

PUBLIC RECORDS AND OPEN MEETINGS LAWS: THE BASICS

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OPEN MEETINGS LAW

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).



WIS. STAT. § 19.81

- ⦿ “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).



TO THAT END...

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



Breaking
it Down

GOVERNMENTAL BODIES



- ◎ A **GOVERNMENTAL BODY** is any state or local agency, board, commission, committee, council, department or public body corporate and politic, *that is created by constitution, statute, ordinance, rule or order.*
 - Wis. Stat. § 19.82(1).
- ◎ The DOJ advises that a governmental body is defined primarily in terms of the manner in which it is created, rather than what it's called or in terms of the type of authority it possesses.
 - *Wisconsin Open Meetings Law Compliance Guide*, May 2019, pg. 2.

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 change 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 as 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



- 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



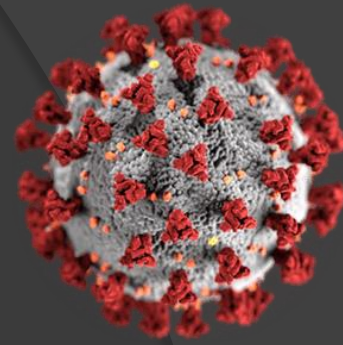
- ⦿ No statutory requirement that a notice must indicate that an action will occur at a meeting. But at least one court has acknowledged that there may be instances where matters of public importance require notice that an action will take place.
 - *State ex rel. Olson v. City of Baraboo*, 2002 WI App 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).

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



- DOJ has advised that, in light of COVID-19, governmental bodies can comply with their accessibility obligations by providing members of the public with a way to monitor the meeting, even if there is no central location at which the public can convene for the meeting.
 - Audio only teleconferences are likely not considered reasonably accessible if complex plans, drawing or charts are being displayed or the demeanor of a witness is significant.
 - Coronavirus Disease 2019 (COVID-19) and Open Meetings Advisory, March 17, 2020.
- For online only video conferences, notices must include a hyperlink that allows members of the public to watch or listen to the meeting.

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 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, 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.**



Sorry WE'RE
CLOSED

CLOSED SESSION

⦿ Authorized Closed Sessions:

- ***Judicial or quasi-judicial hearings***: deliberations on a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body can be held in closed session.
 - Wis. Stat. § 19.85(1)(a).
- ***Employment and Licensing Matters***: for “[c]onsidering dismissal, demotion, licensing or discipline of any public employee or a person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter....”
 - Wis. Stat. § 19.85(1)(b).



CLOSED SESSION

- ***Consideration of employment, promotion, compensation and performance evaluation data*** of any public employee over which the governmental body has jurisdiction or exercises responsibility.
 - Wis. Stat. § 19.85(1)(c).
- ***Considering extended supervision, probation, parole or strategy for crime detection or prevention:*** except during parole commission hearings designed for victims or family members to have direct input in parole decision making process for certain crimes.
 - Wis. Stat. § 19.85(1)(d).
- ***Conducting public business with competitive or bargaining implications:*** for “[d]eliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specific public business, whenever competitive or bargaining reasons require a closed session.”
 - Wis. Stat. § 19.85(1)(e).



CLOSED SESSION

- ***Deliberating to discuss unemployment insurance.***
 - Wis. Stat. § 19.85(1)(ee).
- ***Deliberating to discuss worker's compensation issues.***
 - Wis. Stat. § 19.85(1)(eg).
- ***Deliberating on issues arising out of location of burial sites.***
 - Wis. Stat. § 19.85(1)(em).
- ***Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons*** which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation upon any person referred to in such histories or data, or involved in such problems or investigations.
 - Wis. Stat. § 19.85(1)(f).



CLOSED SESSION

- ***Conferring with legal counsel*** for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.
 - Wis. Stat. § 19.85(1)(g).
- ***Consideration of requests for confidential written advice from the elections commission or the ethics commission*** or from any county or city ethics board.
 - Wis. Stat. § 19.85(1)(h).



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.
 - 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).



PUBLIC RECORDS LAW

WHAT IS IT?

- Mechanism the public can use to view or get copies of government records.
 - Promotes government transparency and oversight.
 - Assists the public in becoming an informed electorate.
 - Sheds light on the workings of government and the official acts of public officers and employees.
- Wisconsin has a liberal public records law that provides broad access to records created or kept by the government.



WIS. STAT. § 19.31

- “[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information...”



REDACTIONS

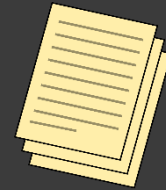
- ⦿ The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”
 - Wis. Stat. § 19.31
- ⦿ An “exceptional case” occurs when:
 - Statutory preclusion to disclosure;
 - Common law preclusion to disclosure; or
 - Public policies favoring nondisclosure outweigh policies favoring disclosure (aka “The Balancing Test”)

WHAT'S A RECORD?

- ◉ 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, that has been created or is being kept by an authority.”
- ◉ AG advises that content, not medium, format or location, determines whether something is a record.

WHAT'S A RECORD?

- Records include, but are not limited to:
 - Handwritten, typed or printed pages;
 - Photos, films, videotapes or tape recordings;
 - Body camera or dash camera footage;
 - Optical disks;
 - Maps, charts and graphs;
 - Public records requests;
 - Emails and electronic documents;
 - Text messages;
 - Social media posts; and
 - Contractor records.



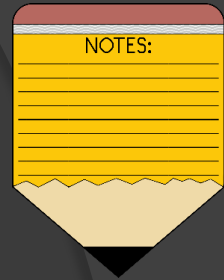
WHAT'S A RECORD?

- ⦿ Emails, text messages and social media posts:
 - Purely personal materials created or maintained on a personal device or account are not considered records.
 - Wis. Stat. § 19.32(2)
 - Purely personal materials created or maintained on a work device *are* records, but the Supreme Court has opined that they are not subject to disclosure.
 - *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9, n.4
 - **Work materials created or maintained on a personal device or account are records, and are subject to disclosure.**
 - OAS I-06-09

- ⦿ Contractor records
 - Records produced or collected under a contract between an authority and a non-authority, that are in the possession of the non-authority.
 - Wis. Stat. § 19.36(3)

WHAT'S NOT A RECORD?

- Purely personal materials.
- Personal drafts, notes, and preliminary computations.
 - Cannot simply stamp draft on a document, or prevent it from becoming finalized.
 - *Fox v. Bock*, 149, Wis.2d 403, 414-417 (1989).
 - Must be prepared for originator's personal use, or in the name of a person who whom the originator is working.
 - Notes memorializing agency activity, or that are readily accessible to others, are not prepared for "personal use."
 - *Voice of Wis. Rapids, LLC v. Wis. Rapids Pub. Sch. Dist.*, 2015 WI App 53, ¶ 21
- Materials protected by patent or copyright.
- Published materials available for sale or at a library



RECEIVING A REQUEST

- ⦿ No magic words are required to make a records request.
- ⦿ Requests can be made orally or in writing.
 - Cannot force a requester to commit request to writing.
- ⦿ Requesters do not have to disclose why they are seeking access to records.
- ⦿ Requests can be made anonymously.



TIME TO RESPOND

- ⦿ There is no time limit, such as 2 weeks or 10 days, specified in the law. Nor is a custodian obligated to respond to a request by an arbitrary date set by a requester.
- ⦿ A request must be responded to “***as soon as practicable and without delay.***”
 - ⦿ Wis. Stat. § 19.35(4)(a).
- ⦿ The DOJ has advised that requests for public records should be given a high priority.



MANDAMUS

- ◉ *Mandamus* is the exclusive remedy provided by the legislature to enforce the Public Records Law.
 - Wis. Stat. § 19.37(1).
- ◉ If a court determines that records were withheld or redacted improperly, or that access was delayed, the requester can be awarded:
 - Attorneys Fees (unless litigants are pro se)
 - Damages of not less than \$100 and other actual costs
 - Civil forfeiture of not more than \$1,000 if response was arbitrarily and capriciously denied or delayed, or if excessive fees were charged
 - Punitive Damages
 - Wis. Stat. §§ 19.37(2)–(4).

CRIMINAL PENALTIES

- ⦿ There are criminal penalties for the “destruction, damage, removal or concealment of public records with intent to injure or defraud.”
 - Wis. Stat. § 946.72
- ⦿ There are also criminal penalties for the alteration or falsification of public records.
 - Wis. Stat. § 943.38
- ⦿ Both are Class H felonies.
 - Fine not to exceed \$10,000, or imprisonment not to exceed 6 years, or both.





"That's all Folks!"