

THE WISCONSIN OPEN MEETINGS LAW: A REFRESHER

Wisconsin Department of Justice

Office of the Attorney General

Office of Open Government

Municipal Electric Utilities of Wisconsin (MEUW)

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Delavan, Wisconsin



INTRODUCTION



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



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)



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



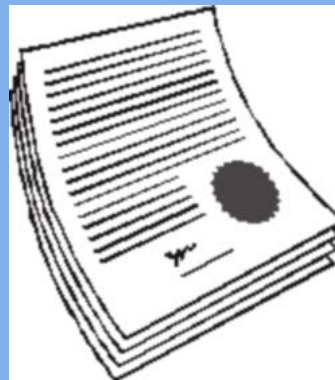
Governmental Bodies: Collective Entities

- 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.

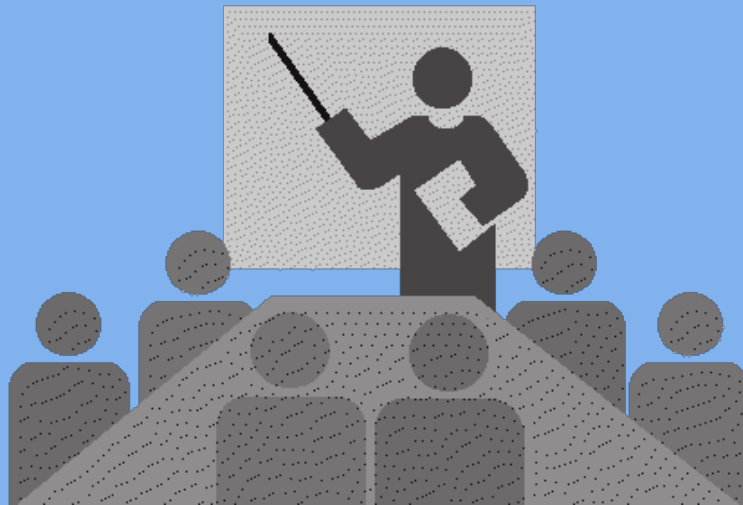


MEETINGS



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
 - Includes preliminary decisions, discussion, information gathering
 - **Numbers** requirement:
 - The **number** of members present is sufficient to determine the body's course of action
 - Includes **negative quorums**



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) – Including Social Media

- **Other forms of electronic messaging**

- **Email**, electronic discussion boards, instant messaging, **social media**, 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) – Social Media and Other Technology Concerns

- 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



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).
 - Including the subject matter of any contemplated closed session
 - Notice should **not** use generic, uninformative subject-matter designations, such as:
 - Old or new business
 - Agenda revisions
 - Miscellaneous business, etc.



Content of Public Notice: Subject Matter

- 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

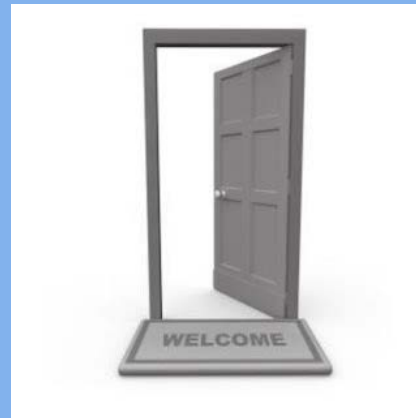


OPEN SESSIONS



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 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

- 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



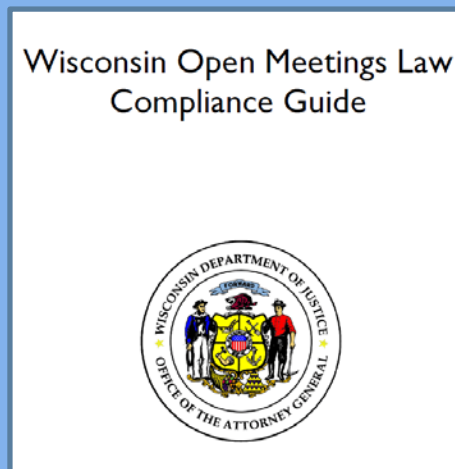
Closed Sessions: Scope and Attendance

- 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.
- 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)

(d) Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention.**

(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.



Closed Sessions: Authorized Subjects (continued)

(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).

(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.



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



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