

# Wisconsin Open Government Essentials

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

October 16, 2019

Wauwatosa, Wisconsin



# Introduction



# Presentation Overview

- ▶ Provide background on DOJ's Office of Open Government
- ▶ Cover public records law essentials
  - ▶ Explain what a record is and who can request records
  - ▶ Discuss the receipt and processing of public records requests
  - ▶ Outline how to respond to public records requests
  - ▶ Detail permissible costs that may be assessed
  - ▶ Address record retention
- ▶ Outline open meetings law essentials
  - ▶ Define what constitutes a governmental body
  - ▶ Explain when a meeting occurs
  - ▶ Discuss closed sessions
- ▶ Opportunity for questions



# Office of Open Government (OOG)

- ▶ Interpret and apply the Open Meetings Law, Public Records 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
  - ▶ Wis. Stat. §§ 19.39 and 19.98
    - ▶ 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 Record 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 Record Roles





# 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



# Who Can Request?

- ▶ **Requester:** Defined at 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)
- ▶ Requester generally **need not identify** himself or herself
- ▶ Requester **need not state the purpose** of the request
  - ▶ Motive generally not relevant, but context appropriately considered

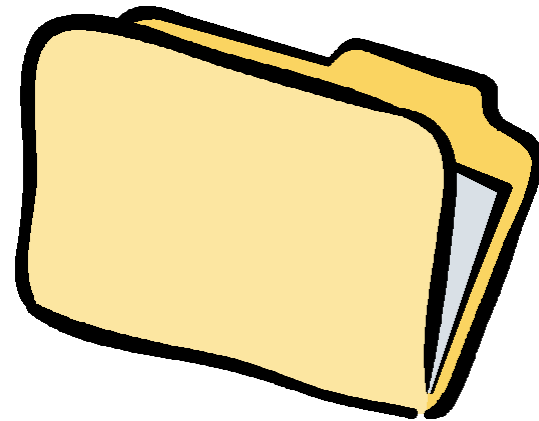


# Records



# Records 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.”



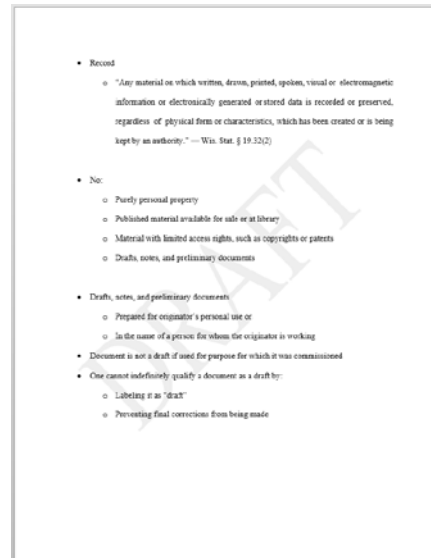
# Is it a Record?

- ▶ 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
    - ▶ Social media
- ▶ 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
- ▶ Generally, exception is limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority



# Personal and Business Email, etc.

- ▶ **Personal** email, 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 authority's officers or employees
  - ▶ *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, 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 private accounts are not subject to disclosure
  - ▶ **Recommendation**: Conduct a careful search of all relevant accounts



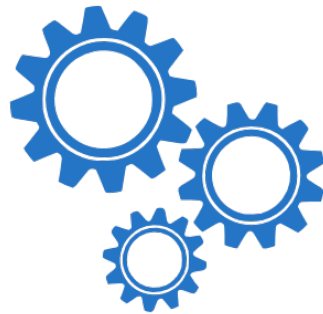
# Receiving and Processing a Request





# Public Records Request Process

- ▶ PRR received and forwarded to authority's records custodian
- ▶ Authority begins search for records
- ▶ Any responsive records 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 letter explaining any redactions



# Receiving a Request

- ▶ A request may be submitted to anyone with 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 about a large number of responsive records, or large estimated costs, and suggest/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



# 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 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



# 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**
- ▶ 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, student records
- ▶ Court decisions
- ▶ Exemptions to open meetings requirements in Wis. Stat. § 19.85(1)
  - ▶ Only if there is a specific demonstration of need to deny access at the time of the request
- ▶ Policies expressed in evidentiary privileges
- ▶ Public interest in reputation and privacy of individuals



# Special Issues





# 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.



# DPPA

- ▶ **Driver's Privacy Protection Act (DPPA)**

- ▶ *New Richmond News v. City of New Richmond*,  
2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339

- ▶ **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 exception applies

- ▶ Compliance with public records request not a "function"

- ▶ Information **verified** using DMV records is not protected by DPPA

- ▶ Presents problem of determining how info. was obtained



# Special Issues - Law Enforcement



# Prosecutor's Files v. Law Enforcement Records

- ▶ A prosecutor's files are not subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991).
- ▶ However, for a law enforcement agency's records, the balancing test must be applied on a case-by-case basis



# Law Enforcement - Key Considerations

- ▶ Crime victim rights expressed in statutes, constitutional provisions, and case law
  - ▶ Consideration of family of crime victims
- ▶ Protection of witnesses
  - ▶ Safety and security
  - ▶ “Chilling” future cooperation with law enforcement
- ▶ Confidential Informants
  - ▶ Wis. Stat. § 19.36(8): Information identifying confidential informants must be withheld unless balancing test requires otherwise
- ▶ Children and juveniles
- ▶ Officer safety
  - ▶ Including the safety of officers’ families and homes
- ▶ **Tip:** If an authority has a record that it did not create, it can reach out to the originating authority to see what concerns it may have



# Law Enforcement – Questions to Ask

- ▶ Would the release endanger the safety of persons involved?
- ▶ Are there reputation and privacy interests involved?
  - ▶ The public interest is found in the public effects of failing to honor the individual's privacy interests **not** the individual's personal interests
- ▶ Do the records contain rumor, hearsay, or potentially false statements?
- ▶ Were potentially biased witnesses interviewed?
- ▶ Do the records discuss confidential law enforcement techniques and procedures?
- ▶ Is there a possibility of threats, harassment, or reprisals?
  - ▶ Against victims, witnesses, officers, others, or their families?
  - ▶ Any such possibility is accorded appropriate weight depending on the likelihood
    - ▶ Generally, there must be a **reasonable probability**
    - ▶ See *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



# Mental Health Records

- ▶ Wis. Stat. § 51.30(4): Generally, **mental health registration and treatment** records are **confidential** and **privileged** to the subject individual.
  - ▶ May only release with the subject individual's **informed written consent**, court order, or other certain limited circumstances. See Wis. § 51.30(4)(b).
  - ▶ **Includes** duplicate copies of **statements of emergency detention** in the possession of a law enforcement agency, absent written informed consent or a court order. See *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
    - ▶ Supreme Court found that such records were registration records even if in the possession of the law enforcement agency.
      - ▶ Treatment records include registration records. See Wis. Stat. § 51.30(1)(b).
- ▶ Consult your legal counsel



# Other Law Enforcement Special Issues

- ▶ Law enforcement records of **children and juveniles** who are the subjects of investigations and other proceedings are confidential with some exceptions. See Wis. Stat. §§ 48.396 and 938.396.
  - ▶ Access to other records regarding or mentioning children are subject to general public records rules including the balancing test
- ▶ Wis. Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- ▶ Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- ▶ Wis. Stat. § 165.79: Crime Laboratory Privilege
- ▶ Other statutes requiring confidentiality





# Special Issues - Electronic Records



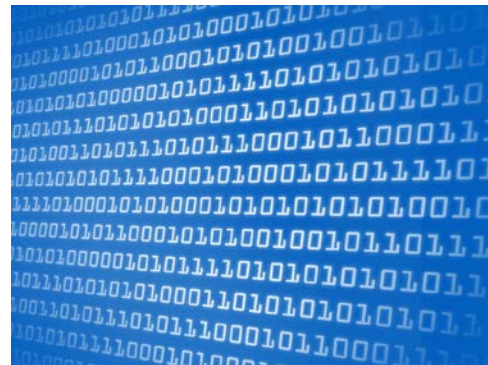
# Social Media Records

- ▶ Social media accounts created or maintained by an authority
  - ▶ Increased use of social media by authorities
    - ▶ E.g., Facebook, Twitter
  - ▶ Constitute records if created or maintained by an authority
- ▶ Considerations:
  - ▶ Be familiar with the site
  - ▶ Are the records archived?
  - ▶ Who may post, manage, or control?
  - ▶ How long is content available?
  - ▶ Third-party messages or posts
  - ▶ Does the authority have a social media policy?



# Electronic Databases

- ▶ Direct access to electronic databases not required
- ▶ Wis. Stat. § 19.35(1)(k): reasonable restrictions on manner of access to original record if irreplaceable or easily damaged
- ▶ Wis. Stat. § 19.36(4): computer program is not subject to examination or copying
  - ▶ However, the following is:
    - ▶ Input: Material used as input for computer program
    - ▶ Output: Material produced as product of computer program
- ▶ Requester, within reasonable limits, may request a **data run** to obtain requested information



# 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
        - ▶ Metadata is 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



# Police Body Camera Recordings

- ▶ Body camera recordings are records subject to disclosure
- ▶ Must be retained as required by relevant records retention schedules
- ▶ Proposed legislation would have public records law and records retention implications
  - ▶ Senate Bill 50
    - ▶ Result of Joint Legislative Council Study Committee on the Use of Police Body Cameras



# Redaction



# 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

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# Redaction of Audio/Video

- ▶ Technology
  - ▶ Software for blurring video can be difficult to find using the term “redaction”
  - ▶ Find software with tools including: Gaussian blur, Mosaic blur, and motion tracking
  - ▶ Most video software will handle audio redactions, too
- ▶ Cost
  - ▶ Many cost effective options available for audio/video software
  - ▶ May take many working hours to redact audio/video (time decreases with practice)
- ▶ Future technical questions?
  - ▶ Contact your agency’s IT department
  - ▶ Contact DOJ DC Digital Records Analyst J. Spencer Gustafson
    - ▶ Email: [gustafsonjs@doj.state.wi.us](mailto:gustafsonjs@doj.state.wi.us)





# Responding to a Request



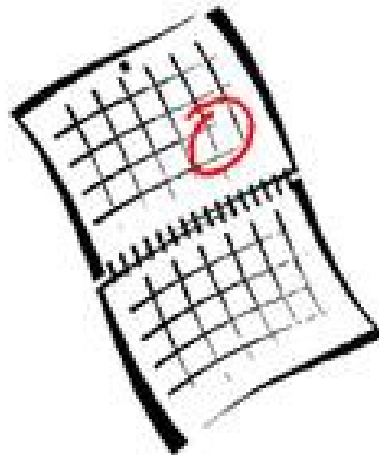
# Written Response?

- ▶ 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 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**
  - ▶ 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
- ▶ May respond in writing to a verbal request
- ▶ A request for clarification, without more, is not a denial



# 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
- ▶ May be prudent to send an acknowledgement and status updates
- ▶ 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 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
- ▶ 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](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
  - ▶ Recent 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
  - ▶ 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.”



# Record Retention



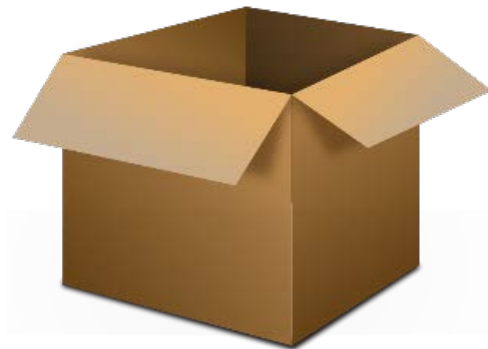
# Record Retention under the Public Records Law

- ▶ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
  - ▶ **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 Record Retention Statutes

- ▶ **Wis. Stat. § 16.61**: State authorities
- ▶ **Wis. Stat. § 19.21**: Local authorities
  - ▶ Generally, a **seven-year retention period** for most records
  - ▶ The Public Records Board (PRB) may set shorter periods
    - ▶ PRB has oversight and accountability for the state's records program



# Types of Record Retention Schedules

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



# Local Government Retention Schedules

- ▶ **County General Records Schedule**
  - ▶ PRB approved in May 2010
  - ▶ Contains schedules for sheriff's records
- ▶ **Wisconsin Municipal Records Schedule (WMRS)**
  - ▶ PRB approved on August 27, 2018
  - ▶ Does not contain schedules for law enforcement records
- ▶ **Guidance in developing agency-specific records schedules:**
  - ▶ Counties General Records Schedule
  - ▶ Wisconsin Municipal Records Schedule
  - ▶ Agency-specific schedules (RDAs)
    - ▶ Including those for state, county, and municipal government agencies



# Adoption of General Records Schedules

- ▶ Local government agencies **may** adopt them, but they are not required
- ▶ To adopt:
  - ▶ Submit the **Notification of General Schedules Adoption** form (PRB-002) to WHS
  - ▶ PRB will return a signed copy to the municipality
  - ▶ Following receipt of PRB approval, the local entity should **enact an ordinance** adopting the general schedule as their official records retention schedule
- ▶ Local entities should:
  - ▶ Supersede any existing ordinances covering records included in the adopted general schedule
  - ▶ Retain any approved schedules in existing ordinances for records that are not covered by the general schedule
- ▶ Local entities may also adopt other GRSs provided by the PRB or submit their own RDAs for PRB approval



# Record Retention - Format

- ▶ Hard copies v. electronic copies
  - ▶ **Retention of records in electronic formats 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





# Retention of Texts, Social Media, etc.

- ▶ Methods of retaining texts, social media, app content, and similar records:
  - ▶ Screen shots
  - ▶ Rely on social media provider or individual phone user
    - ▶ **Caution:** Authorities are responsible for ensuring that records are maintained so this creates a risk
      - ▶ Social media provider may change its terms of use, delete content, or cease to exist
      - ▶ Individual users may not retain content properly or may damage or lose their phones
  - ▶ Archiving services
  - ▶ Agency-created retention tools



# Record 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 other staff on record retention and relevant agency policies
- ▶ Follow your retention schedules
- ▶ Consult your legal counsel
- ▶ For additional information, visit the Public Records Board's website:
  - ▶ <http://publicrecordsboard.gov>



# The Open Meetings Law



# Public Policy

- ▶ “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 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



# Governmental Bodies



# 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



# Governmental Body: Collective Entity

- ▶ Collective governmental entity
  - ▶ Must be a **group** of people
    - ▶ Does not include a single, individual government official
  - ▶ Must have a **collective identity and purpose**
  - ▶ A group with a **determinate membership** and an expectation that it will **act collectively** in relation to some subject of governmental business
  - ▶ Does not include an *ad hoc* gathering





# Governmental Body: 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



# Governmental Body: 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.
- ▶ **Warning:**
  - ▶ This is a very fact-specific standard, so there are no bright-line rules.
  - ▶ DOJ's *Wisconsin Open Meetings Law Compliance Guide* contains lists of some of the kinds of entities that DOJ has advised are created by constitution, statute, ordinance, rule, or order.



# Governmental Body: Subunits and Advisory Bodies

## ▶ Subunits

- ▶ Formally constituted subunits of a governmental body are also subject to the open meetings law.
- ▶ A “subunit” is a body that is:
  - ▶ created by a parent body; and
  - ▶ composed exclusively of members of the parent body
  - ▶ e.g., a committee of a municipal board or a subcommittee.
  - ▶ See 74 Op. Att’y Gen. 38, 40 (1985).

## ▶ Advisory bodies

- ▶ The definition of “governmental body” includes **purely advisory** bodies.
- ▶ A body **does not have to possess final decision-making power**.
- ▶ What usually matters is the manner in which the body was created, rather than the nature of its authority.



# Governmental Body: Administrative Staff

- ▶ A governmental body generally does not include a group of administrative staff of a government agency.
- ▶ This is a highly fact-specific issue. It is discussed further in DOJ's *Wisconsin Open Meetings Law Compliance Guide*.

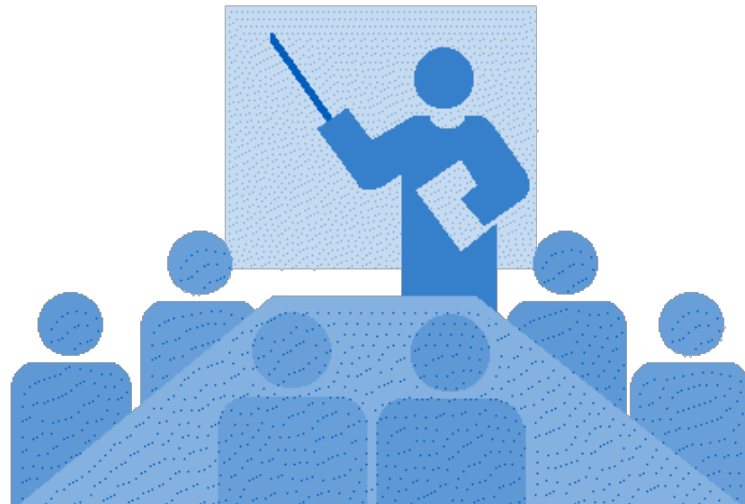


# Meetings



# 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: The *Showers* Test

- ▶ The Wisconsin Supreme Court established a two-part 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
    - ▶ **Numbers** requirement:
      - ▶ The number of members present is sufficient to determine the body's course of action
        - ▶ Includes **negative quorums**



# Meetings: The “Purpose” Requirement

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





# Meetings: The “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.)

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



# Meetings: “Convening” of Members (cont.)

## ▶ Other forms of electronic messaging

- ▶ Email, electronic discussion boards, instant messaging, social networking
- ▶ *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



# Meetings: “Convening” of Members (cont.)

- ▶ Technology creates risk of private communication that should be held 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 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



# Meetings: 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).
- ▶ 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).



# Meetings: Multiple or Overlapping Meetings

- ▶ Sometimes a single gathering may include a “meeting” of more than one governmental body
- ▶ Suppose members of Body “A” attend a meeting of Body “B”
  - ▶ The gathering may be considered a meeting of “A,” as well as “B,” if:
    - ▶ A quorum of members of “A” are present
    - ▶ The meeting involves a subject over which “A” has some authority
- ▶ Exceptions:
  - ▶ The gathering is **not** a “meeting” of Body “A,” if:
    - ▶ The members of “A” are present by chance and did not pre-plan their attendance
    - ▶ All of the members of “A” present are also members of “B”





# Notice



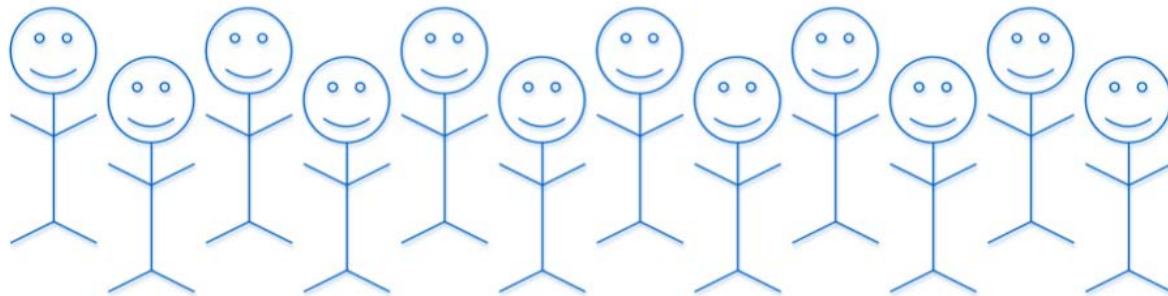
# General Notice Requirement

- ▶ “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 responsible for ensuring notice requirements are met
  - ▶ Tasks may be delegated but presiding officer liable for any violations



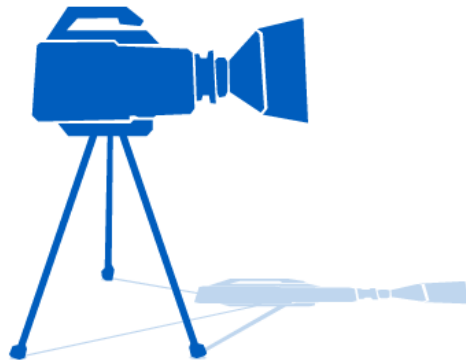
# Manner of Notice: Public

- ▶ If public notice is given by **posting**, it must be posted in a place likely to give notice to the public.
  - ▶ Posting in three such places is recommended and is customary, but it is not specifically required by the open meetings law. 65 Op. Att’y Gen. 250 (1976).
- ▶ If public notice is given by **publication**, it must be paid publication.
  - ▶ This ensures that the notice is actually communicated to the public. 65 Op. Att’y Gen. 250 (1976).



# Manner of Notice: News Media

- ▶ Notice also must be given to any news media that have filed a written request for notice.
- ▶ News media cannot be charged a fee for meeting notices. 77 Op. Att’y Gen. 312 (1988).



# Manner of Notice: Official Newspaper

- ▶ Notice also must be given to the official newspaper for the community in question.
- ▶ If there is no official newspaper, notice must be given to a news medium likely to give notice in the area.
- ▶ The official newspaper is not required to print the notice and the governmental body is not required to pay for publication. *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979).
- ▶ **Caution: Public** notice still must be actually communicated to the public.



# Timing and Content of Notice

- ▶ Notice must be given **at least 24 hours** before the meeting
  - ▶ Shorter notice only if, for good cause, 24-hour notice is impossible or impractical
    - ▶ In no case may less than 2 hours notice be given
- ▶ The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting. Wis. Stat. § 19.84(2).

**NOTICE**



# 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



# Separate Notice for Each Meeting

- ▶ Separate notice must be given for **each** meeting at a time and date reasonably close to the meeting. Wis. Stat. § 19.84(4).
- ▶ An open-session meeting can be adjourned to a later time on the same date without treating the later session as a separate meeting, if an announcement is made to those present.
- ▶ If a meeting is adjourned or recessed to a different date, then the usual notice rules apply to the later session.

**NOTICE**

**NOTICE**

*Notice*





# 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 Session Requirements: Public Accessibility

- ▶ 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 and reasonably accessible to public
  - ▶ **Room size** and acoustics
    - ▶ Must be reasonably calculated to accommodate all who wish to attend
    - ▶ Body members must take reasonable steps to be heard
  - ▶ **Physical accessibility**
    - ▶ In open session, the room should be **unlocked**
    - ▶ If doors must be closed due to noise, post notice inviting entry
    - ▶ Accessibility for people with disabilities
      - ▶ State bodies must meet in facilities that people can access without assistance. Wis. Stat. § 19.82(3).
      - ▶ Statute not applicable to local bodies, but they must provide reasonable access



# 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: Record Keeping

- ▶ Wis. Stat. § 19.88(3) - 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 require bodies to keep formal minutes of meetings
  - ▶ However, minutes are often required by **other statutes** for certain bodies



# Open Sessions: Additional Issues

- ▶ Wis. Stat. § 19.90 - **Recording:**
  - ▶ 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.
- ▶ Wis. Stat. § 19.88 - **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



# Closed Sessions



# 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





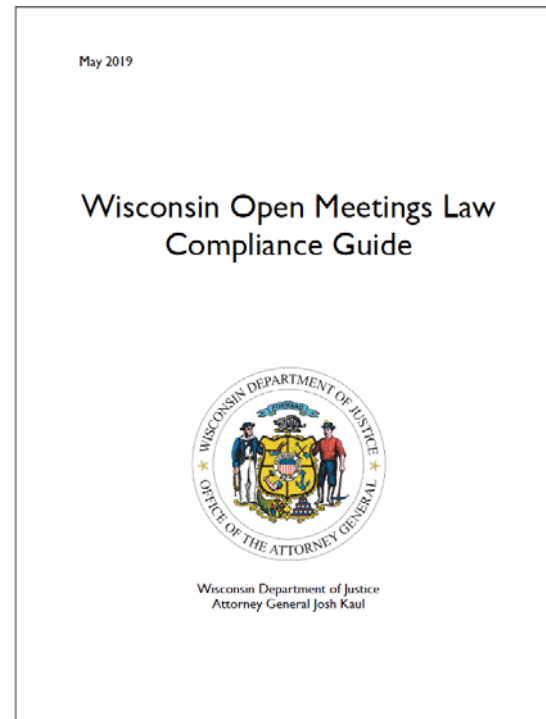
# Closed Sessions: Scope and Attendance

- ▶ 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: Authorized Subjects

- ▶ 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*.



# 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. 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 it occur in open session

(c) Considering **employment, promotion, compensation, or performance evaluation data** of a public employee. Wis. Stat. § 19.85(1)(c).

- ▶ Applies to public employees and *appointed* officials over whom the body exercises responsibility
- ▶ Does not apply to *elected* officials. 76 Op. Att’y Gen. 276 (1987).
- ▶ Applies to *specific individuals* and does not allow closed discussion of more general policies. 80 Op. Att’y Gen. 176 (1992).



# Closed Sessions: Authorized Subjects (cont.)

(d) Except as provided . . . considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**. Wis. Stat. § 19.85(1)(d).

(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
- ▶ (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).



# Closed Sessions: Authorized Subjects (cont.)

(g) **Conferring with legal counsel** about strategy related to litigation. Wis. Stat. § 19.85(1)(g).

- ▶ The attorney must be legal counsel *for the governmental body*
- ▶ The attorney must be rendering advice about *strategy related to litigation* in which the body is or is likely to become involved
- ▶ Other discussions with counsel should be held in open session
- ▶ For additional provisions authorizing closed sessions, see Wis. Stat. § 19.85(1) and DOJ's Compliance Guide



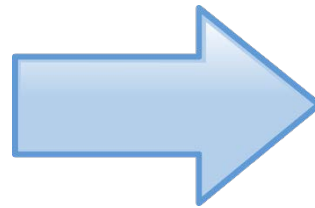
# Closed Sessions: Voting

- ▶ 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: Reconvening in Open Session

- ▶ A body may return to open session after a closed session **only if** the meeting notice specified this would happen
- ▶ A body may adjourn directly from closed session without returning to open session



# 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 s/he 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



# Further Information

- ▶ Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ▶ Contact the Office of Open Government:
  - ▶ Write: Office of Open Government  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857
  - ▶ Tel: (608) 267-2220
  - ▶ Email: [fergusonpm@doj.state.wi.us](mailto:fergusonpm@doj.state.wi.us)



# Wisconsin Open Government Essentials

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

October 16, 2019

Wauwatosa, Wisconsin

