

Wisconsin Department of Justice
Office of the Attorney General

OPEN MEETINGS 101

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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).

I. 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).

A. Definition Of “Governmental Body.”

a. Entities that are governmental bodies.

- i. State or local agencies, boards, and commissions. 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). This definition is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that 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 therefore 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. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).
- ii. 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. 74 Op. Att'y Gen. 38, 40 (1985).

- iii. 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.
 - iv. Governmental or quasi-governmental corporations: 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. See 66 Op. Att'y Gen. 113, 115 (1977).
- b. Entities that are not governmental bodies
- i. Governmental offices held by a single individual, *Plourde v. Habegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130.
 - ii. 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. Wis. Stat. § 19.85(3).
 - iii. Bodies created by the Wisconsin Supreme Court, *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976); OAG 67-79 (July 31, 1979) (unpublished opinion).
 - iv. 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. See Godlewski Correspondence, September 24, 1998.

B. Definition Of “Meeting.”

Wis. Stat. § 19.82(2)" A meeting is: [T]he 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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter

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- a. 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.
 - i. Members need not necessarily convene in person, and the *Showers* test applies to walking quorums. *See Open Meetings Compliance Guide*, pp. 7-8.

II. WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

The two most basic requirements of the open meetings law are that a governmental body:

- A. Give advance public notice of each of its meetings
 - a. 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.
 - b. Every public notice of a meeting must give the “time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.” Wis. Stat. § 19.84(2). The information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.
 - c. Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least twenty-four hours in advance of the meeting, unless “for good cause” such notice is “impossible or impractical.” If “good cause” exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting. Wis. Stat. § 19.84(3).

- d. Under Wis. Stat. § 19.84(2), the public must receive notice of a contemplated closed session.
 - i. Such notice “must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1).” *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att’y Gen. 93, 98.
- B. Conduct all of its business in open session, unless an exemption to the open session requirement applies. Wis. Stat. § 19.83.
- a. Meetings must be accessible to members of the public. Wis. Stat. §§ 19.81(2); 19.82(3).
 - b. Every meeting of a governmental body must initially be convened in “open session.” See Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in “open session,” unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.
 - c. 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. Wis. Stat. § 19.90; 66 Op. Att’y Gen. 318, 325.
 - d. The open meetings law does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting. Although it is not required, the open meetings law does permit a governmental body to set aside a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2) and 19.84(2). Such a period must be included on the meeting notice.
- C. Recording and voting requirements:
- a. No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. See, *Non-Party Brief of the Wisconsin Department of Justice in Journal Times v. City of Racine Bd. of Police and Fire Comm'rs*, No. 13-AP-1715, available online at: https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2013AP001715&p%5bdocId%5d=136359&p%5beventSeqNo%5d=69&p%5bsectionNo%5d=1
- D. Closed session

- a. Notice of closed session must be provided. Wis. Stat. § 19.84(2)
- b. Every meeting of a governmental body must initially be convened in open session. 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. Wis. Stat. § 19.83.
- c. Wis. Stat. § 19.85(1) requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session .
- d. The chief presiding officer 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. 66 Op. Att’y Gen. 93, 97-98. Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure.

E. Authorized closed sessions

- a. 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. Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶ 8. The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session. See 74 Op. Att’y Gen. 70, 73 (1985).
- b. Most frequent closed session rationale:
 - i. 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).
 - ii. Consideration of dismissal, demotion, discipline, licensing, and tenure. Wis. Stat. § 19.85(1)(b).
 - iii. Consideration of employment, promotion, compensation, and performance evaluations. Wis. Stat. § 19.85(1)(c).
 - 1. The language of the exemption refers to a “public employee” rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies “from potential lawsuits resulting

from open discussion of sensitive information.” *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985).

- iv. Conducting public business with competitive or bargaining implications. Wis. Stat. § 19.55(l)(e).
- v. Consideration of financial, medical, social, or personal information. Wis. Stat. § 19.85(1)(f).
- vi. Conferring with legal counsel with respect to litigation. Wis. Stat. § 19.55(1)(g).

c. Voting in closed session

- i. 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). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session. *Accord, Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided); *Schaeve*, 125 Wis. 2d at 53.

III. WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1).

- A. 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. See Wis. Stat. § 19.97(1). Actions to enforce the open meetings law need not be preceded by a notice of claim. State ex rel. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594-97, 547 N.W.2d 587 (1996).
- B. The district attorney has broad discretion to determine whether a verified complaint should be prosecuted. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). 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. See Wis. Stat. § 893.93(1)(a).
- C. 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. *Lawton*, 278 Wis. 2d 388, ¶ 15. Wis. Stat. § 19.97(4). See

also Fabyan v. Achtenhagen, 2002 WI App 214, ¶¶ 10-13, 257 Wis. 2d 310, 652 N.W.2d 649 (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)

- D. 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. Wis. Stat. § 893.93(2)(a); *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6, 265 Wis. 2d 674, 666 N.W.2d 104.
- E. If a private relator brings an enforcement action and prevails, the court is authorized to grant broad relief, including a declaration that the law was violated, civil forfeitures where appropriate, and the award of the actual and necessary costs of prosecution, including reasonable attorney fees. Wis. Stat. § 19.97(4). Attorney fees will be awarded under this provision where such an award will provide an incentive to other private parties to similarly vindicate the public’s rights to open government and will deter governmental bodies from skirting the open meetings law. *Buswell*, 301 Wis. 2d 178, ¶ 54.
- F. 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. Wis. Stat. § 19.96. Any forfeiture obtained in an action brought by the district attorney is awarded to the county. Wis. Stat. § 19.97(1). Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state. Wis. Stat. § 19.97(1), (2), and (4).
- G. In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action.