

# THE WISCONSIN OPEN MEETINGS LAW

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Wisconsin Department of Justice  
Office of the Attorney General  
Office of Open Government  
Wisconsin Department of Corrections  
March 14, 2019  
Madison



# INTRODUCTION

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# Public Policy

- **Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98**

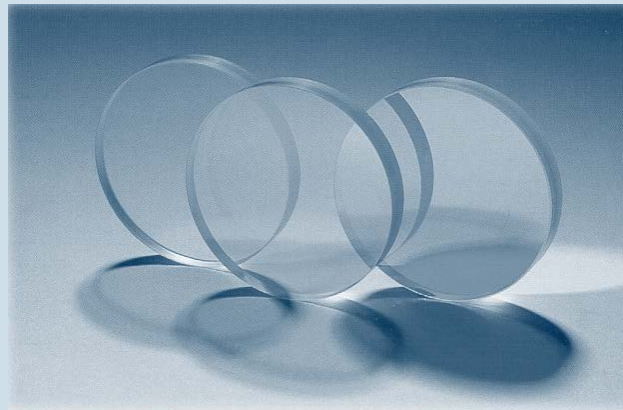
- “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that **the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with 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

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# 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.
    - *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 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*.



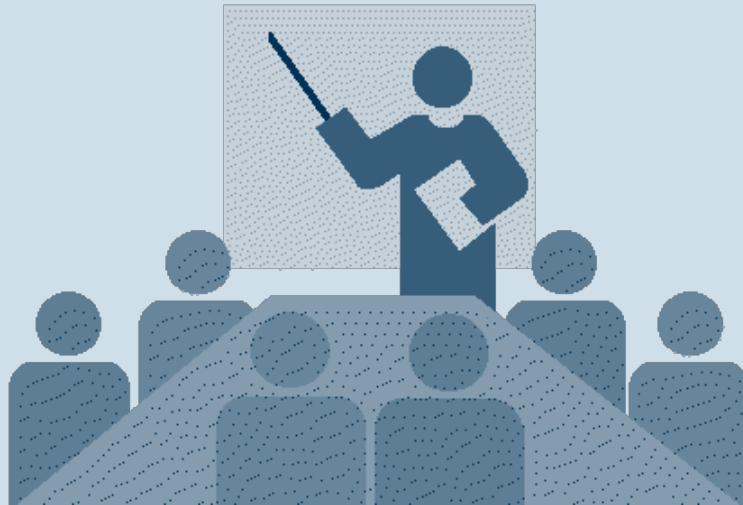
# MEETINGS

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# 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 (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

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# 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



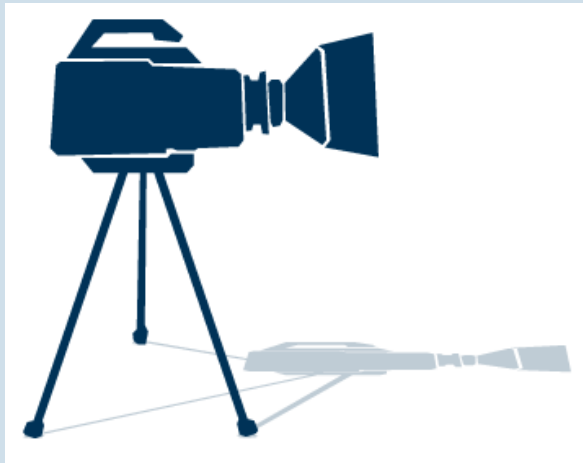
# Manner of Giving Notice: Public

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



# 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).

**NOTICE**



# 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, 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.



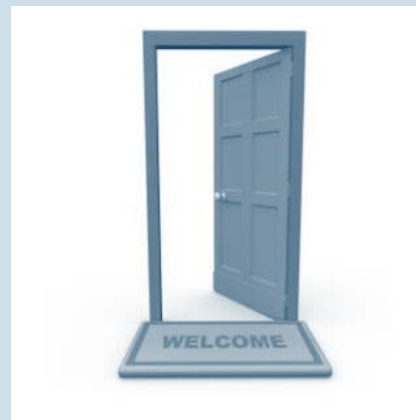
# OPEN SESSIONS

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# 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

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# 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



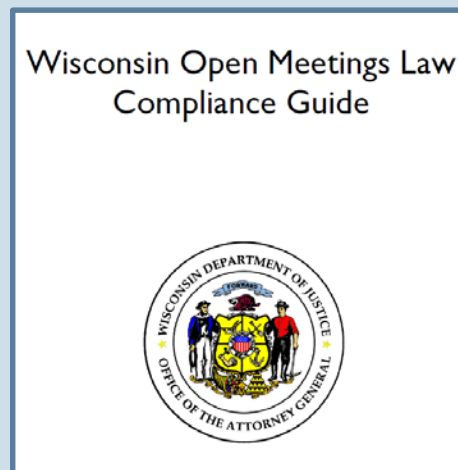
# Closed Sessions: Scope and Attendance

- 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.
- 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)

(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

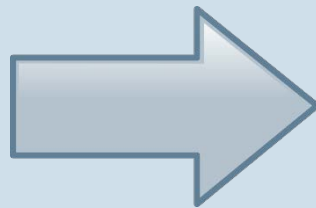
- Under a *prior* version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, **if the vote is integral to the authorized subject of the closed session.** *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- More recently, the 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

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# 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  
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