

Wisconsin Department of Justice Office of Open Government



Public Records Law and Open Meetings Law Training

Cities and Villages Mutual Insurance Company

July 24, 2025

Remote Training



Presentation Overview

- Provide a brief background on DOJ's Office of Open Government
- **First Half:** Cover public records law essentials, including:
 - Explain what is a record and who can request records
 - Discuss the receipt and processing of public records requests
 - Outline how to respond to public records requests
 - Address records retention
- **Second Half:** Outline open meetings law essentials, including:
 - Define what constitutes a governmental body
 - Explain when a meeting occurs
 - Detail meeting notice requirements
- Offer the 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 Records 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:** Wis. Stat. § 19.32(1) - any of specified entities having custody of a record
 - Any of specified entities having custody of a record
 - Public records law obligations apply separately to each authority
 - The authority that receives a request **must** respond
- **Legal Custodian:** 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

- 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)
- Requesters may be anonymous, and generally, **need not identify** themselves
 - However, public records requests are records subject to disclosure
- Requesters **need not state the purpose** of their requests
 - Motive generally not relevant, but context appropriately considered
- *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894: Safety concerns may be relevant, but it is a fact-intensive issue determined on a case-by-case basis in the balancing test.

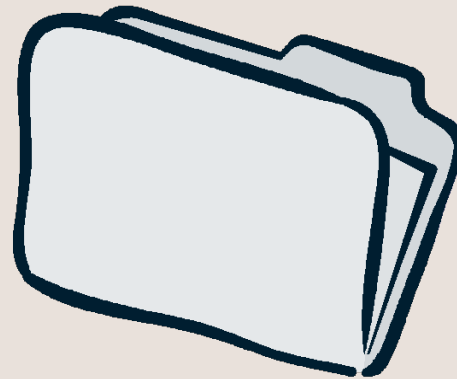


RECORDS



“Record” 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, texts, voicemails, and social media
 - Virtual workplace chat content, channel discussions, and files
- 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

- Record
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Electronic Records: Email, Texts, etc.

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



RECEIVING AND PROCESSING A REQUEST



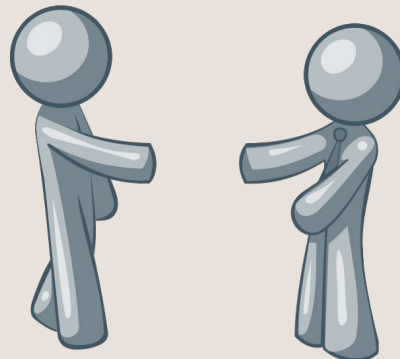
Receiving a Request

- A request may be submitted to anyone working for 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
- 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
- **Tip:** It is okay to contact the requester to clarify



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 if there is a large number of responsive records, or large estimated costs, and suggest or 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



Records Must 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. *See Journal Times v. Police & Fire Com'rs Bd.*, 2015 WI 56, ¶ 102, 362 Wis. 2d 577, 866 N.W.2d 563.



Review Each Requested Record

- Each requested record must be reviewed to determine the following:
 - Whether all or part of the requested record is prohibited from disclosure pursuant to a **statute** or the **common law**
 - Statutes may be found within the public records law itself or elsewhere
 - Whether the **public records balancing test** weighs in favor of not disclosing all or part of the requested record
 - Presumption that the records will be disclosed
- Records or information exempt from disclosure must be redacted
- This process can be time consuming for audio and video recordings
 - It may be helpful to communicate this to the requester



The Balancing Test

- Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **against disclosure**
 - Consider public policies expressed in other statutes, court decisions, exemptions to open meeting requirements in Wis. Stat. § 19.85(1), evidentiary privileges, etc.
- Fact intensive; “blanket rules” disfavored
- Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- Identity of requester and purpose of request are generally not part of the balancing test



ISSUES TO NOTE



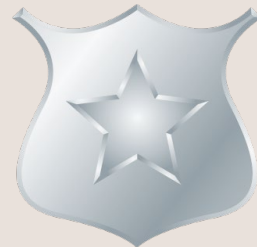
Employee Records

- 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, are subject to disclosure
 - Notice to employees is required in certain circumstances. See Wis. Stat. § 19.356.



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 regular public records process, including application of the balancing test on a case-by-case basis, must be followed.
 - There is a strong public interest in investigating and prosecuting criminal activity
 - *Linzmeier v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811
 - **Public oversight of police investigations is important**
 - Police investigation reports can be particularly sensitive
 - Generally, law enforcement records more likely to have an adverse effect on public interests if released



Law Enforcement Records – Key Considerations

- Crime victims' rights expressed in statutes, constitutional provisions, and case law
 - Includes family of crime victims
 - **Marsy's Law:** Balancing test considerations
 - Office of Open Government Advisory: Marsy's Law and Public Records (May 13, 2021): <https://www.wisdoj.gov/Documents/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>
- 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



Law Enforcement Records – Key Considerations, continued

- Children and juveniles
 - **Wis. Stat. ch. 48:** Law enforcement records of children who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 48.396.
 - **Wis. Stat. ch. 938:** Law enforcement records of juveniles who are the subjects of such investigations or other proceedings are confidential with some exceptions. See Wis. Stat. § 938.396.
 - Access to other records regarding or mentioning children subject to general public records rules, including application of the balancing test.
- Officer safety, including the safety of their 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



Ongoing Investigations and Prosecutions

- The public records law does **not** include a prohibition against the release of records regarding an ongoing investigation or prosecution.
 - Exception under § 19.36(10)(b):
 - Unless required by § 103.13
 - **prohibits** the disclosure of information related to the **current** investigation of possible crime or misconduct connected with employment by **employee**.



Ongoing Investigations and Prosecutions

- Ongoing investigation/prosecution is a factor under the balancing test; considerations:
 - Impact on the ability to have a fair trial
 - Influence on jury pool or judge
 - Influence on potential witnesses and impact on the ability to determine veracity
 - Availability of requested records prior to ongoing investigation/prosecution
 - E.g., an individual's personnel file; Acadis records
- **Tip:** A law enforcement agency that receives a public records request related to an ongoing prosecution should **contact the prosecutor** to see if there are concerns related to release.



Body Camera Recordings – Retention

- **Wis. Stat. § 165.87(2):**

- Must retain all data from law enforcement body cameras for at least **120 days**
 - Exceptions that require longer retention, including:
 - Encounters that result in death or actual or alleged injury
 - Encounters that result in a custodial arrest
 - A search during an authorized temporary questioning
 - Encounters that include the use of force by a law enforcement officer
 - Other situations in which longer retention may be required
 - Including when body camera data is used in criminal, civil, or administrative proceedings



Body Camera Recordings – Definitions

- **Wis. Stat. § 165.87(3)(a):**
 - “Authority” and “requester” have the same meanings as in the public records law
 - “Record subject” means an individual recorded by a body camera to whom **all** the following apply:
 - Individual is depicted or the individual’s voice is audible
 - Individual’s identity is known to the law enforcement agency
 - Individual is **not** a law enforcement officer acting in an official capacity
 - Unless a crime or other violation of law has been committed or alleged to have been committed against the officer while present at the location that was recorded



Body Camera Recordings – Disclosure

- **Wis. Stat. § 165.87(3)(b):**
 - Generally, data from a body camera are records subject to disclosure
- **Wis. Stat. § 165.87(3)(c):**
 - Outlines public policy **weighing in favor of nondisclosure** of certain content:
 - Privacy of victims of sensitive or violent crimes
 - Privacy of minors
 - Privacy of record subjects in a location where a record subject has a reasonable expectation of privacy
 - Such an individual's face and other identifiers must be redacted
 - **Unless** they do **not** object **or** the public interest is **so great** that it outweighs the public policy weighing in favor of nondisclosure



Body Camera Recordings – Disclosure, cont.

- **Wis. Stat. § 165.87(3)(d):**

- For the purposes of public records requests, the law enforcement agency that created the body camera recording is the legal custodian
 - Other authorities possessing the recording must **deny** requests for it

- **Wis. Stat. § 165.87(3)(e):**

- Statute does not prohibit release of body camera data under Wis. Stat. § 175.47(5)(b) (release of reports related to reviews of officer-involved deaths)



Other Issues to Note

- Stat. § 905.03(2) and Common Law: Lawyer-Client Privileged Communications
- Wis. Stat. § 804.01(2)(c)1 and Common Law: Attorney Work Product
- Driver's Privacy Protection Act (DPPA)
 - Information on the intersection of DPPA and the public records law is found in the Wisconsin Public Records Law Compliance Guide.
- 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

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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 the custodian has exercised judgment
 - Reviewing court usually limited to reasons stated in denial
 - **Availability of the same records from other sources generally not a sufficient reason**
 - Must inform the 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



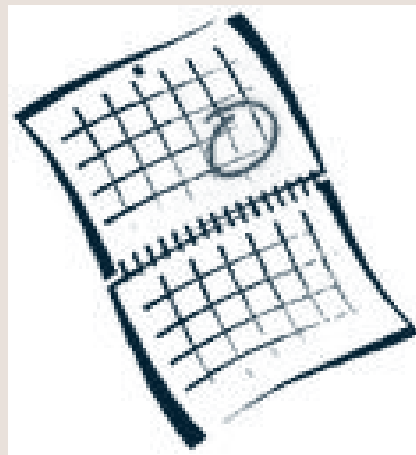
Format of Records

- *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 (data about data)
 - Because emails were requested in electronic format, associated metadata was also requested
- *Wireddata, 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
- 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 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 employer other than the authority about employees of that employer
 - “Record subject” can try to prevent 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



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, except as provided by Wis. Stat. § 19.35(3)(h).
- 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



Redaction Fees: Audio and Video Recordings

- Wis. Stat. § 19.35(3)(h) enacted in Spring 2024.
 - An authority that is a law enforcement agency may impose a fee for the actual, necessary, and direct cost of redacting recorded audio or video content.
 - An authority may **not** impose a fee if two requirements are met:
 - Requester must provide **written certification** that the requester will not use the audio or video content for financial gain (not including an award of damages in a civil action).
 - An individual who provides a false certification is subject to a \$10,000 forfeiture for each violation.
 - Requester cannot have submitted **more than 10 requests** for records containing audio or video content from the same authority during the calendar year (including the current request but excluding requests subject to Wis. Stat. § 19.35(3) 4. or 5.).



Redaction Fees: Audio and Video Recordings, cont.

- An authority may **not** impose a fee for redaction if:
 - Requester is an individual **directly involved** in the event to which the requested records relate, the individual's attorney or other authorized representative, or the individual's parent or guardian if the individual is under 18 years of age.
 - The event to which the requested records relate is an **officer-involved shooting**.
- Fee calculation:
 - The rate for the actual, necessary, and direct charge for staff time spent redacting **must** be based on the pay rate of the authority's lowest paid employee capable of performing the task.
- An authority may not impose a redaction fee **unless** the authority provides the requester with a written estimate of the fee prior to fulfilling the request.



Redaction Fees: Audio and Video Recordings, cont.

- Public access to law enforcement agencies' audio and video recordings helps ensure transparency.
- Time and resources required to review and redact audio and video recordings can be substantial.
 - This appears to be the primary concern behind the development of the new provisions.
- The new provisions raise several questions that require legislative attention to address.
- In the meantime, here are a few best practices:
 - Keep the purpose of the public records law in mind when determining whether to impose fees.
 - The provisions cannot be used to dissuade or discourage requesters from submitting requests.
 - Authorities and requesters should maintain an open line of communication and work together to tailor requests to ensure requesters receive the desired records while reducing redaction costs.
 - The public records law provides that authorities may waive fees.
 - If you have questions, consult your legal counsel.



OOG Fee Advisory

- Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law (August 8, 2018)
 - Available at https://www.wisdoj.gov/Documents/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 (updated in June 2025) is available at <https://www.wisdoj.gov/Open%20Government/Public%20Records%20Request%20Fee%20Schedule%20June%202025.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
 - Mandamus action may be filed by:
 - Requester, with or without attorney
 - District attorney
 - Attorney General
 - 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.”



RECORDS RETENTION



Records 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



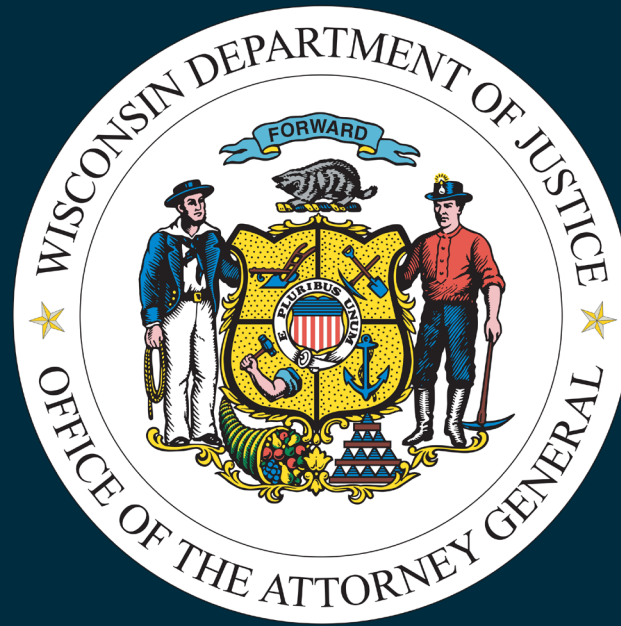
Other Records Retention Statutes

- **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 retention periods
- **General Records Schedules (GRSs)**
 - State agencies must follow; may 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
- Questions about records retention?
 - Consult your legal counsel
 - Visit the PRB's website: <http://publicrecordsboard.gov>



QUESTIONS ABOUT THE PUBLIC RECORDS LAW OR RECORDS RETENTION?





Break



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)



Public Policy, cont.

- 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.



Essentials

- Generally, the open meetings law requires that all meetings of governmental bodies:
 - must be preceded by **public notice**; and
 - must be **publicly held** in a place that is **reasonably accessible** and **open** at all times 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.
- Generally, a governmental body does not include a group of administrative staff of a government agency.
 - Highly fact-specific issue.

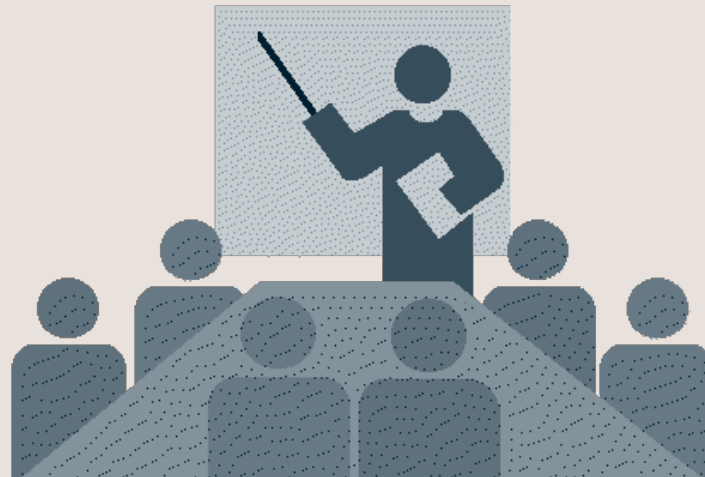


MEETINGS



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).
 - Not limited to face-to-face gatherings or physical presence together.
 - Examples: telephone calls, emails, virtual meetings, other electronic forms of communication



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**



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).



Showers Test: “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.

- 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 with increase in use of virtual workplace platforms
- 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

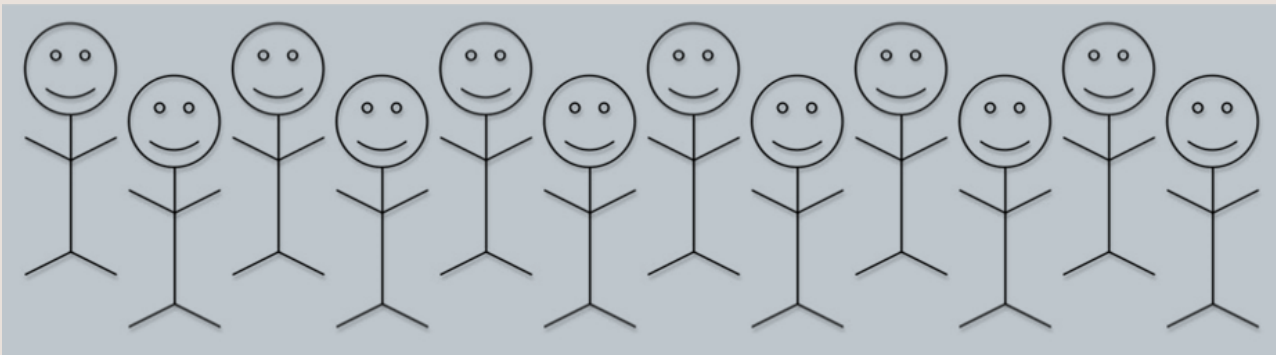
- “Every meeting of a governmental body shall be preceded by public notice”
Wis. Stat. § 19.83(1).
- Notice must be communicated to:
 - The **public**
 - **News media** that have filed a **written request** for notice
 - The **official newspaper** for the community in question
 - If none, then a news 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 to the 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 communicated **at least 24 hours before** the meeting to:

- The **public, news media** that have filed a **written request** for notice, and the **official newspaper** for the community in question

The meeting notice must reasonably inform the public of the **time, date, place,** and **subject matter** of the meeting.

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, including relevant statutory exemption(s) and nature of business to be considered



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 Sessions: Reasonably Accessible

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 & **reasonably accessible** to public
- **Room size** and acoustics
 - Must be reasonably calculated to accommodate all citizens who wish to attend
 - Body members must take reasonable steps to make it possible to be heard
- **Physical accessibility**
 - In open session, the room should be **unlocked**
 - If doors must be closed due to noise, notice should be posted inviting entry
 - Accessibility for people with disabilities
 - Wis. Stat. § 19.82(3): State bodies must meet in facilities people can access w/o assistance.
 - Statute not applicable to local bodies, but they must provide reasonable access.



Open Sessions: Reasonably Accessible, cont.

The type of access that constitutes reasonable access may depend on the circumstances.

- Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.

The Attorney General has long advised that bodies may convene their meetings **via telephone or video conference**.

- However, courts have not resolved the question of whether the practice of convening meeting in this matter is always permissible.
- The **public must be provided an effective way to monitor the meetings**.

Notices must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.



Open Sessions: Reasonably Accessible, cont.

Best practices:

- Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
 - Bodies should **facilitate reasonable access** to meetings for such individuals.
 - For example, bodies could hold meetings in person with a remote option.
- Bodies are encouraged to retain practices adopted to promote transparency during the pandemic to the extent those practices increase accessibility.
- **Bottom Line:** The more access to meetings, the better. Providing multiple options to the public to attend meetings helps to fulfill the purpose of the open meetings law.



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 (unless it was noticed)



Open Sessions: Recording

Wis. Stat. § 19.90:

- 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.



Open Sessions: 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.



Open Sessions: Record Keeping

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 itself require bodies to keep formal minutes of meetings.

However, minutes are often required by **other statutes** for certain types of bodies.



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: 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: 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 309 (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.

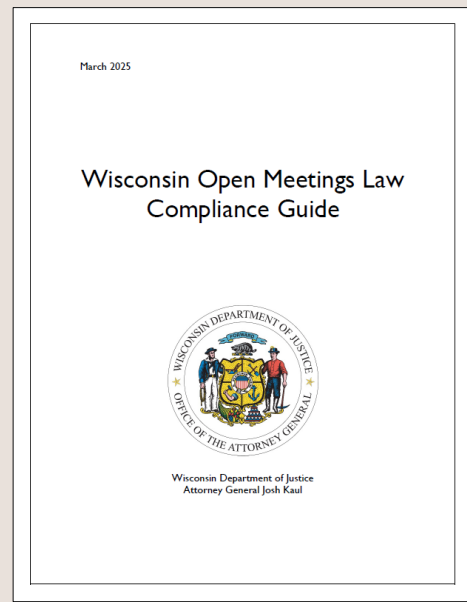
DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.



Closed Sessions: Authorized Subjects

The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).

The following slide includes some commonly used exemptions; it is not a complete list. For a more complete discussion of this topic, see **DOJ's Wisconsin Open Meetings Law Compliance Guide**.



Closed Sessions: Authorized Subjects, cont.

Deliberating about a case that has been the subject of a judicial or quasi-judicial trial or hearing before the body.

Considering **dismissal, demotion, licensing or discipline of a public employee** or the investigation of charges against the employee.

Considering **employment, promotion, compensation, or performance evaluation data** of a public employee.

Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**.

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**.

Considering **sensitive personal information** that would be likely to have a substantial adverse effect on an individual's reputation.

Conferring with legal counsel about strategy related to litigation.



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 the member 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 ABOUT THE OPEN MEETINGS LAW?



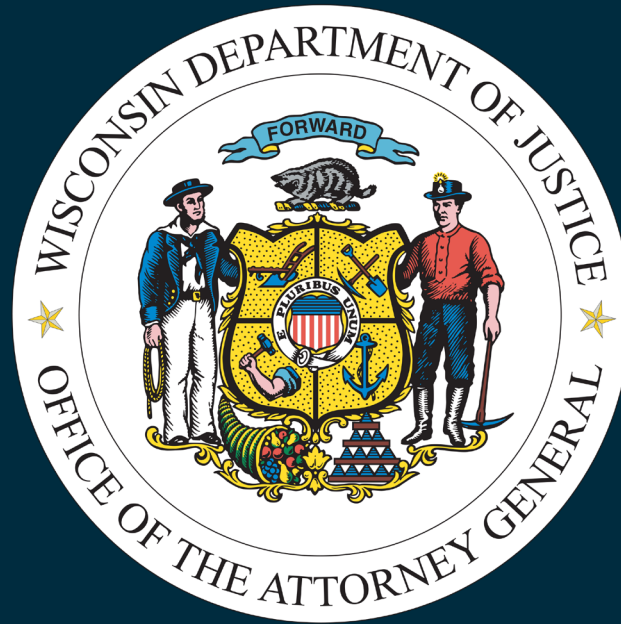
Further Information

Download **DOJ Compliance Guides** and other resources at
<https://www.wisdoj.gov/Pages/AboutUs/office-of-open-government.aspx>

Contact the Office of Open Government:

- Location: AG's Capitol Office, 114 East
- Main Tel: (608) 267-2220
- OOG Email: opengov@wisdoj.gov
- Paul Ferguson: (608) 264-9464
Paul.Ferguson@wisdoj.gov
- Lili Behm: (608) 266-1447
Lili.Behm@wisdoj.gov





Thank You!

