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# Wisconsin Department of Justice Office of Open Government



# Complying with the Wisconsin Open Meetings Law

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**Municipal Electric Utilities of Wisconsin**

**95<sup>th</sup> Annual Conference**

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La Crosse, Wisconsin



# INTRODUCTION

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# Presentation Overview

- Provide a brief background on DOJ's Office of Open Government
- Outline open meetings law essentials
- Define what constitutes a governmental body
- Explain when a meeting occurs
- Detail meeting notice requirements
- Discuss open and closed sessions
- Address enforcement of the open meetings law
- 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



# 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 (continued)

- 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

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# 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.



# Governmental Bodies: Creation

- “[C]reated by constitution, statute ordinance, rule or order . . . .”
  - Refers not to the kind of power wielded by a governmental body, but rather to how the body is created.
- How to determine whether a body is created by constitution, statute, ordinance or rule?
  - Look it up.
- How to determine whether a body is created by order?
  - An order can include **any directive** — whether formal or informal — that creates a body and assigns it some governmental responsibilities. See 78 Op. Att’y Gen. 67 (1989).
  - Such a directive may be issued by any governmental official or entity, **including a governmental body**, that has the power to delegate the governmental responsibilities in question.
  - **Note:** This is a very fact-specific standard, so there are no bright-line rules.



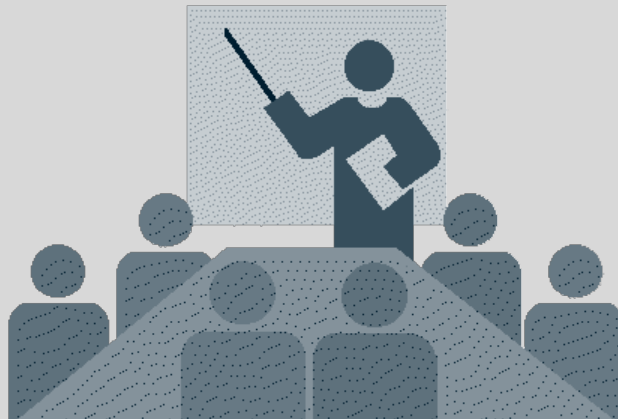
# MEETINGS

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# 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: 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

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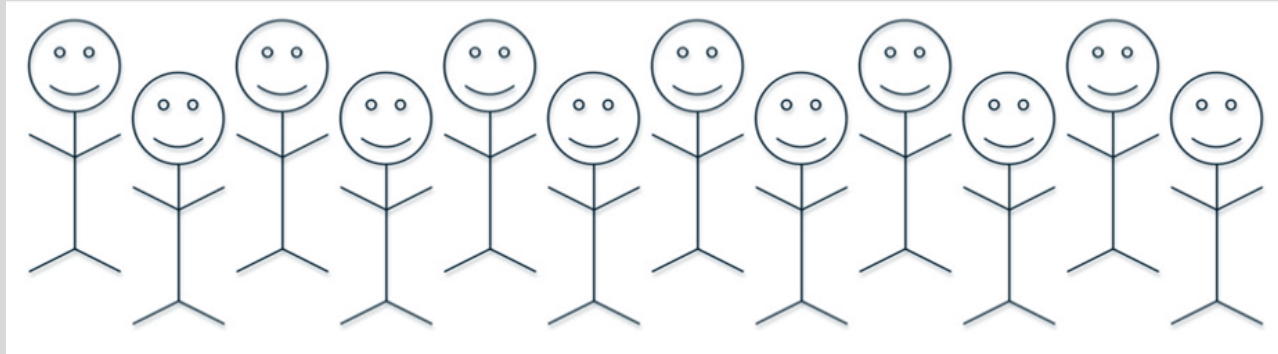
# General Notice Requirement

- “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 responsibly 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

- “Every meeting of a governmental body shall be preceded by public notice . . . .”  
Wis. Stat. § 19.83(1).
- 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

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# 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: 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

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# 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

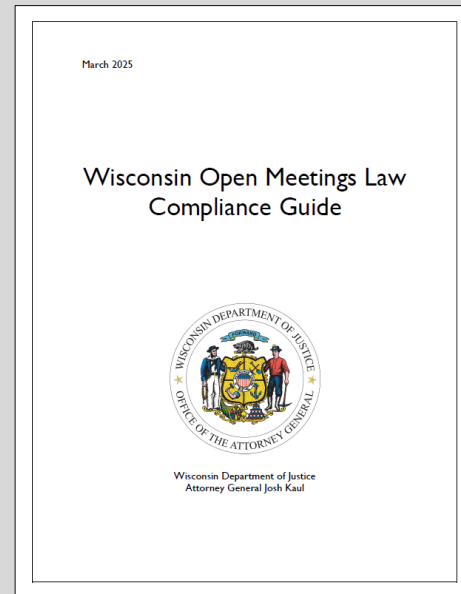
- Under a prior version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, **if the vote is integral to the authorized subject of the closed session**. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
  - The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.
- DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.





# Closed Sessions: 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.)

- (a) **Deliberating about a case** that has been the subject of a judicial or quasi-judicial trial or hearing before the body.
- (b) Considering **dismissal, demotion, licensing or discipline of a public employee** or the investigation of charges against the employee.
- (c) Considering **employment, promotion, compensation, or performance evaluation data** of a public employee.
- (d) Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**.
- (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**.
- (f) Considering **sensitive personal information** that would be likely to have a substantial adverse effect upon an individual’s reputation.
- (g) **Conferring with legal counsel** about strategy related to litigation.



# ENFORCEMENT

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# 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



# 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](mailto:opengov@wisdoj.gov)
  - Paul Ferguson: (608) 264-9464  
[Paul.Ferguson@wisdoj.gov](mailto:Paul.Ferguson@wisdoj.gov)
  - Lili Behm: (608) 266-1447  
[Lili.Behm@wisdoj.gov](mailto:Lili.Behm@wisdoj.gov)



# QUESTIONS?

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Thank You!

