

Public Records and Open Meetings in Wisconsin

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

October 1, 2020

Webinar



▶ 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 (*time permitting*)
 - ▶ Define what constitutes a governmental body
 - ▶ Explain when a meeting occurs
 - ▶ Discuss holding open meetings during COVID-19
- ▶ 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



Transparency During COVID-19

- ▶ **Important:** An authority's obligations under the public records law and a governmental body's obligations under the open meetings law **do not cease** because of the COVID-19 public health situation.



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 Records 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
- ▶ **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)



Questions:

- ▶ Has anyone ever had a requester refuse to identify themselves?
- ▶ Has anyone had a requester who did not want to put their request in writing or fill out a request form?



Who Can Request?

- ▶ 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
- ▶ 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

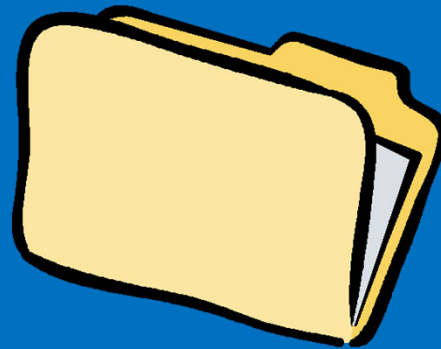




▶ Records

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
- ▶ Cannot simply label a document as a “draft” or prevent final corrections
- ▶ Generally, exception is limited to documents that are circulated to those over whom the person for whom the draft is prepared has authority

- Record
 - “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)
- No:
 - Purely personal property
 - Published material available for sale or at library
 - Material with limited access rights, such as copyrights or patents
 - Drafts, notes, and preliminary documents
- Drafts, notes, and preliminary documents
 - Prepared for originator's personal use or
 - In the name of a person for whom the originator is working
- 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”
 - Preventing final corrections from being made



Questions:

- ▶ Who has a work-related email account or a work-issued phone?
- ▶ Has anyone ever sent or received a work-related email or text from a personal account or phone?



Personal and Business Email, Texts, 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 **personal accounts**:
 - ▶ These materials may be records
 - ▶ Content determines whether something is a record, not the medium, format, or location
 - ▶ Personal materials on the personal accounts are not subject to disclosure
 - ▶ **Recommendation**: Conduct a careful search of all relevant accounts

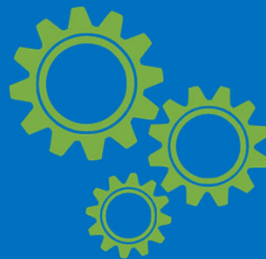




▶ Receiving and
Processing Records

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



Questions:

- ▶ Has anyone ever received a request that you did not understand?
- ▶ Did you deny the request, attempt to fulfill it, or contact the requester?



Communication with a Requester

- ▶ 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
- ▶ 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**
 - ▶ Public policies favoring nondisclosure may found in other statutes, court decisions, Wis. Stat. § 19.85(1) closed session exemptions, and elsewhere
- ▶ 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





▶ Issues to Note

Employee Records

- ▶ Wis. Stat. § 19.36(10): Treatment of employee personnel records
 - ▶ Unless required by Wis. Stat. § 103.13, **prohibits** the disclosure of information related to:
 - ▶ Employee's home address, email, phone number, SSN
 - ▶ **Current** investigation of possible criminal offense or misconduct connected with employment
 - ▶ Employee's employment examination, except the score
 - ▶ Staff management planning, including performance evaluations, judgments, letters of reference, other comments or ratings relating to employees
- ▶ Other personnel-related records, including **disciplinary records**, may be subject to disclosure
 - ▶ Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356.



Law Enforcement Records

- ▶ Crime victims' rights expressed in statutes, constitutional provisions, and case law
 - ▶ Consideration of family of crime victims
 - ▶ **Marsy's Law** passed earlier this year
 - ▶ Balancing test considerations
- ▶ 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



Other 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. § 165.87: Law enforcement **body cameras**; includes provisions regarding:
 - ▶ Retention of body camera data
 - ▶ Legal custodian of body camera data
 - ▶ Possible exceptions to disclosure, including victims of sensitive or violent crimes, minors, and certain locations.
- ▶ Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- ▶ Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- ▶ Other statutes requiring confidentiality





▶ Redaction

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

it affirmed [REDACTED] (For
[REDACTED] in- ion and dissent, see the
[REDACTED] sue.)
[REDACTED] tails). [REDACTED]
[REDACTED] license [REDACTED] th
[REDACTED] the purchase of [REDACTED] The
[REDACTED] incorporated-by-referen
[REDACTED] ent misuse, render- of the intrinsic evidence
[REDACTED] construction. The incorpor
[REDACTED] tional but instead was c
[REDACTED] the claimed produ
[REDACTED] evidence [REDACTED] wa
[REDACTED] alternatives to the [REDACTED] purp
[REDACTED] y tied patents in the [REDACTED]





- ▶ 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



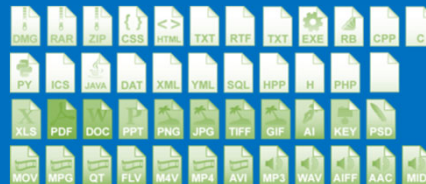
Questions:

- ▶ Has anyone ever received a request for a record in a particular format?
- ▶ Have you complied with such a request by providing the record in the requested format?



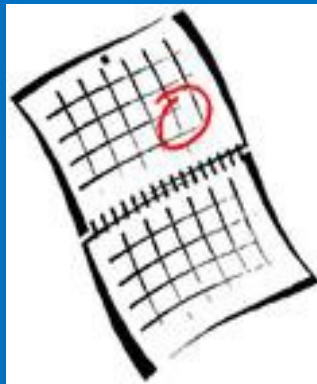
Format of Records

- ▶ *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



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
 - ▶ Overview of costs permissible under the law
 - ▶ Result of inquiries pertaining to high fees charged by some authorities:
 - ▶ Copy costs that are not actual, necessary and direct
 - ▶ Location costs including time spent by specialists
 - ▶ Limit amount of time spent by specialist
 - ▶ Charge lowest hourly rate of individual **capable** of searching
- ▶ DOJ's fee schedule is available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/fee-schedule-final.pdf>





▶ Enforcement

Enforcement

- ▶ Wis. Stat. § 19.37: Mandamus action to challenge withholding a record or part of a record or a delay in granting access
 - ▶ 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 **7-year retention period** for most records
 - ▶ The Public Records Board (PRB) may set shorter periods
- ▶ **General Records Schedules (GRSs)**
 - ▶ State agencies are bound to follow
 - ▶ Unless they opt out and adopt corresponding RDAs within 12 months
 - ▶ Local government units may opt in
- ▶ Agency-specific **Records Retention/Disposition Authorizations (RDAs)**
 - ▶ Deviate from the GRSs to meet specific agency needs



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

- ▶ Wis. Stat. § 19.81(1):
 - ▶ “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.**”



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

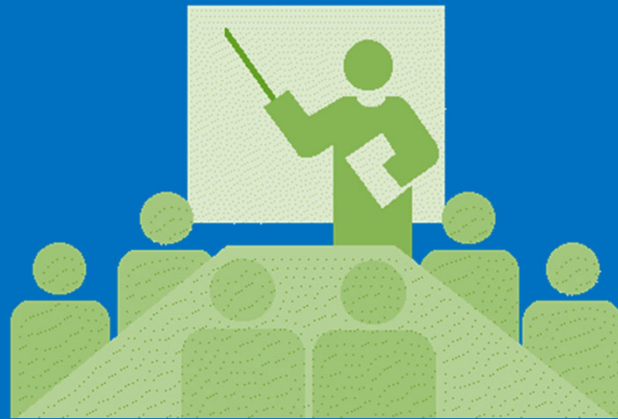




▶ Meetings

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: “Convening” of Members

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



Meetings: “Convening” of Members (cont.)

- ▶ A “convening” of members can occur through **written correspondence, telephone and video conference calls, emails**, and other forms of **electronic messaging**.
- ▶ **Technology** creates risk of private communication that should be held at public meetings
 - ▶ Important to keep in mind during the COVID-19 public health situation
- ▶ To minimize the risk of violations, **caution is advised**:
 - ▶ Use only for one-way transmissions
 - ▶ Do not send replies or minimize their distribution
 - ▶ If a reply is needed, do not reply to all; reply only to the sender
 - ▶ Do not use for debate/discussion or polling/voting
 - ▶ Could be construed as a “walking quorum”
 - ▶ Limit the use of attachments/editing among members



Meetings: Serial or “Walking” Quorum

- ▶ “Walking” Quorum: A meeting resulting from a series of gatherings among body members
- ▶ Elements of a “walking” quorum:
 - ▶ A series of gatherings among groups of members
 - ▶ Each smaller in size than a quorum
 - ▶ Agreement to act uniformly
 - ▶ In sufficient number to control the body
- ▶ The “walking” quorum concept is intended to prevent circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.
- ▶ **Practical Tips:**
 - ▶ “Walking” quorum issues are complex and fact-specific
 - ▶ Consult with your legal counsel





▶ Notice

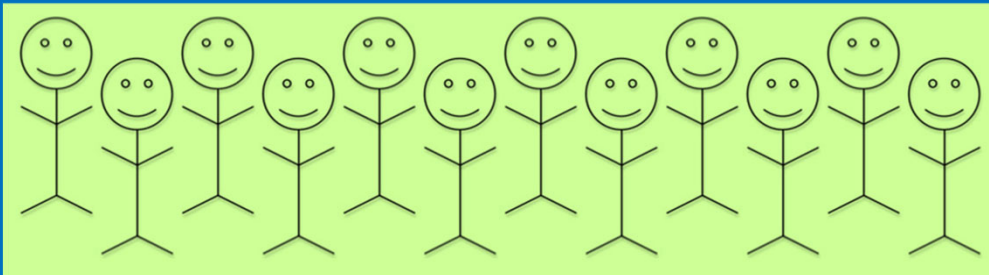
General Notice Requirement

- ▶ “Every meeting of a governmental body shall be preceded by public notice”
Wis. Stat. § 19.83(1).
- ▶ Notice must be communicated to:
 - ▶ The **public**
 - ▶ **News media** that have filed a **written request** for notice
 - ▶ The **official newspaper** for the community in question
 - ▶ If none, then a news medium likely to give notice in the area
- ▶ Presiding officer is legally responsible for ensuring notice requirements are met
 - ▶ Tasks may be delegated but presiding officer liable for any violations



Manner of Notice: Public

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



Timing and Content of Notice

- ▶ 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





▶ **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).

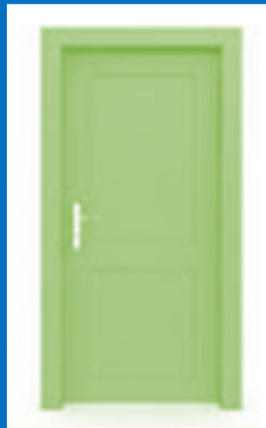




▶ Closed Sessions

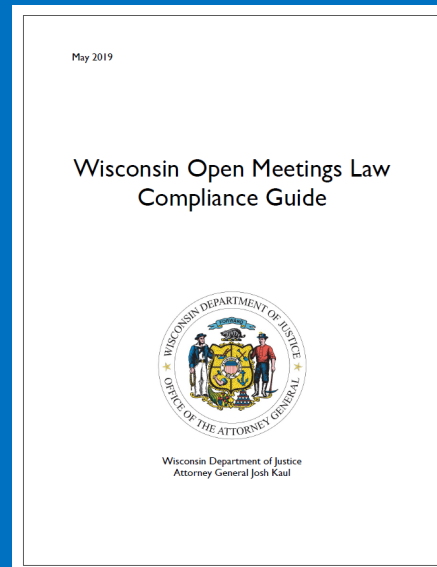
Closed Sessions: Required Procedure

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



Closed Sessions: 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**.





▶ 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



Questions:

- ▶ Does anyone sit on a governmental body or regularly attend meetings of governmental bodies?
- ▶ Has anyone attended a meeting of a governmental body during COVID-19?





▶ Open Meetings -
COVID-19 Considerations

“Reasonably Accessible”

- ▶ The law requires meetings to be held in places “**reasonably accessible**” to the members of the public and open to all citizens at all times unless otherwise provided by law. Wis. Stat. § 19.81(2).
 - ▶ Under the present circumstances, governmental bodies can typically meet their open meetings law obligations while practicing social distancing by conducting meetings via **telephone or video conference calls**.
 - ▶ However, the **public must be provided an effective way to monitor the calls**.
- ▶ A governmental body must provide the public with the **information on how to join the meeting remotely**.
 - ▶ **Notices** should include instructions on how to attend, including any required call-in number and/or log-in information.



Remote Meetings

- ▶ Bodies should be mindful that it may be burdensome or infeasible for some members of the public to attend remotely.
 - ▶ Bodies should **facilitate reasonable access** to meetings for such individuals.
- ▶ Bodies that conduct meetings via videoconference should strongly consider including an **alternate telephone option for those without internet access**.
- ▶ The body chair should encourage body members to **identify themselves** before speaking.
- ▶ Body members should **refrain** from speaking over one another.
- ▶ Bodies should **post a recording** of a meeting on its website as soon as practicable after a meeting concludes.



Additional Considerations

- ▶ For certain types of meetings, only providing remote access may not always be permissible.
 - ▶ For example:
 - ▶ Telephone conferences involving complex plans, drawings, or charts
 - ▶ When the demeanor of a witness is significant
- ▶ The type of access that constitutes **reasonable access** in the present circumstances may be different from the type of access required in other circumstances.
 - ▶ Ultimately, whether a meeting is “reasonably accessible” is a factual question that must be determined on a case-by-case basis.



Best Practices

- ▶ It is advisable for bodies to keep the public health situation, government guidance, and health concerns of the public in mind when making decisions regarding conducting open meetings.
- ▶ Considerations:
 - ▶ Is the governmental business to be discussed related to an **essential government function**?
 - ▶ Is it feasible to **postpone** nonessential governmental business?
 - ▶ What **accommodations** can be made to **facilitate reasonable access** for individuals who wish to observe the meeting?
- ▶ Bodies that meet remotely can and should consider steps to ensure that their meetings remain open and accessible to the public.
- ▶ **Bottom line:** It is important to **focus** on the **purpose of the open meetings law**—to ensure government **openness and transparency**—during the public health situation.



Questions?

Further Information

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



Public Records and Open Meetings in Wisconsin

Wisconsin Department of Justice

Office of Open Government

Cities and Villages Mutual Insurance Company

October 1, 2020

Webinar