Public Records Law and Open Meetings Law Training

Wisconsin Department of Justice
Office of Open Government
October 12, 2023
Wisconsin Technical College System
Annual Executive Assistants to the Presidents and Boards Meeting
Janesville, WI
Presentation Overview

- Provide brief background on DOJ’s Office of Open Government
- **Public Records Session**: Cover public records law essentials, including:
  - Explain what is a record and who can request records
  - Discuss the receipt and processing of public records requests
  - Address records retention
- **Open Meetings Session**: Outline open meetings law essentials, including:
  - Define what constitutes a governmental body
  - Explain when a meeting occurs
  - Detail meeting notice requirements
- Offer the opportunity for questions
DOJ’s Office of Open Government (OOG)

- Interpret and apply the Public Records Law, Open Meetings 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
    - Any person may request AG’s advice
- Provide training and open government resources
Government Transparency

- “Transparency and oversight are essential to honest, ethical governance.” John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862

- **Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39**
  - Sheds light on workings of government, acts of public officers and employees
  - Assists members of the public in becoming an informed electorate
  - Serves a basic tenet of our democratic system by providing for public oversight

- **Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98**
  - The purpose of the open meetings law is to ensure openness
    - Only a few limited exemptions permit confidentiality
  - The open meetings law is to be broadly interpreted to promote openness
The Public Records Law and Records Retention
Presumption

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
Authorities and Custodians

- **Authority**: Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
  - Any of specified entities having custody of a record
  - Public records law obligations apply separately to each authority
  - The authority that receives a request **must** respond

- **Legal Custodian**: 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

- Wis. Stat. § 19.32(3) - generally, any person who requests to inspect or copy a record
  - Incarcerated or committed persons have 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)

- Requesters may be anonymous, and generally, need not identify themselves
  - However, public records requests are records subject to disclosure

- Requesters need not state the purpose of their requests
  - Motive generally not relevant, but context appropriately considered

- State ex rel. Ardell v. Milwaukee Board of School Directors, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.
“Record” Defined

• Wis. Stat. § 19.32(2):
  • “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.”
Is it a Record?

- Records **include** the following:
  - Material not created by the authority but in the authority’s possession
  - Electronic records, including audio and video
  - Data in a database
  - Emails, texts, and social media
  - Virtual workplace chat content, channel discussions, and files

- Records **do not include** the following:
  - Published material available for sale or at library
  - Material with limited access rights, such as copyrights or patents
  - Purely personal property
  - 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” or preventing final corrections from being made
Electronic Records: Email, Texts, etc.

- **Personal** email, texts, calls, and documents on an authority’s account:
  - Email sent and received on an authority’s computer system is a record
    - Includes purely personal email sent by officers or employees of the authority
  - *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177
    - Generally, disclosure not required of purely personal e-mails sent or received by employees that evince no violation of law or policy.

- **Government business** emails, texts, calls, and documents on personal 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
Electronic Records: Virtual Workplaces

- Virtual workplaces, such as Microsoft Teams and Zoom, create or contain records subject to disclosure
  - Chats (e.g., one-to-one chats, group chats)
  - Channels (e.g., discussions, chats, files, and other communications)
  - Also, emojis, GIFs, photos posted

- An authority is responsible for locating records in virtual workplaces that are responsive to public records requests

- **Recommendation for all electronic records**: Ensure you conduct a thorough search of all relevant accounts including emails, texts, and other virtual workplace records.
RECEIVING AND PROCESSING A REQUEST
Public Records Request Process

- PRR is received and forwarded to the authority’s records custodian
- The authority begins the search for records
- Any responsive records subject to disclosure are reviewed:
  - Presumption that they will be disclosed unless:
    - They are exempt from disclosure pursuant to a statute or the common law
    - The public records balancing test weighs in favor of nondisclosure
- Records are released with a letter explaining any redactions
Receiving a Request

- A request may be submitted to anyone working for an authority
  - A request may be **verbal** or **in writing**
  - An authority may **not** require the use of a form
  - “Magic words” are not required

- 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**

- Custodian should not have to guess what records the requester wants
Communication with a Requester

• Don’t understand the request? Contact the requester
  • Send a written summary of your understanding and request clarification

• Inform the requester if there is a large number of responsive records, or large estimated costs, and suggest or solicit alternatives
  • A requester may not know how many responsive records exist
  • A requester may have no interest in many “technically” responsive records

• Send the requester an acknowledgment and periodic status updates if the response will take some time
Records Must 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 the record or inform the requester

• Continuing requests are not contemplated by the public records law

• If there are no responsive records, inform the requester. *See Journal Times v. Police & Fire Com’rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.
Absolute Right and Denial of Access

- **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, for example:
    - 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, for example:
    - Patient health care records; pupil records
The Balancing Test

• Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
  • Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.

• Fact intensive; “blanket rules” disfavored

• Must conduct on **case-by-case basis** considering the totality of circumstances

• Identity of requester and purpose of request are generally not part of the balancing test
ISSUES TO NOTE
Employee Records

• Wis. Stat. § 19.36(10): Treatment of employee personnel records
  • Unless required by Wis. Stat. § 103.13, prohibits the disclosure of 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 employees is required in certain circumstances. See Wis. Stat. § 19.356.
Other Issues to Note

- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Other statutes requiring confidentiality
Redaction

- Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- No specific way to redact: electronic redaction, black magic marker, cover up with white paper when photocopying
- **Redaction constitutes a denial of access to the redacted information**
  - Therefore, subject to review by mandamus
RESPONDING TO A REQUEST
Written Response

- A written request requires a written response, if the request is denied in whole or in part
  - Reasons for denial must be specific and sufficient
    - Purpose is to give adequate notice of reasons for denial and ensure that the custodian has exercised judgment
  - Reviewing court usually limited to reasons stated in denial
- Availability of the same records from other sources generally not a sufficient reason
  - Must inform the 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
- May respond in writing to a verbal request
- A request for clarification, without more, is not a denial
Format of Records

• *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898
  • Emails requested in electronic format, where no redactions were applied, **must** be provided in electronic format
    • Printed copies of requested records were not sufficient
      • Printed copies do not include metadata (data about data)
      • Because emails were requested in electronic format, associated metadata was also requested

• *Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736
  • PDF fulfilled request for “electronic records” despite not having all the characteristics wanted by the requester
Timing of Response

- Response is required, “as soon as practicable and without delay”
  - No specific time limits, depends on circumstances
- DOJ policy: 10 business days generally reasonable for response to simple, narrow requests
- Penalties for arbitrary and capricious delay
Notice Before Release

- Notice to record subjects is 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 employer other than the authority about employees of that employer
      - “Record subject” can try to prevent 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
PERMISSIBLE FEES
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 reach the $50 threshold
  - **Mailing/shipping** to requester
  - Others 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 requests
OOG Fee Advisory

• Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
  • Available at https://www.doj.state.wi.us/sites/default/files/news-media/8.8.18_OOG_Advisory_Fees_0.pdf
  • Overview of costs permissible under the law
  • Result of inquiries pertaining to high fees charged by some authorities:
    • Copy costs that are 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’s fee schedule is available at https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf
ENFORCEMENT
Enforcement

- Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
  - Mandamus action may be filed by:
    - Requester, with or without attorney
    - District attorney
    - Attorney General
  - Authority may be ordered to release records
  - 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.”
RECORDS RETENTION
Records Retention under the Public Records Law

- **Wis. Stat. § 19.35(5):** Governs retention **following receipt of a request:**
  - No destruction until the request is granted or until at least 60 days after the authority denies the request
  - **90 days** if requester is committed or incarcerated
  - No destruction during enforcement action
Other Records Retention Statutes

- **Wis. Stat. § 16.61**: State authorities
- **Wis. Stat. § 19.21**: Local authorities
  - Generally, a *7-year retention period* for most records
  - The Public Records Board (PRB) may set shorter retention periods

- **General Records Schedules** (GRSs)
  - State agencies are bound to follow
    - Unless they opt out and adopt corresponding RDAs within 12 months
  - Local government units may opt in

- Agency-specific **Records Retention/Disposition Authorizations** (RDAs)
  - Deviate from the GRSs to meet specific agency needs
Records Retention – Best Practices

• Establish agency policies regarding retention
• Ensure all agency-specific RDAs are up-to-date
  • RDAs sunset after 10 years
• Train agency records officers and staff on records retention and relevant agency policies
• Follow your retention schedules
• Consult your legal counsel
• For additional information, visit the PRB’s website: http://publicrecordsboard.gov
PUBLIC RECORDS LAW OR RECORDS RETENTION QUESTIONS?
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)
Essentials

• Generally, the open meetings law requires that all meetings of governmental bodies:
  • must be preceded by public notice; and
  • must be publicly held in a place that is reasonably accessible and open at all times to all members of the public;
    • except in limited situations in which a closed session is specifically authorized.
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

- Generally, a governmental body does not include a group of administrative staff of a government agency.
  - Highly fact-specific issue.
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.

• How to determine whether a body is 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.
  • Note: This is a very fact-specific standard, so there are no bright-line rules.
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).

• Not limited to face-to-face gatherings or physical presence together.
  • Examples: telephone calls, emails, virtual meetings, other electronic forms of communication
Meetings: The Showers Test

  • A meeting occurs whenever:
    • **Purpose** requirement:
      • Members convene for the purpose of conducting governmental business
    • **Numbers** requirement:
      • The number of members present is sufficient to determine the body's course of action
        • Includes *negative quorums*
Meetings: “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: “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 (cont.)

• A “convening” of members can occur through written correspondence, telephone and video conference calls, emails, and other forms of electronic messaging.

• **Technology** creates risk of private communication that should be held at public meetings
  • Important to keep in mind with increase in use of virtual workplace platforms

• 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
NOTICE
General Notice Requirement

• “Every meeting of a governmental body shall be preceded by public notice . . . .” Wis. Stat. § 19.83(1).

• Notice must be communicated to:
  • The public
  • News media that have filed a written request for notice
  • The official newspaper for the community in question
    • If none, then a news medium likely to give notice in the area

• Presiding officer is legally responsibly for ensuring notice requirements are met
  • Tasks may be delegated but presiding officer liable for any violations
Manner of Notice to the Public

- Notice to the public **must** be made using one of the following methods:
  - **Posting** in at least **3 public places** likely to give notice to persons affected
  - **Posting** in at least **1 public place** and on the body’s **Internet site**
  - **Paid publication** in news medium likely to give notice to persons affected
Timing and Content of Notice

• “Every meeting of a governmental body shall be preceded by public notice . . . .” Wis. Stat. § 19.83(1).

• Notice must be communicated at least 24 hours before the meeting to:
  • The public, news media that have filed a written request for notice, and the official newspaper for the community in question

• The meeting notice must reasonably inform the public of the time, date, place, and subject matter of the meeting.
Content of Public Notice: Subject Matter

• How detailed must a notice be in describing the subject matter of 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: Reasonably Accessible

• 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 & *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 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 people can access w/o assistance. *Wis. Stat. § 19.82(3).*
      • Statute not applicable to local bodies, but they must provide reasonable access
Reasonably Accessible: Covid’s Impact

• The type of access that constitutes reasonable access during pandemic circumstances may be different from the types of access required in other circumstances.
  • Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.

• The Attorney General has long advised that bodies may convene their meetings via telephone or video conference.
  • However, courts have not resolved the question of whether the practice of convening meeting in this matter is always permissible.
  • The public must be provided an effective way to monitor the meetings.

• Notices must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.
Reasonably Accessible: Covid’s Impact (cont.)

- Best practices:
  - Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
    - Bodies should **facilitate reasonable access** to meetings for such individuals.
      - For example, bodies could hold meetings in person with a remote option.
  - Bodies are encouraged to retain practices adopted to promote transparency during the pandemic to the extent those practices increase accessibility.
  - **Bottom Line:** The more access to meetings, the better. Providing multiple options—even post-pandemic—to the public to attend meetings helps to fulfill the purpose of the open meetings law.
Open Sessions: Citizen Participation

• The open meeting law ensures the right to **attend and observe** open session meetings.
• The law does **not** require a body to allow the public to speak or actively participate.
• However, the law **permits** a portion of an open meeting to be set aside as a **public comment period**:
  • Public comment periods are **not** required.
  • Such a period must be included on the meeting notice.
• During a public comment period, a body:
  • may **receive information** from the public and
  • may **discuss** any subject raised by the public but
  • may **not** take formal action.
Open Sessions: Recording

- Wis. Stat. § 19.90:
  - Bodies must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session.
  - Recording or photographing activities may not disrupt the meeting.
- The open meetings law does not require governmental bodies to permit citizens to record closed sessions.
Open Sessions: Voting

• Unless otherwise specifically provided, no secret ballots may be used except for electing officers of the body.

• Any member may require a roll-call vote.
Open Sessions: Record Keeping

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

• Every meeting must begin in open session
• To go into closed session, a motion must be duly 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: 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: Authorized Subjects

• The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).

• The following slide includes some commonly used exemptions; it is not a complete list. For a more complete discussion of this topic, see DOJ’s Wisconsin Open Meetings Law Compliance Guide.
Closed Sessions: Authorized Subjects (cont.)

(a) Deliberating about a case that has been the subject of a judicial or quasi-judicial trial or hearing before the body.

(b) Considering dismissal, demotion, licensing or discipline of a public employee or the investigation of charges against the employee.

(c) Considering employment, promotion, compensation, or performance evaluation data of a public employee.

(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.

(f) Considering sensitive personal information that would be likely to have a substantial adverse effect upon an individual’s reputation.

(g) Conferring with legal counsel about strategy related to litigation.
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 the member 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.
OPEN MEETINGS LAW QUESTIONS?
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:
  - Location: AG’s Capitol Office, 114 East
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Thank You!