

**WISCONSIN DEPARTMENT OF
JUSTICE
OFFICE OF THE ATTORNEY GENERAL
OPEN MEETINGS 101
July 29, 2015**



WISCONSIN'S OPEN MEETINGS LAW, WIS. STAT. § 19.81 *ET SEQ.*

- The open meetings law requires that “all 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).
- There is thus a presumption that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987).



WHEN DOES THE OPEN MEETINGS LAW APPLY?

- The open meetings law applies to every “meeting” of a “governmental body.” Wis. Stat. § 19.83. The terms “meeting” and “governmental body” are defined in Wis. Stat. § 19.82(1) and (2).



DEFINITION OF “GOVERNMENTAL BODY.”

- The definition of “governmental body” includes a “state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]” Wis. Stat. § 19.82(1).
- A governmental body is defined primarily in terms of the manner in which it is created, rather than in terms of the type of authority it possesses.
- Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order.



DEFINITION OF “GOVERNMENTAL BODY.”

- A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body.



DEFINITION OF “GOVERNMENTAL BODY.”

- State Legislature: Generally speaking, the open meetings law applies to the state Legislature, including the senate, assembly, and any committees or subunits of those bodies. Wis. Stat. § 19.87. The law does not apply to any partisan caucus of the senate or assembly. Wis. Stat. § 19.87(3). The open meetings law also does not apply where it conflicts with a rule of the Legislature, senate, or assembly. Wis. Stat. § 19.87(2). Additional restrictions are set forth in Wis. Stat. § 19.87.



DEFINITION OF “GOVERNMENTAL BODY.”

- The definition of “governmental body” also includes a “governmental or quasi-governmental corporation,” except for the Bradley sports center corporation. Wis. Stat. § 19.82(1).
- The term “governmental corporation” is not defined in either the statutes or the case law interpreting the statutes. It is clear, however, that a “governmental corporation” must at least include **a corporation established for some public purpose and created directly by the state Legislature or by some other governmental body** pursuant to specific statutory authorization or direction.



ENTITIES THAT ARE NOT GOVERNMENTAL BODIES

- Governmental offices held by a single individual
- Bodies meeting for collective bargaining. The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement in closed session
- Bodies created by the Wisconsin Supreme Court
- Ad hoc gatherings, e.g., a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body.
- Groups of a governmental unit's employees



DEFINITION OF “MEETING”

- The *Showers* test: A meeting occurs when: members of a governmental body convene with (1) a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body’s course of action. *Showers*, 135 Wis. 2d at 102.
- Members need not necessarily convene in person, and the *Showers* test applies to walking quorums.
 - Phone calls, emails, text messages



WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

○ NOTICE

- The public needs to know there is going to be a meeting, where and when it is, and what will be discussed.

○ OPEN SESSION

- The public has a right to attend the meeting.

GOVERNMENT BUSINESS IS PUBLIC BUSINESS



NOTICE

- Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how, and to whom notice must be given, as well as what information a notice must contain.
- Time,
- Date,
- Place
- Subject matter of the meeting
- Subject matter of anticipated closed session and statutory exemption authorizing closed session
- Specific enough so the public is reasonably informed as to what will be discussed at the meeting



OPEN SESSION

- Meetings must be accessible to members of the public.
 - Recordings or videoconference are probably reasonable under certain circumstances.
- Every meeting of a governmental body must start in “open session.”
- Citizens may tape record, videotape, or photograph open session meetings—but not closed-session portions—as long as doing so does not disrupt the meeting.
- The open meetings law does not require a governmental body to allow members of the public to speak or actively participate
 - Other statutes may require allowance of public comment



RECORDING AND VOTING REQUIREMENTS

- No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body.
- The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings.
- This requirement applies to both open and closed sessions.



CLOSED SESSION

- Notice of closed session must be provided.
- All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies.
- Must have motion to go into closed session before starting closed session
- Must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. Citing the statute only is not sufficient.



AUTHORIZED CLOSED SESSIONS

- Wisconsin Stat. § 19.85(1) contains thirteen exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session
- Exemptions should be strictly construed
- Exemptions should be invoked sparingly and only where necessary to protect the public interest
- When in doubt, convene in open session
 - See advice of legal counsel, particularly when matters of significant public concern are addressed



MOST FREQUENT CLOSED SESSION RATIONALE

- Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body. Wis. Stat. § 19.85(1)(a).
- Consideration of dismissal, demotion, discipline, licensing, and tenure. Wis. Stat. § 19.85(1)(b).
- Consideration of employment, promotion, compensation, and performance evaluations. Wis. Stat. § 19.85(1)(c).
- Conducting public business with competitive or bargaining implications. Wis. Stat. § 19.55(1)(e).
- Consideration of financial, medical, social, or personal information. Wis. Stat. § 19.85(1)(f).
- Conferring with legal counsel with respect to litigation. Wis. Stat. § 19.55(1)(g).



VOTING IN CLOSED SESSION

- The Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1)
- A governmental body should vote in open session, unless doing so would compromise the need for the closed session



ENFORCEMENT & PENALTIES

- Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1).
- A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney.
- Notice of claim statutes do not apply
- The district attorney has broad discretion to determine whether a verified complaint should be prosecuted.
- An enforcement action brought by a district attorney or by the Attorney General must be commenced within 6 years after the cause of action accrues or be barred.



ENFORCEMENT & PENALTIES

- If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within twenty days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law.
- complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; i.e., the caption must bear the title “State ex rel. . . ,” or the court lacks competency to proceed
- An individual bringing an action on the state’s behalf is referred to as a “relator”



ENFORCEMENT & PENALTIES

- Private relators must first submit a verified complaint to the district attorney as a prerequisite to bringing an action
- Court proceedings brought by private relators to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred



PENALTIES

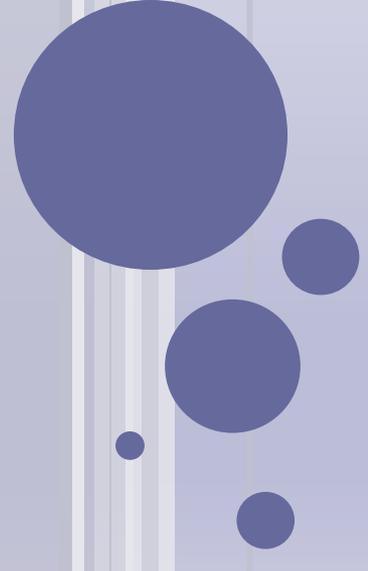
- If a private relator brings an enforcement action and prevails, the court can:
 - Declare that the law was violated,
 - Void any action taken at the meeting,
 - Issue civil forfeitures against individual meeting members,
 - Award of the actual and necessary costs of prosecution, including reasonable attorney fees



PENALTIES

- Any member of a governmental body who “knowingly” attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between \$25 and \$300 for each violation.
- Any forfeiture obtained in an action brought by the district attorney is awarded to the county.
- Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state.





DRAFTING MEETING NOTICES

Best Practices



DRAFTING MEETING NOTICES

OBJECTIVE: know what needs to be on a meeting notice, know where to put a meeting notice, and when to issue it

- All meetings of governmental bodies must be noticed
- This means: the public must know where and when a meeting is scheduled, and what is going to be discussed
- Presumption of openness



NOTICES: FORM

○ Paper notices

- States the governmental body that is to meet, clearly lists the time, date, and location of the meeting
- If applicable, includes information for people with disabilities or people who do not speak English (e.g., building accessibility, sign language services, translation services, closed captioning-type services)
- Looks like an agenda – lists the items to be discussed
 - List all items that will possibly be discussed
 - Ok to not make it all the way through the agenda
 - NOT ok to discuss something that was not listed on the agenda
 - Not necessary to list items in order of discussion, unless not doing so would impact the public's ability to attend



NOTICES: CONTENT

- Specificity requirement:
 - Reasonableness standard
 - The notice must reasonably inform the content of the meeting
 - Think: who, what
 - Case-specific analysis – whether notice is sufficiently specific will depend upon what is reasonable under the circumstances
 - Burden of providing more detailed notice
 - Whether the subject is of particular public interest
 - Whether it involves non-routine action that the public would be unlikely to anticipate
 - Novel issues may require more specific notice
 - Use Common Sense & don't be sneaky



NOTICES: CONTENT

- General topics not sufficient:
 - consideration and/or action concerning employment/ negotiations with district personnel
 - Consideration of public property for possible sale
 - Generic agenda items such as: old business, new business, miscellaneous business, agenda revisions, or other matters authorized by law
 - Notice of general discussion from public official if no topic is listed



NOTICES: CONTENT

- Sufficiently specific items include:
 - Discussion regarding ABC Company's request for a variance to build a 14-story building at the corner of N. Main St. and Apple Avenue.
 - Public input allowed; limited to 3 minutes per person
 - Review of written comments submitted regarding the proposal
- Status report regarding County's RFP for cement contracting for Lincoln Square Mall.
- Discussion and possible approval of drainage permit Nos. 123456, 234567, 456789



NOTICES: CONTENT

- For items that occur during every meeting, a more general description is appropriate:
 - Approval of minutes from July 12, 2015 meeting
 - Approval of invoices submitted to Board between July 11, 2016 and August 10, 2016
 - Financial report
- General reports on items that have been discussed at previous meetings, where a general description will reasonably provide the public with notice of the substance of the discussion
 - Report on Lincoln Square Mall development plans
 - Update on Senior Center Volunteer project



NOTICE: CLOSED SESSIONS

- The meeting notice must contain the subject matter to be considered in closed session
- The notice must contain enough information for the public to discern whether the subject matter is authorized for closed session under s. 19.85(1)
- The notice must be specific about the business to be discussed *and* the statute section under s. 19.85 that authorizes the closed session for that purpose.
 - Closed session pursuant to Wis. Stat. s. 19.85(1)(c) to discuss the role, duties, and responsibilities of the Library Director and evaluation of job performance and possible action.



NOTICE: POSSIBLE ACTION

- If there is any possibility that the governmental body will want to take action or vote on a particular item of business, the notice must so indicate.
- Notice of possible action does not require the governmental body to vote
- A governmental body cannot vote on an item unless the notice indicates that action may be taken



NOTICES: TIMING

- 24 hour notice – but try to give more, a lot more
- Sundays and legal holidays are excluded and cannot be counted
 - Providing notice on a Sunday of a meeting on Monday is not sufficient 24-hour notice
- If impossible to give 24 hour notice, 2 hour notice is required
- No court decisions or guidance on what constitutes “good cause” to give less than 24 hours of notice for a meeting



NOTICE: LOCATION OF NOTICE

- The Public
 - Attorney General advises notice be provided in at least three places in the jurisdiction where the governmental body serves
 - Website posting alone is not sufficient
- News media who have submitted written request to receive notice
- Official newspaper designated pursuant to state statute, or the news medium likely to give notice in the area
 - The governmental body is not required to pay for and the paper is not required to publish the notice
 - This is a notice method distinct from the public notice requirement



NOTICES: IN SUM

- Governmental bodies have a duty to tell the public when and where its meetings are, with as much advance notice as possible under the circumstances.
- Governmental bodies have a duty to tell the public what is going to be discussed at the meeting. This duty extends to the subject of closed sessions.
- All business is presumed open, unless an exception under s. 19.85 applies.
- If you have questions, consult your legal counsel or call the Attorney General's Office of Open Government hotline.

