidential with some exceptions. See Wis. Stat. §§ 48.396 and 938.396.
 - ▶ Access to other records regarding or mentioning children are subject to general public records rules including the balancing test
- ▶ Wis. Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- ▶ Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- ▶ Wis. Stat. § 165.79: Crime Laboratory Privilege
- ▶ Other statutes requiring confidentiality



Special Issues - Electronic Records



Social Media Records

- ▶ Social media accounts created or maintained by an authority
 - ▶ Increased use of social media by authorities
 - ▶ E.g., Facebook, Twitter
 - ▶ Constitute records if created or maintained by an authority
- ▶ Considerations:
 - ▶ Be familiar with the site
 - ▶ Are the records archived?
 - ▶ Who may post, manage, or control?
 - ▶ How long is content available?
 - ▶ Third-party messages or posts
 - ▶ Does the authority have a social media policy?



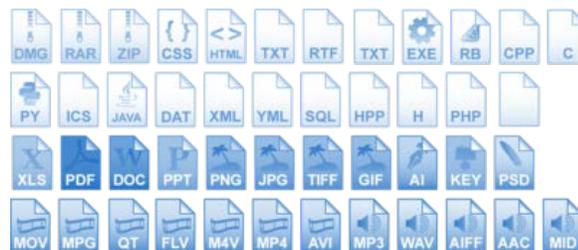
Electronic Databases

- ▶ Direct access to electronic databases not required
- ▶ Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- ▶ Wis. Stat. § 19.36(4): computer program is not subject to examination or copying
 - ▶ However, the following is:
 - ▶ Input: Material used as input for computer program
 - ▶ Output: Material produced as product of computer program
- ▶ Requester, within reasonable limits, may request a **data run** to obtain requested information



Format of Records

- ▶ *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898
 - ▶ Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
 - ▶ Printed copies of requested records were not sufficient
 - ▶ Printed copies do not include metadata
 - ▶ Metadata is data about data
 - ▶ Because emails were requested in electronic format, associated metadata was also requested
- ▶ *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
 - ▶ PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester



Police Body Camera Recordings

- ▶ Body camera recordings are records subject to disclosure
- ▶ Must be retained as required by relevant records retention schedules
- ▶ Proposed legislation would have public records law and records retention implications
 - ▶ Senate Bill 50
 - ▶ Result of Joint Legislative Council Study Committee on the Use of Police Body Cameras



Redaction



Redaction

- ▶ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- ▶ 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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Redaction of Audio/Video

- ▶ Technology
 - ▶ Software for blurring video can be difficult to find using the term “redaction”
 - ▶ Find software with tools including: Gaussian blur, Mosaic blur, and motion tracking
 - ▶ Most video software will handle audio redactions, too
- ▶ Cost
 - ▶ Many cost effective options available for audio/video software
 - ▶ May take many working hours to redact audio/video (time decreases with practice)
- ▶ Future technical questions?
 - ▶ Contact your agency’s IT department
 - ▶ Contact DOJ DC Digital Records Analyst J. Spencer Gustafson
 - ▶ Email: gustafsonjs@doj.state.wi.us



Responding to a Request



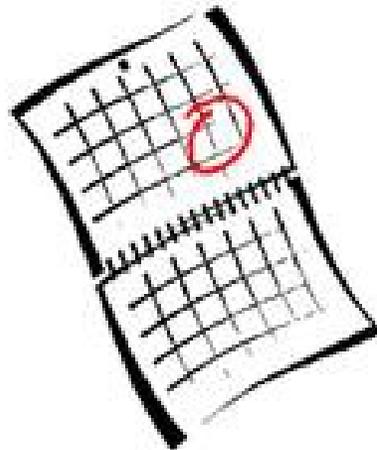
Written Response?

- ▶ A written request requires a written response, if the request is denied in whole or in part
 - ▶ Reasons for denial must be specific and sufficient
 - ▶ Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
 - ▶ Reviewing court usually limited to reasons stated in denial
 - ▶ **Availability of same records from other sources generally not a sufficient reason**
 - ▶ 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
- ▶ May respond in writing to a verbal request
- ▶ A request for clarification, without more, is not a denial



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 and status updates
- ▶ Penalties for arbitrary and capricious delay



Notice Before Release

- ▶ Notice to record subjects is only required in limited circumstances
 - ▶ 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 of the authority holding state or local public office
 - ▶ “Record subject” may augment the record to be released
- ▶ OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- ▶ Courtesy notice



Permissible Fees



Costs

- ▶ **Actual, necessary, and direct** costs only—unless otherwise specified by law
 - ▶ Copying and reproduction
 - ▶ Location, if costs are \$50.00 or more
 - ▶ Location costs themselves must be \$50 or more: An authority **cannot combine** location costs with other costs to reach the \$50 threshold
 - ▶ Mailing/shipping to requester
 - ▶ Others specified in Wis. Stat. § 19.35(3)
- ▶ Authorities **may not** charge for redaction costs
- ▶ Prepayment may be required if total costs exceed \$5.00
- ▶ Authority may waive all or part of costs
- ▶ **Recommendation:** Keep careful records of time spent working on requests



OOG Fee Advisory

- ▶ Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
 - ▶ Available at https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf
 - ▶ Overview of costs permissible under the law
 - ▶ Recent inquiries pertaining to high fees charged by some authorities:
 - ▶ Copy costs that are not actual, necessary and direct
 - ▶ Location costs including time spent by specialists
 - ▶ Limit amount of time spent by specialist
 - ▶ Charge lowest hourly rate of individual **capable** of searching
- ▶ DOJ's fee schedule is available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf>



Enforcement



Enforcement

- ▶ Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
 - ▶ Authority may be ordered to release records
 - ▶ Other remedies
- ▶ 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.”



Record Retention



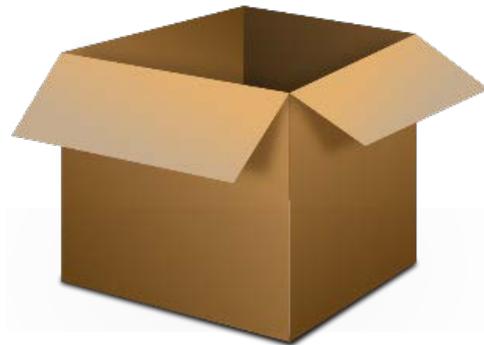
Record Retention under the Public Records Law

- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ **Wis. Stat. § 19.35(5)**: Governs retention **following receipt of a request**:
 - ▶ No destruction until the request is granted or until at least **60 days** after the authority denies the request
 - ▶ **90 days** if requester is committed or incarcerated
 - ▶ No destruction during enforcement action



Other Record Retention Statutes

- ▶ **Wis. Stat. § 16.61**: State authorities
- ▶ **Wis. Stat. § 19.21**: Local authorities
 - ▶ Generally, a **seven-year retention period** for most records
 - ▶ The Public Records Board (PRB) may set shorter periods
 - ▶ PRB has oversight and accountability for the state's records program



Types of Record Retention Schedules

- ▶ Agency-specific **Records Retention/Disposition Authorizations** (RDAs)
 - ▶ Deviate from the GRSs to meet specific agency needs
- ▶ **General Records Schedules** (GRSs)
 - ▶ State agencies are bound to follow
 - ▶ Unless they opt out and adopt corresponding RDAs within 12 months
 - ▶ Local government units may opt in



Local Government Retention Schedules

- ▶ **County General Records Schedule**
 - ▶ PRB approved in May 2010
 - ▶ Contains schedules for sheriff's records
- ▶ **Wisconsin Municipal Records Schedule (WMRS)**
 - ▶ PRB approved on August 27, 2018
 - ▶ Does not contain schedules for law enforcement records
- ▶ **Guidance in developing agency-specific records schedules:**
 - ▶ Counties General Records Schedule
 - ▶ Wisconsin Municipal Records Schedule
 - ▶ Agency-specific schedules (RDAs)
 - ▶ Including those for state, county, and municipal government agencies



Adoption of General Records Schedules

- ▶ Local government agencies **may** adopt them, but they are not required
- ▶ To adopt:
 - ▶ Submit the **Notification of General Schedules Adoption** form (PRB-002) to WHS
 - ▶ PRB will return a signed copy to the municipality
 - ▶ Following receipt of PRB approval, the local entity should **enact an ordinance** adopting the general schedule as their official records retention schedule
- ▶ Local entities should:
 - ▶ Supersede any existing ordinances covering records included in the adopted general schedule
 - ▶ Retain any approved schedules in existing ordinances for records that are not covered by the general schedule
- ▶ Local entities may also adopt other GRSs provided by the PRB or submit their own RDAs for PRB approval



Record Retention - Format

- ▶ Hard copies v. electronic copies
 - ▶ **Retention of records in electronic formats permissible**
 - ▶ State authorities: Wis. Stat. § 16.61(5)(a)
 - ▶ Local authorities: Wis. Stat. § 19.21(4)(c)
 - ▶ Local government unit or agency may provide for retention of records in electronic format
 - ▶ Local government unit or agency shall make for such provision by ordinance or resolution



Retention of Texts, Social Media, etc.

- ▶ Methods of retaining texts, social media, app content, and similar records:
 - ▶ Screen shots
 - ▶ Rely on social media provider or individual phone user
 - ▶ **Caution:** Authorities are responsible for ensuring that records are maintained so this creates a risk
 - ▶ Social media provider may change its terms of use, delete content, or cease to exist
 - ▶ Individual users may not retain content properly or may damage or lose their phones
 - ▶ Archiving services
 - ▶ Agency-created retention tools



Record Retention - Best Practices

- ▶ Establish agency policies regarding retention
- ▶ Ensure all agency-specific RDAs are up-to-date
 - ▶ RDAs sunset after 10 years
- ▶ Train agency records officers and other staff on record retention and relevant agency policies
- ▶ Follow your retention schedules
- ▶ Consult your legal counsel
- ▶ For additional information, visit the Public Records Board's website:
 - ▶ <http://publicrecordsboard.gov>



The Open Meetings Law



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)



Essentials

- ▶ 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



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.)
- ▶ Includes purely advisory bodies, governmental corporations, quasi-governmental corporations, and formally constituted subunits



Governmental Body: Collective Entity

- ▶ 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



Governmental Body: 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 Body: 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.



Governmental Body: Subunits and Advisory Bodies

▶ Subunits

- ▶ 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).

▶ Advisory bodies

- ▶ The definition of “governmental body” includes **purely advisory** bodies.
- ▶ A body **does not have to possess final decision-making power**.
- ▶ What usually matters is the manner in which the body was created, rather than the nature of its authority.



Governmental Body: 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*.

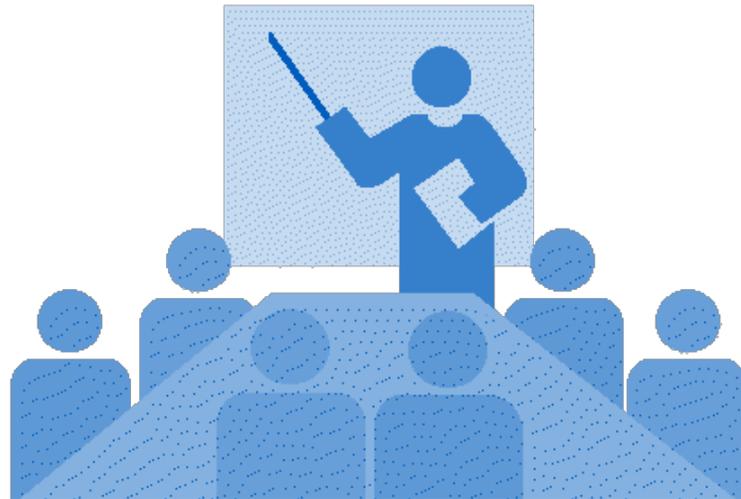


Meetings



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: The *Showers* Test

- ▶ The Wisconsin Supreme Court established a two-part test. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
 - ▶ A meeting occurs whenever:
 - ▶ **Purpose** requirement:
 - ▶ Members convene for the purpose of conducting governmental business
 - ▶ **Numbers** requirement:
 - ▶ The number of members present is sufficient to determine the body's course of action
 - ▶ Includes **negative quorums**



Meetings: The “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: The “Numbers” Requirement

- ▶ This number is not necessarily equal to a majority of the membership or to a quorum of the body.
- ▶ 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**”
- ▶ Fact-specific depending on the governmental body



Meetings: “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: “Convening” of Members (cont.)

▶ 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*

▶ 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 test, then it is a “meeting.”*
69 Op. Att’y Gen. 143 (1980).



Meetings: “Convening” of Members (cont.)

▶ 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*
- ▶ Courts will likely consider:
 - ▶ Number of participants
 - ▶ Number of communications
 - ▶ Time frame
 - ▶ Extent of conversation-like interaction



Meetings: “Convening” of Members (cont.)

- ▶ Technology creates risk of private communication that should be held at public meetings
- ▶ To minimize the risk of violations, **caution is advised**:
 - ▶ Use only for one-way transmissions
 - ▶ Do not send replies or minimize their distribution
 - ▶ If a reply is needed, do not reply to all; reply only to the sender
 - ▶ Do not use for debate/discussion or polling/voting
 - ▶ Could be construed as a “walking quorum”
 - ▶ Limit the use of attachments/editing among members



Meetings: Serial or “Walking” Quorum

- ▶ “Walking” Quorum: A meeting resulting from a series of gatherings among body members
- ▶ 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
 - ▶ Consult with your legal counsel



Meetings: 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: 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
- ▶ 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”



Notice



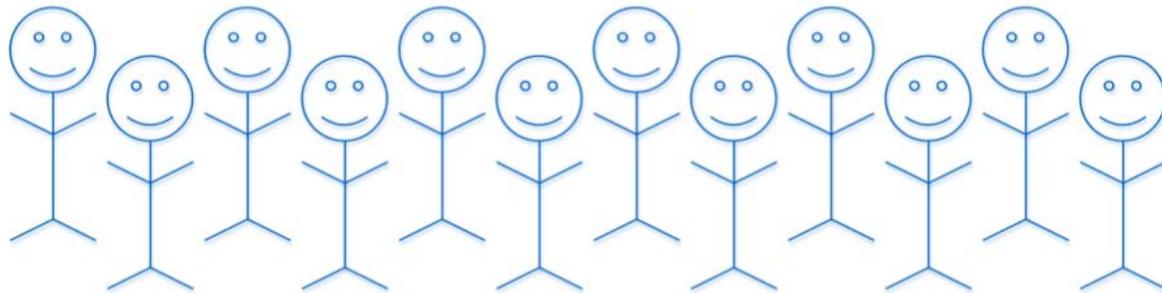
General Notice Requirement

- ▶ “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
- ▶ Presiding officer is legally responsible for ensuring notice requirements are met
 - ▶ Tasks may be delegated but presiding officer liable for any violations



Manner of Notice: Public

- ▶ 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 Notice: News Media

- ▶ Notice also must be given to any news media that have filed a written request for notice.
- ▶ News media cannot be charged a fee for meeting notices. 77 Op. Att’y Gen. 312 (1988).



Manner of Notice: 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.
- ▶ 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.



Timing and Content of Notice

- ▶ Notice must be given **at least 24 hours** before the meeting
 - ▶ Shorter notice 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).

NOTICE



Content of Public Notice: Subject Matter

- ▶ How detailed must a notice be in describing the subject matter of a meeting?
 - ▶ 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
- ▶ Notice should **not** use generic, uninformative subject-matter designations, such as:
 - ▶ Old or new business
 - ▶ Agenda revisions
 - ▶ Miscellaneous business, etc.
- ▶ Notice should include the subject matter of any contemplated closed session



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.

NOTICE

NOTICE

Notice



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

- ▶ Three aspects to public accessibility:
 - ▶ **Physical location** in the community
 - ▶ Meetings should be held within the body's geographic area
 - ▶ May not be held on private premises unless open and reasonably accessible to public
 - ▶ **Room size** and acoustics
 - ▶ Must be reasonably calculated to accommodate all who wish to attend
 - ▶ Body members must take reasonable steps to be heard
 - ▶ **Physical accessibility**
 - ▶ In open session, the room should be **unlocked**
 - ▶ If doors must be closed due to noise, post notice inviting entry
 - ▶ Accessibility for people with disabilities
 - ▶ State bodies must meet in facilities that people can access without assistance. Wis. Stat. § 19.82(3).
 - ▶ Statute not applicable to local bodies, but they must provide reasonable access



Open Sessions: Citizen Participation

- ▶ The open meeting law ensures the right to **attend and observe** open session meetings
- ▶ The law does **not** require a body to allow the public to speak or actively participate
- ▶ 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
- ▶ 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 Sessions: Record Keeping

- ▶ Wis. Stat. § 19.88(3) - All motions and roll call votes must be recorded and preserved
 - ▶ Law does not specify a timeframe in which such records 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 require bodies to keep formal minutes of meetings
 - ▶ However, minutes are often required by **other statutes** for certain bodies



Open Sessions: Additional Issues

- ▶ Wis. Stat. § 19.90 - **Recording:**
 - ▶ 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
 - ▶ The open meetings law does not require governmental bodies to permit citizens to record *closed* sessions.
- ▶ Wis. Stat. § 19.88 - **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



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



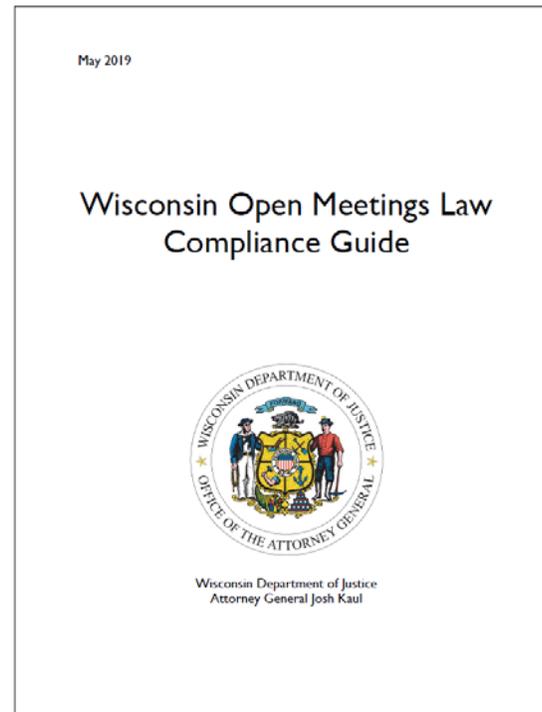
Closed Sessions: Scope and Attendance

- ▶ 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
 - ▶ may not take up any other matters
- ▶ Attendance
 - ▶ A body has discretion to allow anyone to attend a closed session
 - ▶ 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 (cont.)

(a) **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).

(b) 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 it occur in open session

(c) 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 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 (cont.)

(d) Except as provided . . . considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**. Wis. Stat. § 19.85(1)(d).

(e) 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
- ▶ 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
- ▶ (f) 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 (cont.)

(g) **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



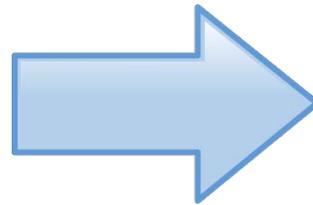
Closed Sessions: Voting

- ▶ 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
- ▶ 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 may 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 and Penalties

- ▶ The open meetings law may be enforced by the attorney general, local district attorney, or by a private relator. Wis. Stat. § 19.97:
- ▶ Penalties:
 - ▶ Civil forfeiture of \$25 to \$300 per violation for any **member** of a body who **knowingly** attends a meeting held in violation of the open meetings law or 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
- ▶ 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

- ▶ 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
 - ▶ Email: fergusonpm@doj.state.wi.us



Wisconsin Open Government Essentials

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

October 16, 2019

Wauwatosa, Wisconsin

