

The Open Meetings Law: Essentials for Ensuring Transparency

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
State Law Library Training
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Madison, Wisconsin



Overview of Presentation

- ▶ What is the Office of Open Government (OOG)?
- ▶ What is the Open Meetings Law?
- ▶ What is a “Meeting”?
 - ▶ *Showers* test: Purpose and Numbers Requirements
 - ▶ “Convening” of Members
 - ▶ Serial Meetings and “Walking” Quorums
 - ▶ Social or Chance Gatherings
- ▶ Requirements of the Open Meetings Law
 - ▶ Notice Requirements
 - ▶ Open Meetings Requirements
 - ▶ Closed Meetings Requirements



What is the OOG?



Office of Open Government (OOG)

- ▶ Interpret and apply the Public Records and Open Meetings (PROM) Laws, 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 (PR Law) and 19.98 (OM Law)
 - ▶ Any person may request AG's advice
- ▶ Provide training and open government resources
 - ▶ PR/OM Law Compliance Guides (online)



DOJ's Website: www.doj.state.wi.us

► Office of Open Government



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Happy 4th of July! Stay safe as we celebrate independence with family and friends.
#4thofJuly

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Latest News Release

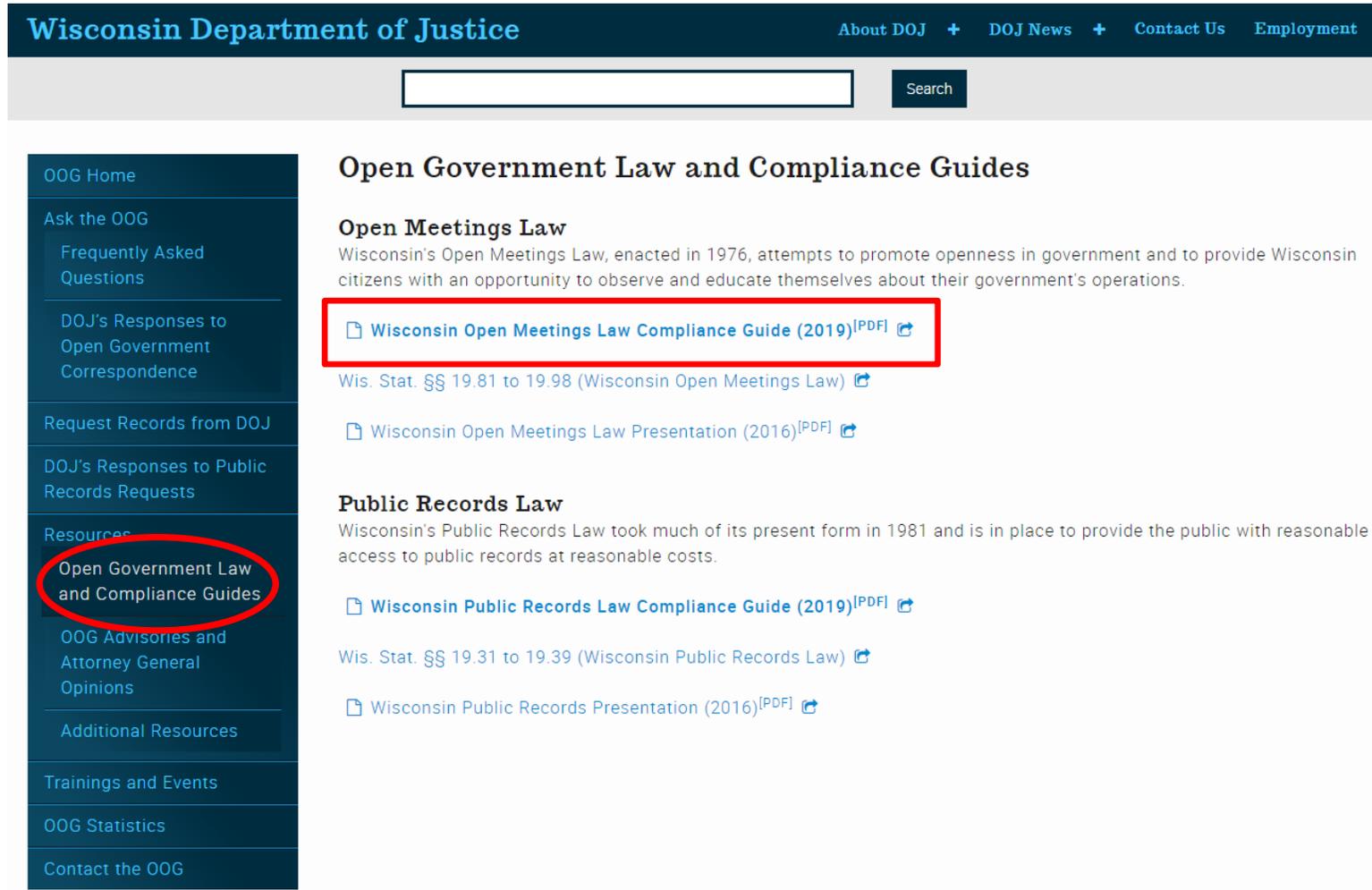
AG Kaul Urges Federal Government to Ensure Equal Access to Shelters

Jul 3 2019

MADISON, Wis. - Attorney General Josh Kaul, as part of a multistate group of 16



Resources: Open Government Law and Compliance Guides



The screenshot shows the Wisconsin Department of Justice website. The header includes the department name and navigation links for About DOJ, DOJ News, Contact Us, and Employment. A search bar is located below the header. The left sidebar contains a menu with the following items: OOG Home, Ask the OOG (with sub-items: Frequently Asked Questions, DOJ's Responses to Open Government Correspondence), Request Records from DOJ, DOJ's Responses to Public Records Requests, Resources (with 'Open Government Law and Compliance Guides' circled in red), OOG Advisories and Attorney General Opinions, Additional Resources, Trainings and Events, OOG Statistics, and Contact the OOG. A red arrow points from the left towards the sidebar. The main content area is titled 'Open Government Law and Compliance Guides' and is divided into two sections: 'Open Meetings Law' and 'Public Records Law'. Each section includes a brief description and a list of resources. The first resource in the 'Open Meetings Law' section, 'Wisconsin Open Meetings Law Compliance Guide (2019)', is highlighted with a red box. The 'Public Records Law' section also lists a 'Wisconsin Public Records Law Compliance Guide (2019)'.

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Open Government Law and Compliance Guides

Open Meetings Law
Wisconsin's Open Meetings Law, enacted in 1976, attempts to promote openness in government and to provide Wisconsin citizens with an opportunity to observe and educate themselves about their government's operations.

- [Wisconsin Open Meetings Law Compliance Guide \(2019\)](#)^[PDF]
- [Wis. Stat. §§ 19.81 to 19.98 \(Wisconsin Open Meetings Law\)](#)
- [Wisconsin Open Meetings Law Presentation \(2016\)](#)^[PDF]

Public Records Law
Wisconsin's Public Records Law took much of its present form in 1981 and is in place to provide the public with reasonable access to public records at reasonable costs.

- [Wisconsin Public Records Law Compliance Guide \(2019\)](#)^[PDF]
- [Wis. Stat. §§ 19.31 to 19.39 \(Wisconsin Public Records Law\)](#)
- [Wisconsin Public Records Presentation \(2016\)](#)^[PDF]

Wisconsin Department of Justice
OFFICE OF THE ATTORNEY GENERAL

Open Meetings Law Compliance Guide

May 2019

Wisconsin Open Meetings Law Compliance Guide



Wisconsin Department of Justice
Attorney General Josh Kaul



What is the Open Meetings Law?



Government Transparency and the Open Meetings Law

“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)



Policy of Openness

- ▶ The open meetings law is to be broadly interpreted to promote the policy of openness
 - ▶ See Wis. Stat. § 19.81(4)
- ▶ On close questions, courts will prefer an interpretation of the law that favors open government
- ▶ Courts disfavor any interpretation that would facilitate evasion of the policy of openness
- ▶ *Bottom Line:* The purpose of the open meetings law is to ensure openness
 - ▶ Only a few limited exemptions permit confidentiality (closed sessions)



Wisconsin Open Meetings Law

- ▶ Open meetings law – Wis. Stat. §§ 19.81-19.98
 - ▶ Any person may request advice from AG – Wis. Stat. § 19.98
 - ▶ AG and DA enforces OM law – Wis. Stat. § 19.97
 - ▶ Individuals may also file verified complaint to enforce, but prerequisites apply
- ▶ Generally, OM 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*



What is a “Governmental Body” Subject to Open Meetings Laws?

- ▶ Governmental Body – Wis. Stat. § 19.82(1)
 - ▶ State or local agency, board, commission, committee, counsel, department or body corporate
 - ▶ Created by constitution, statute, ordinance, rule, order
 - ▶ Includes *purely advisory bodies*
- ▶ “Formally Constituted Subunits” of Governmental Body
 - ▶ Separate smaller body created by parent body
 - ▶ Composed exclusively of members of parent body
- ▶ Quasi-Governmental Corporations
 - ▶ Complex; Consult your legal counsel



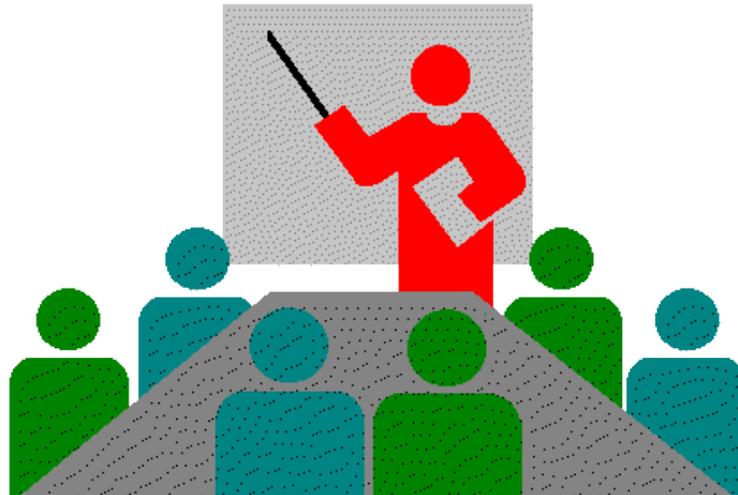
What is a “Meeting”?



Definition of “Meeting”

- ▶ “Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.”

—Wis. Stat. § 19.82(1)



Meetings | Key Concepts: The Two-Part *Showers* 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; AND

Numbers Requirement

- ▶ The **number** of members present is sufficient to determine the body's course of action



Meetings | *Showers* Test: “Purpose” Requirement

- ▶ “Conducting governmental business” is an *expansive* concept that is not limited to formal or final decision making
- ▶ “Conducting governmental business” includes:
 - ▶ Preliminary decisions
 - ▶ Discussion
 - ▶ Information gathering
 - ▶ Interaction among members is not required
 - ▶ *State ex rel. Badke v. Greendale Vill. Bd.*,
173 Wis. 2d 553, 494 N.W.2d 408 (1993)



Meetings | *Showers* Test: “Numbers” Requirement

- ▶ **Q:** How many members must gather to constitute a meeting?
 - ▶ **A:** A sufficient number to determine a body’s course of action.
 - ▶ **WARNING:** This number is not necessarily equal to a majority of the membership or to a quorum of the body.



Meetings | *Showers* Test: “Numbers” Requirement (continued)

- ▶ A sufficient number of members to determine a body’s course of action can refer to either:
 - ▶ The *affirmative* power to pass an action
 - OR
 - ▶ The *negative* power to defeat an action
 - ▶ This is sometimes referred to as a “**negative quorum**”
- ▶ This is very fact-specific to each governmental entity



Meetings | Key Concepts: “Convening” of Members

- ▶ Members must **convene** for there to be a meeting
- ▶ Not limited to face-to-face gatherings or physical presence together
- ▶ Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority
- ▶ If members communicate without physically gathering together, the key question to ask is:
 - ▶ To what extent do their communications resemble a *face-to-face exchange*?



“Convening” of Members

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



“Convening” of Members | Email and Electronic Messaging

- ▶ Email, electronic discussion boards, instant messaging, social networking, blog comments, etc.
 - ▶ **Warning:** 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



“Convening” of Members | Best Practices for Technology

- ▶ **Warning:** Technology creates a risk of private communication that should be conducted 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 content and distribution
 - ▶ If reply needed, do not reply to all; reply only to sender
 - ▶ Do not use for debate/discussion or polling/voting
 - ▶ Could be construed as “walking quorum”
 - ▶ Limit the use of use attachments/editing among members



Meetings | Key Concepts:

Serial Meetings or “Walking” Quorum

- ▶ A “meeting” can sometimes result from a *series of gatherings* among body members (aka serial or “walking” quorum)
- ▶ Elements of a “walking” quorum:
 - ▶ A series of gatherings among groups of members
 - ▶ Each smaller in size than a quorum
 - ▶ Agreement to act uniformly (explicit or implicit)
 - ▶ In sufficient number to control the body
- ▶ **Caution:**
 - ▶ “Walking” quorum issues are complex and fact-specific
 - ▶ Be prepared to consult with your legal counsel



Meetings | Key Concepts: Social or Chance Gathering

- ▶ A “meeting” does *not* include a social or chance gathering of members of a body, unless the gathering is intended to avoid compliance with the law.
 - ▶ Wis. Stat. § 19.82(2)
- ▶ BUT... If one-half or more of the members are present at a gathering, they have the burden to prove that the gathering was social or chance, and was not for the purpose of conducting governmental business
 - ▶ Wis. Stat. § 19.82(2)



Notice Requirements



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

NOTICE



Timing and Content of Public Notice

- ▶ **Timing:** Notice must be given **at least 24 hours** before the meeting. Wis. Stat. § 19.84(3)
 - ▶ Shorter notice may be given *only if, for good cause*, 24-hour notice is impossible or impractical
 - ▶ In no case may less than 2 hours notice be given
- ▶ **Content:** The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting. Wis. Stat. § 19.84(2)
 - ▶ Including the subject matter of any contemplated closed session
 - ▶ Notice should **not** use generic, uninformative subject-matter designations, such as:
 - ▶ Old or new business
 - ▶ Agenda revisions
 - ▶ Miscellaneous business, etc.



Content of Public Notice | Subject Matter

- ▶ **Q:** How detailed must a notice be in describing the subjects to be considered at a meeting?
 - ▶ **A:** The Wisconsin Supreme Court has said that the description must be “reasonable” under all of the “relevant circumstances” of the particular case
 - ▶ *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804
- ▶ “Relevant circumstances” include:
 - ▶ The burden of providing more detail
 - ▶ The degree of public interest in the subject
 - ▶ Whether the subject is non-routine



Open Session Requirements



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)



Accessibility and Citizen Participation

- ▶ Meetings must be reasonably accessible to those with disabilities
 - ▶ When possible, meet in buildings/rooms that are accessible to people with disabilities *without* assistance
 - ▶ Additional requirements may apply under the ADA
- ▶ Citizen participation/Public Comment Periods
 - ▶ OM Law does *not* require that citizens be allowed to participate
 - ▶ But other statutes might require public comment periods
 - ▶ Can impose reasonable limits (*e.g.*, time, agenda items)
- ▶ Citizens are allowed to record meetings – Wis. Stat. § 19.90
 - ▶ So long as doing so is not disruptive to open meetings
 - ▶ OM Law does not require governmental body to permit citizens to record closed meetings



Recordkeeping Requirements

- ▶ All motions and roll call votes must be recorded and preserved
 - ▶ Law does not specify a timeframe in which records of motions and roll call votes must be created
 - ▶ However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable
 - ▶ Voting records must be open to public inspection to the extent required under the public records law
- ▶ The open meetings law does *not* itself require bodies to keep formal minutes of meetings
 - ▶ However, minutes are often required by **other statutes** for certain types of bodies, such as city councils, village boards, county boards



Closed Session Requirements



Closed Sessions | Required Procedure

- ▶ Every meeting must begin in open session
 - ▶ To go into closed session, a motion must be made and carried in open session
 - ▶ The vote of each member must be recorded
 - ▶ Before a vote to go into closed session, the presiding officer must announce:
 - ▶ The statutory exemption(s) authorizing the closed session
- AND
- ▶ The nature of the business to be considered



Closed Sessions | Limited Scope

- ▶ When a governmental body is in closed session, it must limit its discussion:
 - ▶ to the specific business for which the closed session was authorized
- AND
- ▶ may not take up any other matters
- ▶ The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1)
 - ▶ For a more complete discussion of this topic, see DOJ's *Wisconsin Open Meetings Law Compliance Guide*.



Wis. Stat. § 19.85(1) Exemptions | Authorized Subjects for Closed Session

- ▶ 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 the hearing or action be conducted in open session



Authorized Subjects (cont.)

- ▶ 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 governmental body exercises responsibility.
 - ▶ Does not apply to *elected* officials. 76 Op. Att’y Gen. 276 (1987)
 - ▶ Applies to *specific individuals* and does not allow closed discussion of more general policies. 80 Op. Att’y Gen. 176 (1992)
- ▶ 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).
 - ▶ Very limited—need actual knowledge. 74 Op. Att’y Gen. 70 (1985)



Authorized Subjects (cont.)

- ▶ 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.
 - ▶ *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640.
 - ▶ The competitive or bargaining interests must belong to the *government*, not to a private party
 - ▶ Only those *portions* of a meeting may be closed which directly impact the competitive or bargaining interests
 - ▶ Closed *discussion must be limited* to matters that directly and substantially affect the government’s competitive or bargaining interests



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 Open Meetings Law Compliance Guide



For 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
Wisconsin Dept. of Justice
P.O. Box 7857
Madison, WI 53707-7857
 - ▶ Tel: (608) 267-2220 (main OOG line)
 - ▶ Email Assistant Attorneys General:
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Questions?



Thank you for your time and attention!

