THE WISCONSIN OPEN MEETINGS LAW

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
Wisconsin Department of Corrections
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Madison
INTRODUCTION
Public Policy

- Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98
  - “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)
Government Transparency

- The open meetings law is to be broadly interpreted to promote the policy of openness
- On close questions, courts will prefer a legal interpretation favoring 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 (closed sessions)
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
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.).

- Includes purely advisory bodies, governmental corporations, quasi-governmental corporations, and formally constituted subunits
Governmental Bodies: Collective Entities

• 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 Bodies: 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 Bodies: 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.

- **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 Bodies: 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

  - 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

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 (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.*

- **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 (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*
  - Courts will likely consider:
    - Number of participants
    - Number of communications
    - Time frame
    - Extent of conversation-like interaction
Meetings: “Convening” of Members (continued)

- 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 responsibly for ensuring notice requirements are met
  • Tasks may be delegated but presiding officer liable for any violations
Manner of Giving 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 Giving Notice: News Media

- Notice also must be given to any news media that have filed a written request for notice.
Manner of Giving 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 Public 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).
Content of Public Notice: Subject Matter

• How detailed must a notice be in describing the subjects to be considered at 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, unininformative 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.
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 citizens who wish to attend
    • Body members must take reasonable steps to make it possible for them to be heard
  • Physical accessibility
    • In open session, the room should be unlocked
    • If doors must be closed due to noise, notice should be posted 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: 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.
- The open meetings law does not require governmental bodies to permit citizens to record closed sessions.
Open Sessions: 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.
Open Sessions: Record Keeping

- 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 itself require bodies to keep formal minutes of meetings
  - However, minutes are often required by other statutes for certain types of bodies
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 (continued)

(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.
Closed Sessions: Authorized Subjects (continued)

(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 (continued)

(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:
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