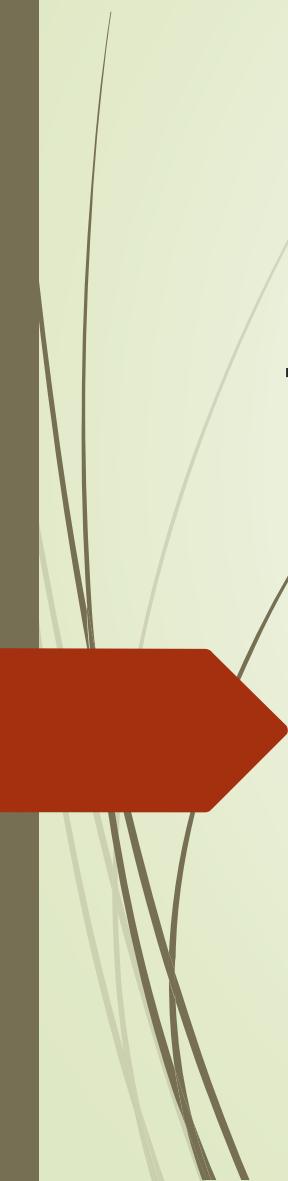


Wisconsin Open Meetings Law Training



Milwaukee Assistant City
Attorney Greg Kruse
(414) 286-2649
grkrus@milwaukee.gov

WHAT IS IT?

- ▶ Requires that the business of governmental bodies be conducted publicly.
 - ▶ Provides the public with essential information regarding the affairs of government.
 - ▶ Assists the public in becoming an informed electorate.
 - ▶ Prevents governmental bodies from governing in secret.
- ▶ OML is to be liberally interpreted to promote the policy of openness and transparency in gov't.
 - ▶ Wis. Stat. § 19.81(4).



IN A NUTSHELL

All **MEETINGS** of
GOVERNMENTAL BODIES
must be preceded by
public **NOTICE**, and
must be **REASONABLY**
ACCESSIBLE to members
of the public.



MEETINGS



- ▶ A **MEETING** is a 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(2).
- ▶ The Supreme Court has established a two-part test for determining whether a meeting is occurring. Look to:
 - ▶ The **purpose** of the gathering; and
 - ▶ The **number** of members present.
 - ▶ *State ex rel. Newspapers v. Showers*, 135 Wis.2d 77 (1987).

MEETINGS



► Purpose Requirement:

- Looks to whether the purpose of the gathering is to engage in governmental business **including discussion, decisions or information-gathering.**
 - *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis.2d 553 (1993).
- Interactions between members is not required.
- Not limited to formal or final decision making.
- Does not include social or chance gatherings or a conference. **BUT**, there is a rebuttal presumption that governmental business is being discussed if half or more of the body is present.
 - Wis. Stat. § 19.82(2).

MEETINGS



► Numbers Requirement:

- Looks to whether the number of members present are sufficient to determine the governmental body's course of action on the business under consideration.
- Quorums: Enough members to start meeting/take an action.
- Negative Quorums: Enough members to block an action. Typically seen in even numbered bodies, or where voting is by supermajority.
- Walking Quorums: When there is a series of gatherings among separate groups of the members of a body, each less than the quorum, who agree, passively or explicitly, to act in sufficient numbers to reach a quorum.
 - DOJ has opined that this includes agents and surrogates. (Clifford Correspondence (Apr. 28, 1986)).
 - DOJ has opined that members merely asking that a subject be placed on an agenda for discussion at an upcoming meeting does not constitute a walking quorum. (Kay Correspondence (Apr. 25, 2007)).

MEETINGS



► **Conference Calls**

- Wis. DOJ has advised that meetings can occur if the purpose of the call is to conduct government business and a sufficient number of members are present to determine a course of action under consideration.
 - 69 Op. Att'y Gen. 143.

► **Text Messages**

- Wis. DOJ has advised that text messages are analogous to conference calls in that all participants in the communication are present at the same time.
 - Krischan Correspondence (Oct. 3, 2000).

► **Emails**

- Wis. DOJ strongly discourages, and advises that meetings can occur via e-mail depending on: (1) the number of participants; (2) number of communications re: subject; (3) time frame of the e-mails; and (4) extent of conversation-like interactions in the communications.
 - Schmiege Correspondence (Aug. 22, 2018); see also *State ex rel. Zecchino v. Dane County*, 2018 WI App 19.



NOTICE



- ▶ “Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.”

- ▶ Wis. Stat. § 19.84(2).



NOTICE



- ▶ Notice must be provided to:
 - ▶ **The Public**:
 - ▶ Posted in 3 physical locations; or
 - ▶ Posted in 1 physical location and online; or
 - ▶ Paid publication.
 - ▶ **News Media** that have filed a written request for such notice; and
 - ▶ **Officially Designated Newspaper**, or, if none exists, a news medium likely to give notice in the area.
 - ▶ Wis. Stat. § 19.84(1)(b).



NOTICE



- ▶ The content of notices must be **reasonably specific**. Determining what is reasonable requires a case-specific analysis. Look to:
 - ▶ Burden of providing more specificity;
 - ▶ Matters of particular interest to the public; and
 - ▶ Non-routine actions.
 - ▶ *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 28.
- ▶ Generic designations are not sufficient (e.g. miscellaneous business, old business, new business, agenda revisions, others matters authorized by law).
 - ▶ Erickson Correspondence (Apr. 22, 2009).



NOTICE

- ▶ No statutory requirement that a notice must indicate that an action will occur at a meeting. But at least one court has acknowledged that there may be instances where matters of public importance require notice that an action will take place.
 - ▶ *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶15.
- ▶ No requirement that agenda items be discussed in the order they are listed on the notice, unless item noticed for a specific time.
 - ▶ Stencil Correspondence (Mar. 6, 2008).
- ▶ All closed sessions must be noticed. Must contain the specific nature of the business to be discussed in closed session, unless conferring with legal counsel re: litigation. Merely citing and quoting from statute is not sufficient.
 - ▶ Weinschenk Correspondence (Dec. 29, 2006).
- ▶ Body must notice that it intends to go back into open session after a closed session, or else it must wait 12 hours.
 - ▶ Wis. Stat. § 19.85(2).





NOTICE



► **Simultaneous (Multiple) Meetings**

- When a quorum of one government body knowingly attends the meeting of a subunit of that body, or a meeting of a different body, to gather information, two meetings are actually taking place, and both must be properly noticed. Be mindful of this if members of the Committee wish to attend a HACM Board meeting.

► *Badke*, 173 Wis. 2d at 577.

► **When must notices be posted?**

- Notices must be provided **at least 24 hours in advance** of the meeting, unless for good cause such notice is impossible or impractical. If good cause exists, the notice should be given as soon as possible, but not less than two hours in advance of the meeting.

► Wis. Stat. § 19.84(3).

ACCESSIBILITY



- ▶ Open meetings must be held in a place reasonably accessible to members of the public and open to all citizens at all times.
 - ▶ Wis. Stat. § 19.81(2).
- ▶ Reasonable access does not mean total access, nor does it mean that a body can systematically exclude or arbitrarily refuse admittance to any individual.
 - ▶ Badke, 173 Wis.2d at 580-81.

ACCESSIBILITY



► Recordings:

- Citizens have the right to tape record or videotape meetings in open session, as long as doing so does not disrupt the meeting. Reasonable efforts must be made to accommodate anyone who wants to record, film or photograph an open session meeting.

► Wis. Stat. § 19.90.

► Citizen Participation:

- The Open Meetings Law grants citizens the right to attend and observe meetings occurring in open session. It does not require that members of the public be allowed to speak or actively participate in the meeting. However, a body may set aside a portion of the meeting for public comment if it wishes.

► Wis. Stat. §§ 19.83(2) and 19.84(2).



OPEN MEETINGS LAW: *open v. closed session*

OPEN SESSION

- ▶ **Open Session** means a meeting which is held in a place reasonably accessible to members of the public and open to citizens at all time.
 - ▶ Wis. Stat. § 19.82(3).
- ▶ Every meeting of a governmental body must first be convened in open session, and all business of any kind must be initiated, discussed and acted upon in open session unless one of the 11 exemptions in Wis. Stat. § 19.85(1) applies.



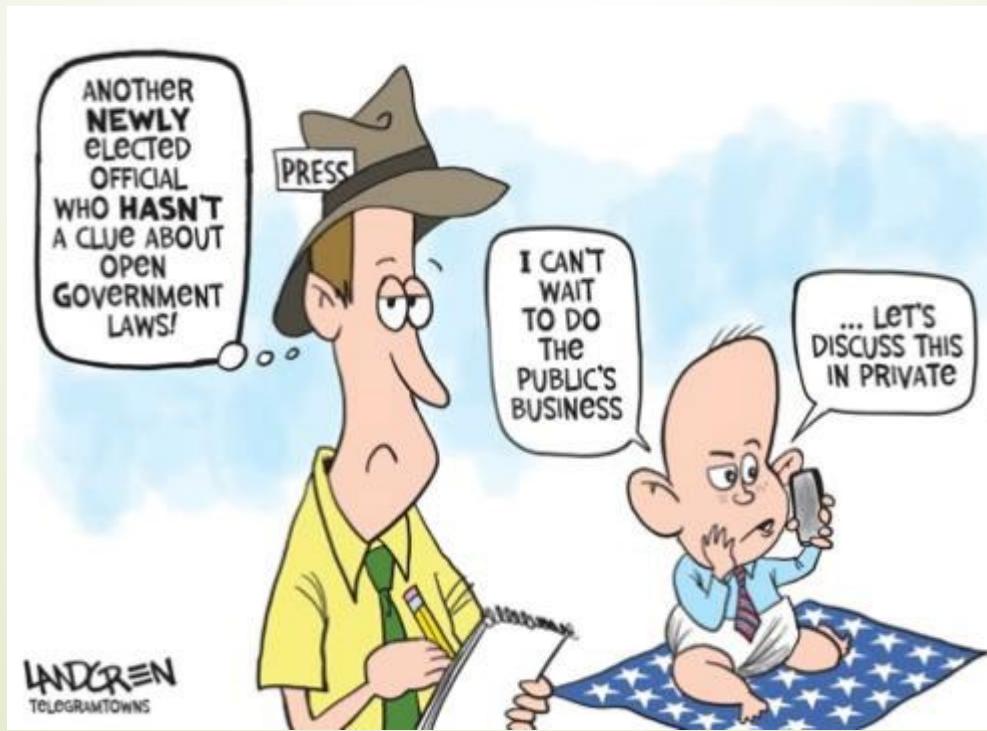
CLOSED SESSION

- ▶ If one of the exemptions applies and the closed session was appropriately noticed, bodies can motion and vote to go into **Closed Session**.
- ▶ Bodies have wide discretion to admit anyone into a closed session whose presence the body determines is necessary for the business at hand.
- ▶ No members of a governmental body may be excluded from any meeting of the body.
 - ▶ Nor may a member be excluded from a subunit of that body, unless the body's rules state otherwise.
 - ▶ Wis. Stat. § 19.89.



CLOSED SESSION

- ▶ **NO BUSINESS MAY BE TAKEN UP DURING THE CLOSED SESSION EXCEPT THAT RELATING TO MATTERS SPECIFICALLY NOTICED.**





OPEN MEETINGS LAW: *Voting and Records*

VOTING

- ▶ Any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.
 - ▶ Wis. Stat. § 19.88(2).
- ▶ Unless otherwise specifically provided by statute, no secret ballots may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body.
 - ▶ Wis. Stat. § 19.88(1).



RECORD KEEPING

- ▶ All motions and roll-call votes of each meeting shall be recorded and preserved and open to public inspection.
 - ▶ Wis. Stat. § 19.88(3)
- ▶ No specified timeframe in which records of motions and roll call votes must be created.
 - ▶ AG advises that motions and roll call votes be recorded at the time of the meeting or as soon thereafter as practicable.
- ▶ Open Meetings Law does not require that formal minutes be created (but other statutes, rules or regulations may).

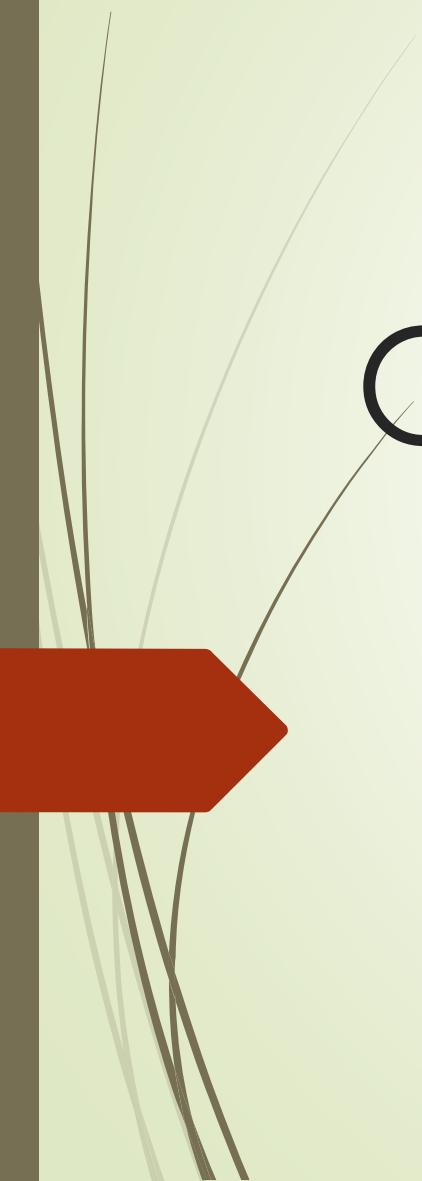


RECORD KEEPING

- ▶ **Meeting minutes and records of votes in closed session** may be subject to disclosure under the Public Records Law, depending on whether the reason for convening in closed session continues.
 - ▶ However, the DOJ advises that a record custodian must still separate information that can be made public from that which cannot and must disclose the former, even if the latter is withheld.

▶ De Moya Correspondence (June 17, 2009) and 67 Op. Att'y Gen. 117 (1978)





OPEN MEETINGS LAW: *Enforcement*

OVERSIGHT

- ▶ The AG's Office and the DA's Office have the ability to enforce the Open Meetings Law.
- ▶ BUT FOR US, as Milwaukee is a first class county, Milwaukee Corporation Counsel takes the place of the DA's Office.
 - ▶ Wis. Stat. § 59.42(2)(b)4.
- ▶ In order to take action, these agencies must receive a **verified complaint** (written, signed and sworn).
- ▶ If these agencies refuse to commence action, or fail to act within 20 days, complainant has the right to bring an action in the name of the state.



OVERSIGHT

- ▶ An individual bringing an action to enforce the Open Meetings Law may be awarded the actual and necessary costs of prosecution, including reasonable attorney fees.
- ▶ Statute of Limitations on actions to enforce the Open Meetings Law is **two years** after the cause of action accrues.



PENALTIES

- ▶ Any member of the governmental body who **“knowingly”** attends a meeting in violation of the Open Meetings Law is subject to a forfeiture between \$25 and \$300 for each violation. **This is personal liability.**
- ▶ **“knowingly”** means not only positive knowledge of the illegality of a meeting, but also the awareness of the high probability of the meeting’s illegality or conscious avoidance or awareness of the illegality.

▶ *State v. Swanson, 92 Wis. 2d 310 (1979).*



PENALTIES

- ▶ No liability for member knowingly attending an unlawful meeting if the member makes or votes in favor of a motion to prevent the violation from occurring, or does so on the advice of counsel.
- ▶ A body may not reimburse a member for a forfeiture incurred as a result of violation, unless the enforcement action involved an issue regarding the constitutionality of the Open Meetings Law.
 - ▶ But the DOJ has opined that bodies can vote to reimburse attorney fees.
 - ▶ 77 Op. Att'y Gen. 177, 180 (1988).



PENALTIES

- ▶ Any action taken at a meeting of a governmental body in violation of the Open Meetings Law is voidable. However, only after court finds that the public's interest in enforcement of the Open Meetings Law outweighs the public interest in sustaining the validity of the action taken

▶ Wis. Stat. § 19.97(3).

