

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

Wisconsin Department of Justice
Office of the Attorney General
Office of Open Government
City of Janesville Training
January 8, 2019
Janesville, Wisconsin



Overview

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



Public Records Law



Overview of Public Records Law Presentation

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



What is the OOG?
What is the Public Records Law?



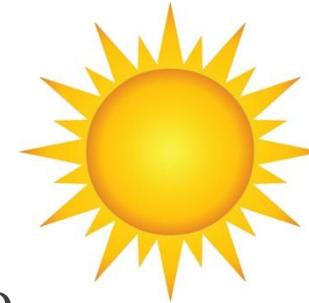
Office of Open Government (OOG)

- ▶ Interpret and apply the Public Records and Open Meetings (PROM) Laws, and other open government statutes and rules
- ▶ Manage DOJ's public records request process
- ▶ Develop open government policies
- ▶ Provide legal counsel to DOJ and clients
- ▶ Run the PROM help line and respond to citizen correspondence concerning open government issues
 - ▶ Wis. Stat. §§ 19.39 (PR Law) and 19.98 (OM Law)
 - ▶ Any person may request AG's advice
- ▶ Provide training and open government resources
 - ▶ PR/OM Law Compliance Guides (online)



Government Transparency and the Public Records Law

- ▶ “Transparency and oversight are essential to honest, ethical governance.”
 - ▶ *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
- ▶ Objectives of Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - ▶ Shed light on workings of government and acts of public officers and employees
 - ▶ Assist members of the public in becoming an informed electorate
 - ▶ Serve a basic tenet of our democratic system by providing opportunity for public oversight



Presumption of Access

The public records law “shall be construed in every instance with *a presumption of complete public access, consistent with the conduct of government business*. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

— Wis. Stat. § 19.31



Public Records Roles and Definitions



Authorities and Custodians

- ▶ **Authority:** Defined in Wis. Stat. § 19.32(1) – Any of specified entities having custody of a record
- ▶ **Legal Custodian:** Defined in Wis. Stat. § 19.33 – Vested by an authority with full legal power to render decisions and carry out public records responsibilities
 - ▶ *E.g.*, elective official or designee
 - ▶ Custodial services: Other staff may assist
 - ▶ All records belong to the authority



Requesters

- ▶ **Requester:** Defined in Wis. Stat. § 19.32(3) – Generally, any person who requests to inspect or copy a record
 - ▶ Incarcerated or committed persons: *More limited rights*
 - ▶ Requester has *greater rights* to inspect personally identifiable information about himself or herself in a record.
 - ▶ Wis. Stat. § 19.35(1)(am)
- ▶ Requester generally ***need not identify*** himself or herself
 - ▶ Requester can remain anonymous
 - ▶ However, public records requests are themselves records subject to disclosure



Purpose of Request

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



Sufficiency of Request

- ▶ A request may be **verbal** or **in writing**
 - ▶ An authority may not require the use of a form
- ▶ “Magic words” are not required
 - ▶ *E.g.*, Not required to cite statute, can use “FOIA,” etc.
- ▶ In order to be a sufficient request, it must:
 - ▶ Reasonably describe the information or records requested
 - ▶ Be reasonably specific as to time and subject matter
- ▶ *Bottom Line*: Custodian should not have to guess what records the requester wants



Verbal Requests

- ▶ Encourage requester to reduce request to writing and submit to records custodian
 - ▶ But they don't have to—verbal requests are sufficient
- ▶ If verbal, email summary of request to records custodian
 - ▶ Date and time received
 - ▶ Requester's name, contact information
 - ▶ Any relevant information to process request
- ▶ *Tip:* Confirm request in writing to requester



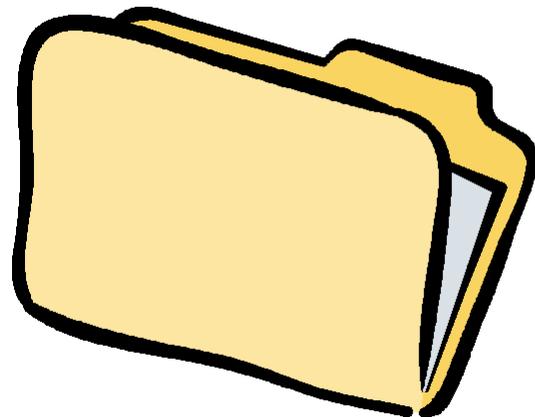
What is a Record? (And What is Not?)



“Record” = Content, Not Form

“Any material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, *regardless of physical form or characteristics*, which has been created or is being kept by an authority.”

— Wis. Stat. § 19.32(2)



Record Subject to Disclosure v. Disclosing Record

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



Is it a Record?

Yes:

- ▶ Not created by the authority, but in the authority's possession
- ▶ Contractors' records
- ▶ Electronic records, including:
 - ▶ Data in a database
 - ▶ Emails
 - ▶ Audio and video
 - ▶ Social media



Is it a Record?

No:

- ▶ Published material available for sale or at library
- ▶ Purely personal property
- ▶ Material with limited access rights
 - ▶ E.g., Copyrights or patents
- ▶ *Drafts, notes, and preliminary documents*



Drafts, Notes, Preliminary Documents

- ▶ Prepared for originator's **personal use**, or in the name of a person for whom the originator is working
- ▶ Not a draft if used for purpose for which it was commissioned
- ▶ One cannot indefinitely qualify a document as a draft by:
 - ▶ Simply labeling it “draft”
 - ▶ Preventing final corrections from being made
- ▶ *Tip: Consult legal counsel with Qs about drafts/notes*

- Record
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- Document is not a draft if used for purpose for which it was commissioned
- One cannot indefinitely qualify a document as a draft by:
 - Labeling it as “draft”
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Personal vs. Business Email

- ▶ **Personal** email, calls, and documents on an **authority's account**:
 - ▶ Email sent/received on an authority's computer system is a record subject to disclosure
 - ▶ Includes purely personal email sent by officers or employees of the authority, using authority's email system
 - ▶ But disclosure generally not required of purely personal e-mails sent or received by employees that evince no violation of law or policy
 - ▶ *Schill v. Wisconsin Rapids School District*,
2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 17
- ▶ **Bottom Line**: Give all responsive emails to records custodian, even if personal
 - ▶ Records custodian must still be made aware that such personal emails exist on the authority's account, to make disclosure determination on a case-by-case basis



Personal vs. Business Email (cont.)

- ▶ **Government business** emails, calls, and documents on **private accounts**:
 - ▶ These materials may be “records”
 - ▶ *Content* determines whether something is a “record,” not the medium, format, or location
- ▶ Personal materials on the same private accounts are not subject to disclosure
- ▶ **Recommendation:** Conduct a careful search of **all relevant accounts** (personal and business email)



Electronic Records = Public Records

- ▶ Social media content posted on social media accounts created or maintained by an authority = Public Record
- ▶ Cell phone content, including content on phones issued by an authority and *possibly content on personal phones used for government business* = Public Record
 - ▶ Phone call records, text messages, app content
- ▶ *Bottom Line:* It is important to **check cell phones** when gathering records in response to public records requests
- ▶ **Recommendation:** **Be aware of what you post** on your private accounts/phone!

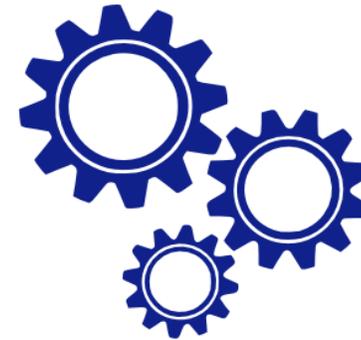


Receiving and Processing a Public Records Request (PRR)



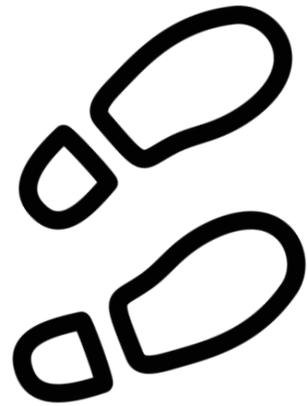
Public Records Request (PRR) Process, Generally

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



Processing a Request: Four Steps

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the public records balancing test



Step 1: Does the Record Exist?

- ▶ Generally, only **records that exist** at the time of the request must be produced
 - ▶ To respond, an authority **need not create** new records
- ▶ Public records law does **not require** answering questions
 - ▶ However, if a request asks a question and an existing record answers the question, provide record or inform requester
- ▶ Continuing requests are not contemplated by the public records law
- ▶ If there are no responsive records, inform the records custodian so the requester can be notified
 - ▶ *Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563



Steps 2 & 3: Absolute Right/Denial

- ▶ **Absolute Right:** Not many exist
 - ▶ Books and papers “required to be kept” by sheriff, clerk of circuit court, and other specified county officials
 - ▶ Daily arrest logs or police “blotters” at police departments
- ▶ **Absolute Denial:**
 - ▶ Can be located in public records statutes:
 - ▶ Information related to a *current* investigation of possible employee criminal conduct or misconduct
 - ▶ Plans or specifications for state buildings
 - ▶ Can be located in other statutes or case law:
 - ▶ Patient health care records; Pupil records



Step 4: The Balancing Test

- ▶ Weigh the **public interest in disclosure** of the record **against** the **public interest and public policies against disclosure**
- ▶ Fact intensive; “blanket rules” disfavored
 - ▶ Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- ▶ Identity of the requester and the purpose of the request are generally *not* part of the balancing test



Some Sources of Public Policies



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



Special Records



Prosecutor, LE, and Juvenile Records

- ▶ Prosecutor's files
 - ▶ Not subject to public inspection under the public records law
 - ▶ *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608, 610 (1991)
- ▶ Law enforcement records
 - ▶ Balancing test must be applied on a case-by-case basis
- ▶ Records related to children or juveniles
 - ▶ Wis. Stat. §§ 48.396 and 938.396: Law enforcement records of children and juveniles, respectively, are confidential with some exceptions
 - ▶ Access to other records regarding or mentioning children subject to general public records rules



Motor Vehicle Records: Driver's Protection and Privacy Act (DPPA)

- ▶ *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W. 2d 339
 - ▶ Wisconsin case construing federal law (DPPA)
 - ▶ Personal information: SSN, DL number, VIN, address, phone, hair/eye color, medical or disability information
- ▶ **Accident reports:** Permitted to be released unredacted
 - ▶ DPPA exception allows (see 18 U.S.C. § 2721(b)(14))
- ▶ **Incident reports:** Release of DMV info prohibited, unless another DPPA exception applies
- ▶ **Information verified using DMV records:** Not protected by DPPA
 - ▶ Presents a problem of determining how info was obtained



Employee Personnel Records

- ▶ Wis. Stat. § 19.36(10): Generally, access *not* permitted for information related to:
 - ▶ Employee's home address, email, phone number, SSN
 - ▶ *Current* investigation of possible criminal offense or misconduct connected with employment
 - ▶ Employee's employment examination, except the score
 - ▶ Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- ▶ Other personnel-related records, including disciplinary records, *may* be subject to disclosure
- ▶ **Notice** to record subjects only required in limited circumstances (Wis. Stat. § 19.356)



Responding to a Request



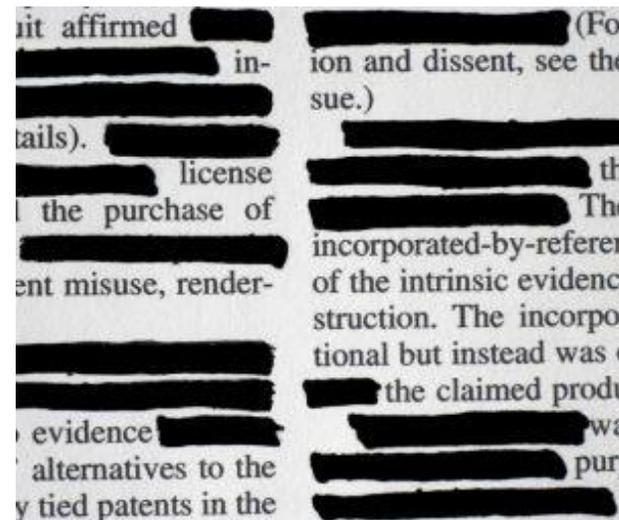
Written Response to a Request

- ▶ If a *written* request is denied in whole or in part, it *requires* a written response, with reasons for denial
 - ▶ May/Should respond in writing to verbal request
 - ▶ Request for clarification, without more, is not a denial
- ▶ Reasons for denial must be **specific** and **sufficient**
 - ▶ Purpose is to give adequate notice of reasons for denial and ensure that custodian has exercised judgment
 - ▶ Reviewing court usually limited to reasons stated in denial
 - ▶ Availability of same records from other sources generally not a sufficient reason for a denial
- ▶ Must inform requestor that denial is subject to review in an enforcement action for mandamus under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney General



Redaction

- ▶ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
- ▶ **Redaction constitutes a denial of access to the redacted information**
 - ▶ Therefore, redaction is subject to review by mandamus (court action)



Timing of Response

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



Format of Records

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



Notice Before Release

- ▶ Notice to “record subjects” only required in limited circumstances
- ▶ *Required by Wis. Stat. § 19.356(2)(a)1:*
 - ▶ Records containing information resulting from *closed* investigation into a disciplinary matter or possible employment-related violation of policy, rule, or statute
 - ▶ Records obtained by subpoena or search warrant
 - ▶ Records prepared by an employer other than the authority about employees of that employer
 - ▶ “Record subject” can try to stop disclosure in court
- ▶ *Required by Wis. Stat. § 19.356(9):*
 - ▶ Officer or employee of the authority holding state or local public office
 - ▶ “Record subject” may augment the record to be released
- ▶ Attorney General opinions regarding notice:
OAG-02-18 (Feb. 23, 2018); OAG-07-14 (Oct. 15, 2014)
- ▶ *Courtesy notice*



Other Issues: Costs, Enforcement, Retention



Costs

- ▶ **Actual, necessary, and direct costs only**—unless otherwise specified by law
 - ▶ Copying and reproduction
 - ▶ Location, if costs are \$50.00 or more
 - ▶ Location costs themselves must be \$50 or more
 - ▶ An authority cannot combine location costs with other costs to meet the \$50 threshold
 - ▶ Mailing/shipping to requester
 - ▶ Other costs specified in Wis. Stat. § 19.35(3)
- ▶ Authorities **may not** charge for redaction costs
- ▶ Prepayment may be required if total costs exceed \$5.00
- ▶ Authority may waive all or part of costs
- ▶ **Recommendation:** Keep careful records of time spent working on public records requests



Office of Open Government Advisory: Charging Fees Under the Wisconsin Public Records Law (Aug. 8, 2018)

- ▶ Overview of costs permissible under the law
 - ▶ Available at <https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>
- ▶ Recent inquiries pertaining to high fees charged by some authorities
 - ▶ Copy costs that were not actual, necessary and direct
 - ▶ Location costs, including time spent by specialists
 - ▶ Limit amount of time spent by specialist
 - ▶ Charge lowest hourly rate of individual **capable** of searching
- ▶ DOJ recently revised its own fee schedule
 - ▶ Available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf>



Enforcement

- ▶ Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
 - ▶ Requester may sue; or may ask DA or AG to sue
 - ▶ Authority may be ordered to release records; or other remedies
- ▶ Wis. Stat. § 946.72: Tampering with public records and notices
 - ▶ “Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony.”



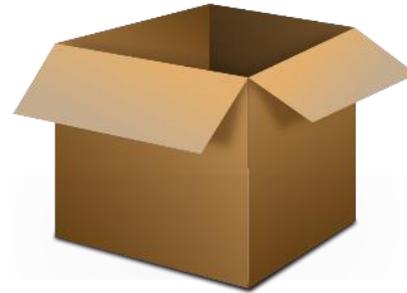
Record Retention – Public Records Law

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



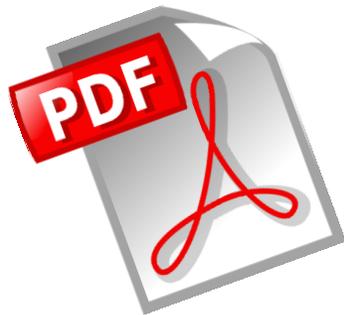
Record Retention – Other Statutes

- ▶ Records Retention Laws
 - ▶ State authorities: Wis. Stat. § 16.61
 - ▶ Local authorities: Wis. Stat. § 19.21
- ▶ Records Retention Schedules
 - ▶ General Records Schedules (GRS's)
 - ▶ Agency-Specific Records Retention/Disposition Authorizations (RDA's)
 - ▶ <http://Publicrecordsboard.wi.gov>



Record Retention – Format

- ▶ Hard copies v. Electronic copies
 - ▶ Copies of records in electronic format are *permissible*
- ▶ State authorities: Wis. Stat. § 16.61(5)(a)
- ▶ Local authorities: Wis. Stat. § 19.21(4)(c)
 - ▶ Local government unit or agency may provide for retention of records in electronic format
 - ▶ Local government unit or agency shall make for such provision by ordinance or resolution



Record Retention – Best Practices

- ▶ Establish agency policies regarding retention
- ▶ Ensure all agency-specific RDA's are up-to-date
 - ▶ RDA's sunset after 10 years
- ▶ Train agency records officers and other staff on record retention and relevant agency policies
- ▶ Follow your retention schedules
- ▶ Consult your legal counsel



Questions?

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



- ▶ After break, Open Meetings Law Presentation

Open Meetings Law



Overview of Open Meetings Law Presentation

- ▶ What is the Open Meetings Law?
- ▶ What is a “Meeting”?
 - ▶ *Showers* test: Purpose and Numbers Requirements
 - ▶ “Convening” of Members
 - ▶ Serial Meetings and “Walking” Quorums
 - ▶ Social or Chance Gatherings
- ▶ Requirements of the Open Meetings Law
 - ▶ Notice Requirements
 - ▶ Open Meetings Requirements
 - ▶ Closed Meetings Requirements



What is the Open Meetings Law?



Government Transparency and the Open Meetings Law

“In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that **the public is entitled to the *fullest and most complete information* regarding the affairs of government as is compatible with the conduct of governmental business.**”

— Wis. Stat. § 19.81(1)



Policy of Openness

- ▶ The open meetings law is to be broadly interpreted to promote the policy of openness
 - ▶ See Wis. Stat. § 19.81(4)
- ▶ On close questions, courts will prefer an interpretation of the law that favors open government
- ▶ Courts disfavor any interpretation that would facilitate evasion of the policy of openness
- ▶ *Bottom Line:* The purpose of the open meetings law is to ensure openness
 - ▶ Only a few limited exemptions permit confidentiality (closed sessions)



Wisconsin Open Meetings Law

- ▶ Open meetings law – Wis. Stat. §§ 19.81-19.98
 - ▶ Any person may request advice from AG – Wis. Stat. § 19.98
 - ▶ AG and DA enforces OM law – Wis. Stat. § 19.97
 - ▶ Individuals may also file verified complaint to enforce, but prerequisites apply
- ▶ Generally, OM Law requires that all meetings of governmental bodies:
 - ▶ Must be preceded by **public notice**; AND
 - ▶ Must be held in a place that is **open** and **reasonably accessible** to all members of the public;
 - ▶ Except in limited situations in which a **closed session** is *specifically authorized*



What is a “Governmental Body” Subject to Open Meetings Laws?

- ▶ Governmental Body – Wis. Stat. § 19.82(1)
 - ▶ State or local agency, board, commission, committee, counsel, department or body corporate
 - ▶ Created by constitution, statute, ordinance, rule, order
 - ▶ Includes *purely advisory bodies*
- ▶ “Formally Constituted Subunits” of Governmental Body
 - ▶ Separate smaller body created by parent body
 - ▶ Composed exclusively of members of parent body
- ▶ Quasi-Governmental Corporations
 - ▶ Complex; Consult your legal counsel



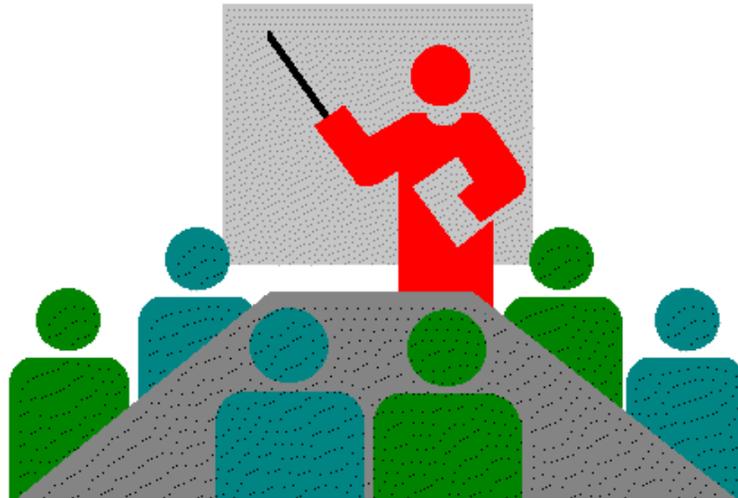
What is a “Meeting”?



Definition of “Meeting”

- ▶ “Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.”

—Wis. Stat. § 19.82(1)



Meetings | Key Concepts: The Two-Part *Showers* Test

State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987)

A “Meeting” occurs whenever:

Purpose Requirement

- ▶ Members **convene** for the **purpose** of conducting governmental business; AND

Numbers Requirement

- ▶ The **number** of members present is sufficient to determine the body's course of action



Meetings | *Showers* Test: “Purpose” Requirement

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



Meetings | *Showers* Test: “Numbers” Requirement

- ▶ **Q:** How many members must gather to constitute a meeting?
 - ▶ **A:** A sufficient number to determine a body’s course of action.
 - ▶ **WARNING:** This number is not necessarily equal to a majority of the membership or to a quorum of the body.



Meetings | *Showers* Test: “Numbers” Requirement (continued)

- ▶ A sufficient number of members to determine a body’s course of action can refer to either:
 - ▶ The *affirmative* power to pass an action
 - OR
 - ▶ The *negative* power to defeat an action
 - ▶ This is sometimes referred to as a “**negative quorum**”
- ▶ This is very fact-specific to each governmental entity



Meetings | Key Concepts: “Convening” of Members

- ▶ Members must **convene** for there to be a meeting
- ▶ Not limited to face-to-face gatherings or physical presence together
- ▶ Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority
- ▶ If members communicate without physically gathering together, the key question to ask is:
 - ▶ To what extent do their communications resemble a *face-to-face exchange*?



“Convening” of Members

▶ Written correspondence

- ▶ Circulation of one or more written documents among members of a body
- ▶ Generally, a “one-way” communication
- ▶ Any responses are spread out over time
- ▶ *Courts are unlikely to find such written communication to be a “convening” of members*



▶ Telephone conference calls, video conferences, etc.

- ▶ Permit instantaneous verbal interaction among members
- ▶ For practical purposes, equivalent to a physical gathering
- ▶ *If it passes the purpose and numbers tests, then it is a “meeting.”
See 69 Op. Att’y Gen. 143 (1980)*



“Convening” of Members | Email and Electronic Messaging

- ▶ Email, electronic discussion boards, instant messaging, social networking, blog comments, etc.
 - ▶ **Warning:** May or may not implicate the open meetings law; depends on how they are used
- ▶ *Courts will likely consider:*
 - ▶ Number of participants
 - ▶ Number of communications
 - ▶ Time frame
 - ▶ Extent of conversation-like interaction



“Convening” of Members | Best Practices for Technology

- ▶ **Warning:** Technology creates a risk of private communication that should be conducted at public meetings
- ▶ To minimize the risk of violations, **caution is advised:**
 - ▶ Use only for one-way transmissions
 - ▶ Do not send replies or minimize their content and distribution
 - ▶ If reply needed, do not reply to all; reply only to sender
 - ▶ Do not use for debate/discussion or polling/voting
 - ▶ Could be construed as “walking quorum”
 - ▶ Limit the use of use attachments/editing among members



Meetings | Key Concepts:

Serial Meetings or “Walking” Quorum

- ▶ A “meeting” can sometimes result from a *series of gatherings* among body members (aka serial or “walking” quorum)
- ▶ Elements of a “walking” quorum:
 - ▶ A series of gatherings among groups of members
 - ▶ Each smaller in size than a quorum
 - ▶ Agreement to act uniformly
 - ▶ In sufficient number to control the body
- ▶ **Caution:**
 - ▶ “Walking” quorum issues are complex and fact-specific
 - ▶ Be prepared to consult with your legal counsel



Meetings | Key Concepts: Social or Chance Gathering

- ▶ A “meeting” does *not* include a social or chance gathering of members of a body, unless the gathering is intended to avoid compliance with the law.
 - ▶ Wis. Stat. § 19.82(2)
- ▶ BUT... If one-half or more of the members are present at a gathering, they have the burden to prove that the gathering was social or chance, and was not for the purpose of conducting governmental business
 - ▶ Wis. Stat. § 19.82(2)



Notice Requirements



General Notice Requirement

- ▶ “Every meeting of a governmental body shall be preceded by public notice” Wis. Stat. § 19.83(1).
- ▶ Notice must be communicated to:
 - ▶ The public; AND
 - ▶ News media that have filed a written request for notice; AND
 - ▶ The official newspaper for the community in question
 - ▶ If none, then a news medium likely to give notice in the area

NOTICE



Timing and Content of Public Notice

- ▶ **Timing:** Notice must be given **at least 24 hours** before the meeting. Wis. Stat. § 19.84(3)
 - ▶ Shorter notice may be given *only if, for good cause*, 24-hour notice is impossible or impractical
 - ▶ In no case may less than 2 hours notice be given
- ▶ **Content:** The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting. Wis. Stat. § 19.84(2)
 - ▶ Including the subject matter of any contemplated closed session
 - ▶ Notice should **not** use generic, uninformative subject-matter designations, such as:
 - ▶ Old or new business
 - ▶ Agenda revisions
 - ▶ Miscellaneous business, etc.



Content of Public Notice | Subject Matter

- ▶ **Q:** How detailed must a notice be in describing the subjects to be considered at a meeting?
 - ▶ **A:** The Wisconsin Supreme Court has said that the description must be “reasonable” under all of the “relevant circumstances” of the particular case
 - ▶ *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804
- ▶ “Relevant circumstances” include:
 - ▶ The burden of providing more detail
 - ▶ The degree of public interest in the subject
 - ▶ Whether the subject is non-routine



Open Session Requirements



Open Session Requirements

- ▶ “[A]ll meetings of all state and local governmental bodies shall be **publicly held in places reasonably accessible** to members of the public and **shall be open** to all citizens at all times **unless otherwise expressly provided by law.**”
 - ▶ Wis. Stat. § 19.81(2)
- ▶ “‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times”
 - ▶ Wis. Stat. § 19.82(3)



Accessibility and Citizen Participation

- ▶ Meetings must be reasonably accessible to those with disabilities
 - ▶ When possible, meet in buildings/rooms that are accessible to people with disabilities *without* assistance
 - ▶ Additional requirements may apply under the ADA
- ▶ Citizen participation/Public Comment Periods
 - ▶ OM Law does *not* require that citizens be allowed to participate
 - ▶ But other statutes might require public comment periods
 - ▶ Can impose reasonable limits (*e.g.*, time)
- ▶ Citizens are allowed to record meetings – Wis. Stat. § 19.90
 - ▶ So long as doing so is not disruptive to open meetings
 - ▶ OM Law does not require governmental body to permit citizens to record closed meetings



Recordkeeping Requirements

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



Closed Session Requirements



Closed Sessions | Required Procedure

- ▶ Every meeting must begin in open session
 - ▶ To go into closed session, a motion must be made and carried in open session
 - ▶ The vote of each member must be recorded
 - ▶ Before a vote to go into closed session, the presiding officer must announce:
 - ▶ The statutory exemption(s) authorizing the closed session
- AND
- ▶ The nature of the business to be considered



Closed Sessions | Limited Scope

- ▶ When a governmental body is in closed session, it must limit its discussion:
 - ▶ to the specific business for which the closed session was authorized
- AND
- ▶ may not take up any other matters
- ▶ The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1)
 - ▶ For a more complete discussion of this topic, see DOJ's *Wisconsin Open Meetings Law Compliance Guide*.



Wis. Stat. § 19.85(1) Exemptions | Authorized Subjects for Closed Session

- ▶ A) **Deliberating** about a case that has been the subject of a judicial or quasi-judicial trial or hearing before the body.
Wis. Stat. § 19.85(1)(a).
- ▶ B) Considering **dismissal, demotion, licensing or discipline** of a public employee or the investigation of charges against the employee. Wis. Stat. § 19.85(1)(b).
 - ▶ If there is to be an *evidentiary hearing* or if *action* is to be taken in closed session, then the employee is entitled to actual notice, and may demand that the hearing or action be conducted in open session



Authorized Subjects (cont.)

- ▶ 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 governmental 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)
- ▶ 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).
 - ▶ Very limited—need actual knowledge. 74 Op. Att’y Gen. 70 (1985)



Authorized Subjects (cont.)

- ▶ E) Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting “other specified public business” whenever **competitive** or **bargaining reasons** require a closed session. Wis. Stat. § 19.85(1)(e).
 - ▶ The burden is on the governmental body to show that competitive or bargaining interests *require* confidentiality.
 - ▶ *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640.
 - ▶ 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



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 Open Meetings Law Compliance Guide



For Further Information

- ▶ Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ▶ Contact the Office of Open Government:
 - ▶ Write:

Office of Open Government
Wisconsin Dept. of Justice
P.O. Box 7857
Madison, WI 53707-7857
 - ▶ Tel: (608) 267-2220 (main OOG line)
 - ▶ Email Assistant Attorneys General:
 - ▶ Paul Ferguson: fergusonpm@doj.state.wi.us
 - ▶ Sarah Larson: larsonsk@doj.state.wi.us



Questions?



Thank you for your time and attention!

