The Public Records and Open Meetings Laws: Essentials for Ensuring Transparency

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
City of Janesville Training
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Janesville, Wisconsin
Overview

- Public Records Law Presentation
  - 50 minutes
  - 5-10 minutes Q & A
- Break (10 minutes)
- Open Meetings Law Presentation
  - 30 minutes
  - 5-10 minutes Q & A
Public Records Law
Overview of Public Records Law Presentation

- What is the Office of Open Government (OOG) and the Public Records Law?
- Public Records Roles and Definitions
- What is a Record? (And What is Not?)
- Receiving and Processing a Public Records Request (PRR)
- Special Records
- Responding to a Request
- Other Issues: Costs, Enforcement, Retention
What is the OOG?

What is the Public Records Law?
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)
Government Transparency and the Public Records Law

“Transparency and oversight are essential to honest, ethical governance.”


- Shed light on workings of government and acts of public officers and employees
- Assist members of the public in becoming an informed electorate
- Serve a basic tenet of our democratic system by providing opportunity for public oversight
Presumption of Access

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 Records Roles and Definitions
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
Requesters

- **Requester**: Defined in Wis. Stat. § 19.32(3) – Generally, any person who requests to inspect or copy a record
  - Incarcerated or committed persons: *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 can remain anonymous
  - However, public records requests are themselves records subject to disclosure
Purpose of Request

- Requester *need not state the purpose* of the request
  - Motive generally not relevant, but context appropriately considered
- Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in balancing test
  - *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894
Sufficiency of Request

- A request may be **verbal** or **in writing**
  - An authority may not require the use of a form
- “Magic words” are not required
  - *E.g.*, Not required to cite statute, can use “FOIA,” etc.
- 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
- *Bottom Line:* Custodian should not have to guess what records the requester wants
Verbal Requests

- Encourage requester to reduce request to writing and submit to records custodian
  - But they don’t have to—verbal requests are sufficient
- If verbal, email summary of request to records custodian
  - Date and time received
  - Requester’s name, contact information
  - Any relevant information to process request
- Tip: Confirm request in writing to requester
What is a Record?
(And What is Not?)
“Record” = Content, Not Form

“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.”

— Wis. Stat. § 19.32(2)
Record Subject to Disclosure v. Disclosing Record

- **Employee’s Role:** You search for responsive records and give all responsive records to records custodian to review
  - You must give custodian all responsive records, even if you think record should not be disclosed or you don’t want it disclosed
- **Custodian’s Role:** S/he reviews responsive records and determine if records must be disclosed (4-step evaluation)
- **Bottom Line:** Record subject to disclosure does NOT necessarily mean it will be disclosed
Is it a Record?

Yes:
- Not created by the authority, but in the authority’s possession
- Contractors’ records
- Electronic records, including:
  - Data in a database
  - Emails
  - Audio and video
  - Social media
Is it a Record?

No:

- Published material available for sale or at library
- Purely personal property
- Material with limited access rights
  - E.g., Copyrights or patents
- 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”
  - Preventing final corrections from being made
- **Tip**: Consult legal counsel with Qs about drafts/notes
Personal vs. Business Email

Personal email, calls, and documents on an authority’s account:

- Email sent/received on an authority’s computer system is a record subject to disclosure
  - Includes purely personal email sent by officers or employees of the authority, using authority’s email system
- But disclosure generally not required of purely personal e-mails sent or received by employees that evince no violation of law or policy
  - Schill v. Wisconsin Rapids School District, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 17

Bottom Line: Give all responsive emails to records custodian, even if personal

- Records custodian must still be made aware that such personal emails exist on the authority’s account, to make disclosure determination on a case-by-case basis
Personal vs. Business Email (cont.)

- **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 same private accounts are *not* subject to disclosure
- **Recommendation**: Conduct a careful search of all relevant accounts (personal and business email)
Electronic Records = Public Records

- Social media content posted on social media accounts created or maintained by an authority = Public Record

- Cell phone content, including content on phones issued by an authority and possibly content on personal phones used for government business = Public Record
  - Phone call records, text messages, app content

- Bottom Line: It is important to **check cell phones** when gathering records in response to public records requests

- **Recommendation:** Be aware of what you post on your private accounts/phone!
Receiving and Processing a Public Records Request (PRR)
Public Records Request (PRR) Process, Generally

- PRR received and forwarded to authority’s records custodian
- Authority begins search for any responsive records that are subject to disclosure
- Responsive records are reviewed:
  - Presumption = Records will be disclosed
  - But under limited exceptions, not disclosed/redacted
    - Exempt from disclosure (statutory or common law)
    - Withheld or redacted under public records balancing test
- Records are released with letter explaining any redactions
Processing a Request: Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the public records balancing test
Step 1: 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 record or inform requester
- Continuing requests are not contemplated by the public records law
- If there are no responsive records, inform the records custodian so the requester can be notified
  - *Journal Times v. Police & Fire Com’rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563
Steps 2 & 3: Absolute Right/Denial

- **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:
    - 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:
    - Patient health care records; Pupil records
Step 4: 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; Pupil records
- Court decisions and other statutes requiring confidentiality
- Exemptions to open meetings requirements in Wis. Stat. § 19.85(1)
  - But only if there is a specific demonstration of need to deny access at the time of the request
- Policies expressed in evidentiary privileges
  - Attorney/Client Privileged Communications – Wis. Stat. § 905.03(2)
  - Attorney Work Product – Wis. Stat. § 804.01(2)(c)1 and Common Law
- *Public* interest in reputation and privacy of individuals
  - Public interest is found in the *public effects of failing to honor the individual’s privacy interests*, not the individual’s personal privacy interests
Special Records
Prosecutor, LE, and Juvenile Records

- Prosecutor’s files
  - Not subject to public inspection under the public records law

- Law enforcement records
  - Balancing test must be applied on a case-by-case basis

- Records related to children or juveniles
  - Wis. Stat. §§ 48.396 and 938.396: Law enforcement records of children and juveniles, respectively, are confidential with some exceptions
  - Access to other records regarding or mentioning children subject to general public records rules
Motor Vehicle Records: Driver’s Protection and Privacy Act (DPPA)

  - Wisconsin case construing federal law (DPPA)
  - Personal information: SSN, DL number, VIN, address, phone, hair/eye color, medical or disability information

- **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 another DPPA exception applies

- **Information verified using DMV records**: Not protected by DPPA
  - Presents a problem of determining how info was obtained
Employee Personnel Records

- Wis. Stat. § 19.36(10): Generally, access not permitted for 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 record subjects only required in limited circumstances (Wis. Stat. § 19.356)
Responding to a Request
Written Response to a Request

- If a *written* request is denied in whole or in part, it *requires* a written response, with reasons for denial
  - May/Should respond in writing to verbal request
  - Request for clarification, without more, is not a denial
- 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 for a denial
- 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
Redaction

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

- Redaction constitutes a denial of access to the redacted information

  - Therefore, redaction is subject to review by mandamus (court action)
Timing of Response

- Response is required “as soon as practicable and without delay”
  - No specific time limits; depends on circumstances
  - Penalties for arbitrary and capricious delay
  - May be prudent to send an acknowledgement of request and periodic status updates
- DOJ policy: 10 business days generally reasonable for a response to simple, narrow requests
- Bottom line: When you are informed of a pending public records request, work to gather responsive records as soon as practicable
Format of Records

- Can release a copy of the record, if it is substantially as readable/audible/good as the original
  - Wis. Stat. §§ 19.35(1)(b), (c), (d)
- Sufficient to provide a copy of relevant data in an “appropriate format”
  - WIREData, Inc. v. Village of Sussex (“WIREData II”), 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
  - Court did not squarely address whether records must be produced in requested format
  - Court said PDF fulfilled request for “electronic records,” despite not having all the characteristics wanted by the requester
- Tip: If the requested records are already in a requested format, provide the records in that format unless there is a good reason for not doing so
Notice Before Release

- Notice to “record subjects” only required in limited circumstances
- **Required** by Wis. Stat. § 19.356(2)(a)1:
  - Records containing 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
- Attorney General opinions regarding notice: OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- **Courtesy** notice
Other Issues: Costs, Enforcement, Retention
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 meet the $50 threshold**
  - Mailing/shipping to requester
  - Other costs 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 public records requests

- Overview of costs permissible under the law

- Recent inquiries pertaining to high fees charged by some authorities
  - Copy costs that were 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 recently revised its own fee schedule
Enforcement

- Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
  - Requester may sue; or may ask DA or AG to sue
  - Authority may be ordered to release records; or 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 – Public Records Law

- Wis. Stat. § 19.35(5) – after receiving a PR request:
  - No destruction until request granted or until at least 60 days after request is denied
    - 90 days if requester is committed or incarcerated
  - No destruction during any enforcement action
Record Retention – Other Statutes

- **Records Retention Laws**
  - State authorities: Wis. Stat. § 16.61
  - Local authorities: Wis. Stat. § 19.21

- **Records Retention Schedules**
  - General Records Schedules (GRS’s)
  - Agency-Specific Records Retention/Disposition Authorizations (RDA’s)

- [http://Publicrecordsboard.wi.gov](http://Publicrecordsboard.wi.gov)
Record Retention – Format

- **Hard copies v. Electronic copies**
  - Copies of records in electronic format are *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
Record Retention – Best Practices

- Establish agency policies regarding retention
- Ensure all agency-specific RDA’s are up-to-date
  - RDA’s 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
Questions?

- Q & A (5-10 minutes)
- Break (10 minutes)

- After break, Open Meetings Law Presentation
Open Meetings Law
Overview of Open Meetings Law Presentation

- 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 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

  - 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
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.”**
  
“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
  - 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.
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)
- 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.)


- Applies to public employees and appointed officials over whom the governmental body exercises responsibility.
- 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).

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.
  - 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.
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](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:**
    - Paul Ferguson: fergusonpm@doj.state.wi.us
    - Sarah Larson: larsonsk@doj.state.wi.us
Questions?

Thank you for your time and attention!