

**WCA / LGE TRAINING**

# 2020 COUNTY OFFICIALS WORKSHOPS (COWS)



**Extension**

UNIVERSITY OF WISCONSIN-MADISON  
**LOCAL GOVERNMENT EDUCATION**

## ZOOM WEBINARS

**Monday,  
June 8, 2020**

**9:00 am - 10:30 am**

- Who We Are
- Roles & Responsibilities for County Officials

**Monday, June 15, 2020**

**9:00 am - 10:30 am**

- Wisconsin's Open Meetings Law
- Agendas & Minutes

**Monday, June 22, 2020**

**9:00 am - 10:30 am**

- Running Effective Meetings
- County Budgeting

**Monday, June 29, 2020**

**9:00 am - 10:30 am**

- Wisconsin's Public Records Law
- Ethics and Conflicts of Interest

# Wisconsin's Open Meetings Law

## COUNTY OFFICIALS WORKSHOPS JUNE 15, 2020

**DANIEL FOTH, JD – INTERIM PROGRAM MANAGER,**  
UNIVERSITY OF WISCONSIN – MADISON  
LOCAL GOVERNMENT EDUCATION, DIVISION OF EXTENSION

**Acknowledgements: UW Madison – Division of Extension**

Dan Hill: Retired Local Government Specialist

Larry Larmer: Retired Local Government Specialist

Philip Freeburg: Distinguished Lecturer, Local Government Legal Education



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## What We Will Cover Today

- What is a Meeting
- Wisconsin's Open Meeting Law
- Public Notice Requirements
- Closed Sessions
- Electronic Meetings
- Penalties



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## What is a Meeting?



- Meeting is a gathering of members of a governmental body for purposes of exercising its responsibilities *Wis. Stat. Sec. § 19.82(2)*



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## Intent of Open Meetings Law



### **Ensure:**

- Public Access
- Open Decision-Making: information gathering, discussion, and voting

### **Through:**

- Advance public notice of meetings,
- meetings that are open and accessible to the public, and
- Limited closed sessions.



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## Bodies Subject to the Law Wis. Stat. § 19.82(1)



- local governing bodies of general and special purpose units of government,
- their committees, commissions and boards
- special study and advisory committees, and other bodies or subunits created by a governmental body or an officer, and
- governmental and quasi-governmental corporations
  - (Body members covered by the law include citizen members.)



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## Meeting defined - The Two Tests Wis. Stat. § 19.82(2)

**Numbers test** = enough members of a body are present to determine the outcome of an action

**Purpose test** = discussion, information gathering or decision-making on a matter within the jurisdiction of the body.



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## Numbers Test

- By statute, if one-half of the members of a body are present, there is a presumption that a meeting has occurred, unless the purpose test is not met.
- A lesser number of members may meet the numbers test if they can affect the outcome.

$$1/2$$

$$< 1/2$$


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## Quiz Question

- Are these board committee members in violation of the open meetings law?



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## Responses

- A. Yes
- B. No
- C. What, what, no one said there was gonna be a test
- D. Need more information
- E. All of the above



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## Special Cases



Walking Quorum--A series of phone calls, e-mails or conversations to "line up votes" or conduct other business

Phone conferences may constitute a meeting if the number and purpose tests are met.

Emails, Texting and related examples



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## Public Notice Requirement

- Every meeting shall be preceded by public notice.
  - Separate notice for each meeting.
  - Reasonably proximate to the time and date of the meeting.
  - Special exemption for subunit meetings held during or right after lawful meeting of parent body.



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## Public Notice: What?

- Time
- Date
- Place
- Subject Matter



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- Date
- Time
- Place

**County Clerk's Office**  
Richland County, Wisconsin

Victor V. Vlazak  
County Clerk  
Administrative Coordinator

Courthouse - P.O. Box 310  
Richland Center, Wisconsin 53581

(608) 647-2197  
(fax) (608) 647-6134  
[victor.vlazak@co.richland.wi.us](mailto:victor.vlazak@co.richland.wi.us)



May 18, 2020

Dear Honorable Board Member:

Please be advised that the May meeting of the Richland County Board of Supervisors will convene at 7:00 p.m., Tuesday, May 19, 2020, at the Richland County Highway Shop, 120 Bowen Circle, Richland Center, Wisconsin. The meeting will also be hosted through WebEx video teleconferencing. Members of the public are strongly encouraged to participate remotely.

Tuesday, May 19, 2020 7:00 pm | 4 hours | (UTC-05:00) Central Time (US & Canada)  
Meeting number: 625 684 426  
Password: Richland  
<https://richlandcounty.my.webex.com/richlandcounty.my/j.php?MTID=m6b918d5c914379bc83731c40570f0d09>

Join by phone  
1-408-418-9388 United States Toll  
Access code: 625 684 426

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## Public Notice: What? Subject Matter

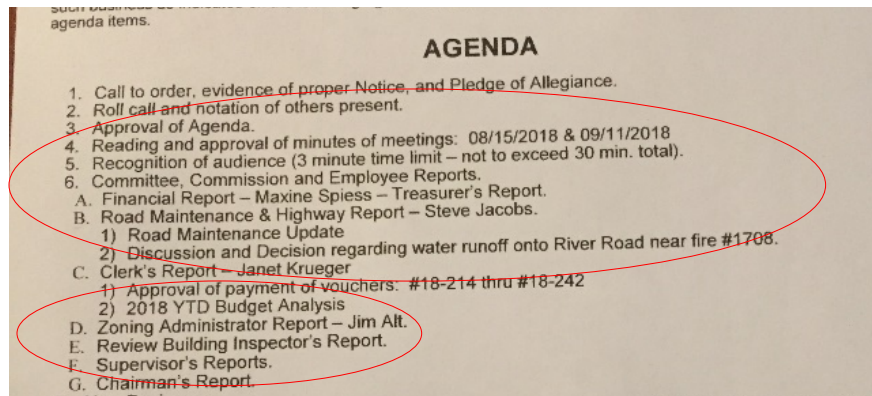
- Apprise public of what will be addressed.
  - Only noticed agenda items may be discussed.
- Specific.
- Does not grant citizens right to participate.
- Public comment period may be included.



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- Content



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## Public Notice: When?

- At least 24 hours prior to the Meeting
- 2 hours prior for good cause
  - unless for good cause such notice is impossible or impractical



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## Public Notice: To Whom?

### Law Change Wis. Stat. § 19.84

#### Three Options -

1. Posting a notice in at least 3 public places likely to give notice to persons affected.
2. Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body's Internet site.
3. By paid publication in a news medium likely to give notice to persons affected.
  - **Notify official newspaper, if there is one;** if none, notify news medium likely to give notice.
  - Must provide notice to any media requesting it.



OZAUKEE - WASHINGTON  
**DAILY NEWS**  
 NEWS GRAPHIC TIMES PRESS



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## Public Notice: By Whom?

- Chief presiding officer.
- Or designee, usually the clerk.
- Ultimate responsibility rests with the chief presiding officer.



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## Public Access

- Reasonable access.
- Anticipate large crowds for controversial topics.
- Proximate to the public served.

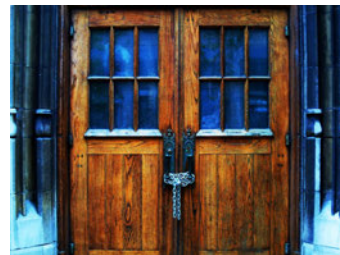


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## Permitted closed sessions

Closed sessions are limited to those authorized by statute, *including...*

- Deliberations concerning a judicial or quasi-judicial “case”.
- Personnel matters including employee discipline and licensing.
- Deliberations on property acquisitions, investments.
- Competitive or bargaining issues.



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## Closed session procedures

- Convene in open session.
- Announce authority and purpose of proposed closed session.
- Close session by a majority vote, showing vote of each member.
- If unanimous, note as such



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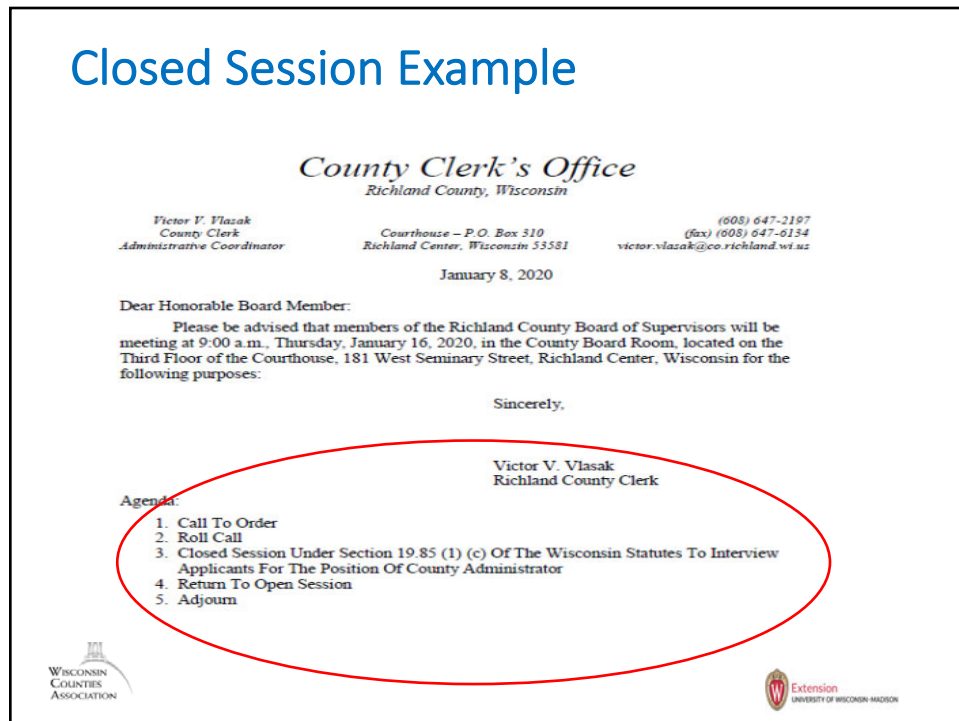
## Closed session procedures

- Objecting body members, personnel essential to closed discussion and members of parent body may remain.
- Limit discussion to announced items.
- Do not reconvene in open session unless it was included in the public notice.



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## Closed Session Example



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## Electronic Meetings

- Permitted - Recent OOG Advisories
  - March 17 & 20, 2020
  - Video conference and telephone
- Reasonably accessible to the public
  - Remotely – link / phone number
  - Non-remotely – place public can access
  - Telephone option
  - Access information part of Notice
- Meeting Protocols
  - Members identify self before speaking
  - Complex plans, drawings may be an issue
  - When possible, record meeting and make available



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## Penalties

Any member

- \$25-\$300 non-reimbursable forfeiture.
- Attorney's fees may or may not be reimbursable.
- Loss of public trust.
- Personal embarrassment.



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## Vote Time

### How Does Your Body Adjourn

- a) Motion
- b) Chair declares Agenda is done and meeting is over
- c) Everybody just leaves
- d) Other



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# Questions?



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## Resources



- **Wisconsin Counties Association** - <https://www.wicounties.org/>
  - County Officials Handbook – Laws of Governing Chapter
- **Local Government Center Website** - <https://localgovernment.extension.wisc.edu/>
  - Effective Meetings - <https://lgc.uwex.edu/effective-meetings/>
  - Provides wealth of Parliamentary Procedure information, written and video format
- **Electronic Meetings** - <https://lgc.uwex.edu/update-government-meetings-during-covid-19-pandemic/>
  - Provides OOG and webinar resources
- **Attorney General, Office of Open Government,**
  - <https://www.doj.state.wi.us/office-open-government/office-open-government/>
- **Deliberative Governance** - <https://lgc.uwex.edu/deliberative-governance/>
  - Provides deliberative governance tools, guides and web resources
- **Wisconsin Statutes,** <https://docs.legis.wisconsin.gov/statutes/prefaces/toc>
- **Daniel Foth, Local Government Center, UW Madison** - Division of Extension [Daniel.Foth@wisc.edu](mailto:Daniel.Foth@wisc.edu)



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Thanks!

**Local Government Education  
University of Wisconsin-Madison  
Division of Extension**

Daniel Foth

[Daniel.Foth@wisc.edu](mailto:Daniel.Foth@wisc.edu)

Phone: (608) 265-2852

Local Government Education

<https://lge.uwex.edu/>





## **AGENDAS AND MINUTES FOR COUNTY BOARD AND COMMITTEE MEETINGS**

**County Officials Workshops  
(COWS)**

**June 2020**

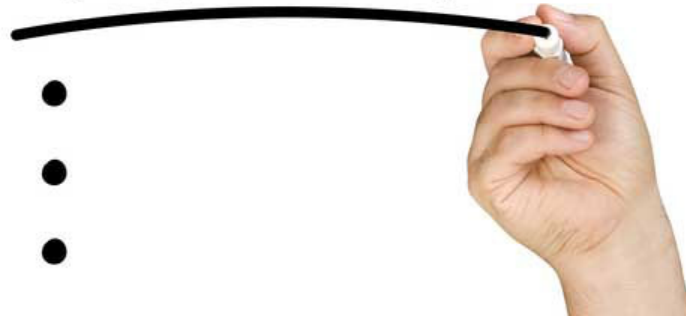


## **SOURCES OF PROCEDURAL RULES**

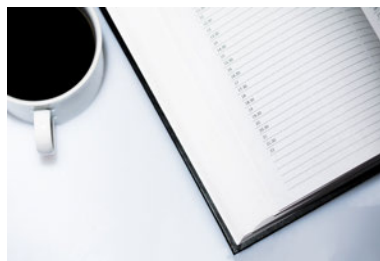
- State Statutes
- Local Rules
- Robert's Rules of Order (RONR)
  - RONR is the default for determining order of business and agenda, etc.
  - Can be modified by local rule as long as compliant with all legal requirements



# AGENDA



## PURPOSE OF THE AGENDA



- Sets the expectations for the members of the governmental body and the public
  - Items of business that will be addressed
  - The order in which they will be considered
- For counties, often serves as a meeting's notice requirement.





## PUBLIC NOTICE REQUIREMENTS

- 24 hours notice is required
  - Unless “for good cause” such notice is “impossible or impractical;” must be given ASAP and at least two hours in advance
  - When calculating the 24 hour rule, Sundays and legal holidays are not included
- A separate meeting notice is required for each meeting



## WHO SETS THE AGENDA?

- Presiding officer, or designee, is responsible for developing the agenda and noticing the meeting
- Wis. Statutes Sec. 59.23 provides that the Clerk creates the agenda for meetings “under the direction of the county board chairperson or committee chairperson”
  - Ensures compliance with the Open Meetings Law
  - Provides consistency across all county meetings



## WHO SETS THE AGENDA?

- Counties have varying procedures regarding how meeting agendas are developed
- Advisable to have written procedures
- Typically channeled through the county board chair, admin/admin coor., county clerk, corporation counsel



## ACCESSING THE AGENDA



- No matter what approach is taken:
  - Governing body should adopt rules that specify procedures for individual members to contribute items to the agenda of an upcoming meeting
  - Members should understand the procedures and know their rights and responsibilities
  - Members can **request** that items be placed on the agenda of a specific future meeting; however, they cannot demand it
  - According to RONR, the board could vote to place an item on the agenda; however, if the vote fails, the item will not be placed on the agenda



## WHO SETS THE AGENDA? (ALTERNATIVES FOR COMMITTEES)

- Left to discretion of each committee chair
- Chair and “clerk” develop agenda jointly
- “Clerk” with input from individual members
- Department heads, with input from chair
- Requests channeled through county board chair or executive committee
- Potential topics generated at end of each meeting



## ELEMENTS AND SEQUENCE

1. *Call to order*
2. *Roll call (establish a quorum)*
3. *Certification of compliance with the Open Meetings Law*
4. *Approval of the agenda*
5. *Citizen comments*
6. *Correspondence*
7. Reading and approval of minutes
8. Reports
  - a. Reports of officers, boards, and standing committees
  - b. Reports of special (select or ad hoc) committees
9. Special orders
10. Unfinished business (avoid this heading) and general orders
11. New business
12. *Set next meeting date*
13. Adjourn

Note: Italicized items are  
not specified in RONR



## USE OF GENERIC AGENDA ITEMS

- Insufficient standing alone as they identify no particular subjects at all
- Lacking in informational value
- Fails to give reasonable notice of what will be discussed
- Notice has to reasonably apprise the public of the meeting's subject matter
- Ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed



## ELEMENTS AND SEQUENCE

1. Call to order
2. Roll call
  - In small boards and committees a roll call is not necessary, simple statement that a quorum is present
  - The meeting minutes should reflect who was in attendance
3. Certification of compliance with open meetings law
  - Optional
  - Do *not* vote on this item



## ELEMENTS AND SEQUENCE

4. **Approval of the agenda**
  - Simply means we agree to take up the items and address them in the order presented
  - Not an opportunity to review the items and add new ones
5. **Citizen/Public Comments**
  - Establish local rules and procedures that address permissible content, when on the agenda comments will be received, and their length



## ELEMENTS AND SEQUENCE

6. **Correspondence**
  - Guidance from Attorney General's office—list topics and subject matter; Otherwise, risks violating the open meetings law
7. **Reading and approval of minutes**
  - If sent in advance should take no more than a minute (no need to read)
  - Procedure for approval





## ELEMENTS AND SEQUENCE

### 8. Reports

- Another area with potential for violating the Open Meetings Law; List subject matter of the report on the agenda

### 9. Special orders



## ELEMENTS AND SEQUENCE

### 10. Unfinished business

- Not necessarily listed on agenda this way
- Subject matter brought up at a previous meeting, but needs further discussion or action
  - Items postponed or referred to a committee
  - Items that will rescind or renew an action previously decided
  - These items all need to be included on the notice/agenda



## ELEMENTS AND SEQUENCE

### 11. New business

- Not necessarily listed on the agenda in this way
- Do not use other “catch-all” phrases such as “Other business,” “Any other business that may properly come before the committee,” or “Any other business as allowed by law”
- Not an opportunity to address items not on the agenda - Simply a category that includes subject matter that the body has not taken up at a previous meeting



## ELEMENTS AND SEQUENCE



### 12. Set next meeting date

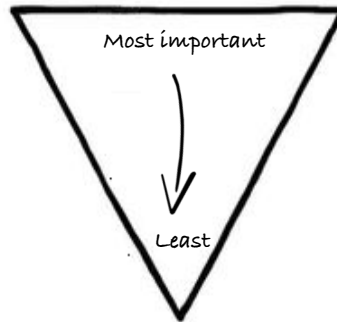
- Opportunity to decide/recommend what items should be on the agenda for the next meeting

### 13. Adjourn



## **ELEMENTS AND SEQUENCE: ADDITIONAL THOUGHTS**

- Not required to follow the sequence in RONR
- Logic often dictates which items should come first
- May want to list in order of importance



## **CLOSED SESSIONS**

- Specific exemptions in Wis. Statutes 19.85 (1) exist that allow meeting in closed session
- Any contemplated closed session must be properly noticed
- Include subject matter and the specific statutory exemptions
- Indicate on the agenda if the body will be returning to open session





# MEETING MINUTES



## PURPOSE OF THE MINUTES

- The official record of the proceedings of the governing body
  - Accurate record that a meeting was held
  - Captures the **substance** of the official action taken by the body
  - Minutes are **NOT** a transcript of a meeting



## WHAT TO RECORD



- Legal requirement—  
“Substance” of  
proceedings
- Roberts Rules of  
Order, Newly  
Revised (RONR)
- These offer  
guidance, but are not  
prescriptive



## WHAT TO INCLUDE: FROM THE STATUTES

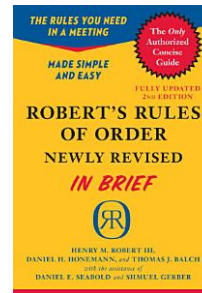
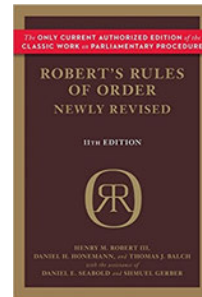
- “Substance”—an intelligible abstract or  
synopsis of the essential elements of the  
official action taken by a local governing  
body, including the subject matter of a  
motion, the persons making and seconding  
the motion, and the roll call vote on the  
motion
  - Wis. Stat. 985.01(6)





## RONR RECOMMENDATIONS

- Kind of meeting
- Name of the organization
- Date, time, and place of the meeting
- Name of the presiding officer and the secretary, or their substitutes
- Members present and establishment of a quorum



## RONR RECOMMENDATIONS

- Action on the minutes of the previous meeting
- Exact wording of each motion, the name of the maker (state statute requires the second also be recorded), and whether it passed or failed
- Points of order and appeals
- For reports, the name of the committee and the reporting member
- The hour of adjournment



## WHAT *NOT* TO INCLUDE, ACCORDING TO RONR

- Opinion or interpretation of the secretary
- Judgmental phrases— members expressed total confidence, lengthy report
- Discussion
- Motions that were withdrawn
- Detailed reports



## CORE CONCEPT

- Minutes should focus on what the body ***did***, not on what was ***said***

✓ Announced

✓ Reported

✓ Ordered

✓ Decisions Made

✓ Discussed

✓ Commitments Made



## REPORTS AND ANNOUNCEMENTS

- Simply record that the body received the report, who gave the report, and the subject matter
- Written reports can be kept on file
- Body should **not** vote to accept or approve the report



## RECOMMENDATIONS FOR RECORDING FORMAL DECISIONS



- If a decision is made by unanimous consent, the minutes should reflect it
- Show the distribution of counted votes
  - Motion carried, 5-2
- Roll call vote – indicate how each person voted
- Voice vote – indicate outcome and that voice vote was taken (Motion carried, voice vote)



## **RECOMMENDATIONS FOR RECORDING FORMAL DECISIONS**

- Better to record “without negative vote” rather than unanimous—unless you know
- Must, in local government, record person seconding (not in RONR)
  - Wis. Stat. 985.01(6)
- The minute taker must make sure to get the wording down before the vote is taken



## **APPROVAL OF MINUTES**

- Done at the subsequent meeting of the body
- Should be signed by the secretary
- Can also be signed by the presiding officer



## CORRECTING MINUTES

- Minutes of Meeting B should show ***what corrections*** were ordered in the minutes of Meeting A
- The original minutes of Meeting A should be corrected so that the error remains apparent
- Retain original version in the minute book
- Corrections may be made at any time



## MINUTES OF CLOSED SESSIONS

- Are advisable only in rare occasions, but necessary if official action was taken
- Indicate in open session minutes that the presiding officer announced in open session the subject matter and the specific exemption allowing closure
- The motion to convene in closed session and the vote (taken so that each member's vote can be determined) must be recorded
- A motion to adjourn the closed session is also recorded



## MINUTES OF CLOSED SESSIONS

- As with open sessions, motions and votes must be recorded
- Written summary of the discussion is not advisable in a closed session



## MINUTES OF QUASI-JUDICIAL BODIES

- Making a decision based on evidence
- Minutes should reflect the basis for the decision



## **OTHER CONSIDERATIONS**

- Minute takers may interrupt if necessary to get the exact wording of a motion, or in the event the open meetings law is being violated
- Encourage the use of written reports that are kept on file
- Record the arrival and departure of members during the meeting



## **AUDIO RECORDINGS OF MEETINGS**

- The County Clerk or committee secretary may utilize an audio recording device to capture the discussions, actions, and contents of a meeting for the sole purpose of utilizing such record to refresh their recollections when later drafting official minutes of the recorded meeting
- Provided such recording is used solely for the aforementioned purpose, and provided it is maintained solely by the County Clerk or committee secretary between the time such recording is made and the official Minutes are ratified by the County Board or committee to which such minutes pertain, such recording constitutes a note under Wisconsin's Public Records Law and, therefore, does not constitute an official County record





## **AUDIO RECORDINGS OF MEETINGS**

- Because such recording does not constitute an official County record under the Public Records Law, the County Clerk or secretary is authorized to delete, discard of, or otherwise destroy such recording upon the County Board's or applicable committee's ratification of the official minutes that were drafted by the County Clerk or committee secretary in relation to such recording
- Because such recording does not constitute an official County record under the Public Records Law, such recording is not subject to disclosure under the Public Records Law



## **AUDIO RECORDINGS OF MEETINGS**

- The county must have a written policy to allow the County Clerk or committee secretary to destroy the audio recording once the minutes are approved
- If the audio recording is shared with anyone else, the recording becomes a public record



## ROLE OF THE COUNTY CLERK

- The county clerk plays an important role in the issuance of an agenda and creation of minutes
  - Work closely with your county clerk
  - Will ensure you are in compliance with the open meetings and public records law



## RESOURCES

**The UW-Extension Local Government Center**  
608-262-9961

**“Agenda & Minutes Guide for Wisconsin County Clerks”**  
Wisconsin County Clerk’s Association

**von Briesen & Roper, s.c.**  
414-287-1570

**Wisconsin Counties Association**  
866-404-2700



**THANK YOU!  
QUESTIONS?**



**Wisconsin Counties Association**  
**(866) 404-2700**





Local  
Government  
CENTER

# FACT SHEET NO. 1

## *Open Government*

# Wisconsin Open Meetings Law

*Revised by Philip J. Freeburg, J.D., Local Government Educator,  
University of Wisconsin-Extension Local Government Center  
April 2020*

## Policy (Wis. Stat. § 19.81)

The Open Meetings Law begins by recognizing that a representative government depends on an informed electorate. An informed electorate needs access to information. The Wisconsin State Legislature declares that the policy of the Open Meetings Law is to:

- Enable the public to have “the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business;”
- Ensure that meetings of governmental bodies are held in places reasonably accessible to the public; and
- Ensure that such meetings are open to the public unless otherwise expressly provided by law.

The Open Meetings Law is to be “liberally construed” (i.e. broadly interpreted) to achieve the purpose of open government.<sup>1</sup> The law ensures that there is public access and open decision making. Open decision making includes the information gathering stages, discussions, and voting.<sup>2</sup>

The policy provisions of the Open Meetings Law are not idle rhetoric. Almost all court decisions enforcing the law begin by invoking the explicit policies stated in Wis. Stat. § 19.81.<sup>3</sup> To implement these policies, the law requires advance notice of meetings and that those meetings be open and accessible to the public. Closed sessions are limited to exceptions specifically provided by statute.<sup>4</sup>

## Coverage

### “Governmental bodies” subject to the Open Meetings Law

The definitions in the Open Meetings Law not only explain terms used in the statute, they also determine which bodies are covered and what gatherings constitute a “meeting” under the law. A “governmental body” under the Open Meetings Law includes any state or local agency, board, commission, committee and council created by law, ordinance, rule or order.<sup>5</sup> “Rule or order” includes motions, resolutions, formal and informal directives by a governmental body or officer that sets up a body and assigns it duties.<sup>6</sup> At the local level, bodies covered include county, village, and town boards, city councils, school boards, as well as all their committees, commissions, and boards. It is how the body is created, not its members or authority that is the determining factor. Thus, a citizen study or advisory committee created by a county board is considered a governmental body.<sup>7</sup>

A committee, including one set up by administrative staff, could be a governmental body under the Open Meetings Law even if it is not a typical sub-unit of the city council, town or county board. If the committee takes the form of a body with defined membership, is created by “rule,” and has the power to take collective action, then it is considered a governmental body under the Open Meetings Law.<sup>8</sup> The key element is whether it is created by “rule.” A rule can be a statute, ordinance, resolution, or policy, including handbooks or by-laws, that creates or authorizes the committee. The Wisconsin Counties Association and the League of Wisconsin Municipalities recommend reviewing ordinances, by-laws, policies, and handbooks that are approved by the county or village board or city council to determine which committees are created by rule.<sup>9</sup>

In addition, the term “governmental body” under the law includes governmental and quasi-governmental corporations, as well as other specified entities.<sup>10</sup> A governmental or quasi-governmental corporation includes corporations created by the legislature or by other governmental bodies under statutory authorization. Quasi-governmental corporations are not just those created by a governmental body, but also may be corporations that resemble governmental corporations.<sup>11</sup> Determining if an entity resembles a governmental corporation depends on the total facts and circumstance about the entity and is determined on a case-by-case basis.<sup>12</sup> Thus no single factor is determinative, but courts consider several factors: (1) whether the entity performs or serves a public function, as opposed to a purely private function, even if the public function is merely recommending action to a governmental body;<sup>13</sup> (2) the degree of public funding;<sup>14</sup> (3) government access to the entity’s records;<sup>15</sup> (4) express or implied representations that the entity is affiliated with government;<sup>16</sup> and (5) the extent government controls the entity’s operation, such as appointing directors, officers or employees, or officials serving in those positions.<sup>17</sup>

If a citizen body creates itself by its own authority (independent of any governmental unit or statute, ordinance, rule or order) and sets its own charter, bylaws, membership requirements, or rules, most likely it is not a quasi-governmental corporation. To constitute a governmental corporation or quasi-governmental corporation, the organization must in fact be incorporated, and not another type of entity such as a nonprofit association.<sup>18</sup>

The Open Meetings Law still provides that a local governmental body conducting collective bargaining is not subject to the law. However, this is not as significant a provision of the law as it was before the Act 10 public union reforms. Nonetheless, notice of reopening a collective bargaining agreement must be given under the Open Meetings Law and final ratification of the agreement must be done in open session under such law.<sup>19</sup>

### **“Meetings” under the Open Meetings Law**

A meeting is defined as a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body.<sup>20</sup> The courts apply a *purpose test* and a *numbers test* to determine if a meeting occurred. The law applies to a meeting when both the numbers and purpose tests are met.<sup>21</sup>

#### *Purpose and Numbers Tests*

The purpose test is met when there is information gathering, discussion, or decision-making on matters over which the governmental body has authority. Social or chance gatherings where there is no discussion on the topics over which the body has jurisdiction are excluded. The numbers test asks if there are enough members to determine the outcome of an action. The statute presumes that a gathering of one-half of the membership is a meeting, because one-half could determine the outcome of a vote by preventing a majority in favor of a proposal. Thus less than a majority could determine the outcome of an issue. This is called a “negative quorum,” and can meet the numbers test. Use caution when gathering with other members, because less than half can also be a negative quorum. There could be less than half a city council, or county board gathered together, but a quorum or a negative quorum of a committee may exist. Votes requiring a two-thirds majority, like a budget amendment, can meet the numbers test if one-third plus one of the members are together discussing the amendment.<sup>22</sup>

There are other special cases where a meeting exists for the purposes of the law. A series of conversations, phone calls, or emails to “line up votes” or conduct other business is known as a “walking quorum,” and violates the law.<sup>23</sup> Such conduct addresses the business of the governmental body without public notice, information, or participation. Telephone conference calls among members are also considered a meeting when the two tests are met and therefore, must be conducted in such a manner as to be accessible to the public.<sup>24</sup>

Emails, instant messages, blogs, social media sites, and other electronic message forms could also create a meeting. While no court decision has clarified the Open Meetings Law on this issue, the state attorney general’s office advises that if the communications are like an in-person discussion with a prompt exchange of viewpoints by members, then it raises the possibility of an Open Meetings Law violation. If the communication is more like written a communication on paper, which is not an Open Meetings Law violation, then the communication is less likely a violation. To avoid the risk of excluding the public and violating the law, the attorney general’s office discourages the use of electronic messages between members to discuss issues within the authority of the body. Certainly, avoid the “reply” or “reply all” email functions.<sup>25</sup>

If enough members of one government body to satisfy the numbers test and attend the meeting of another government body in an effort to gather information on a subject over which the body has authority, a meeting under the law may occur. Unless the gathering is by chance, it should be treated as a meeting of both bodies and notice must be given.<sup>26</sup> The attorney general's office recommends giving notice of when a body is attending the meeting of another body and to be as specific in the notice as possible. It is further recommended to avoid stock or boilerplate language such as that "a possible quorum may attend." Instead, be specific as to which bodies will attend the other's meeting and include when it is scheduled to occur.<sup>27</sup>

Not all gatherings of members become a meeting under the law. As previously mentioned, the Open Meetings Law does not require notice for social gatherings, gatherings by chance, or at a conference if there is no business conducted (that is, the purpose test is not met).

The place of meeting must be reasonably accessible to the public, including persons with disabilities.<sup>28</sup> Accordingly, the facility chosen for a meeting must be sufficient for the number of people reasonably expected to attend.<sup>29</sup>

## Public Notice Requirements

If the public did not know the subjects of a governmental meeting or were not made aware of its location, date, and the time of the meeting, a meeting open to the public would be almost meaningless. Thus, public notice is required before every governmental meeting.<sup>30</sup> Further, separate notices must be given for each meeting.<sup>31</sup>

Effective March 2020, the Legislature changed the Open Meetings Law to require that Open Meetings Law notice to the public shall use one of three specific methods.

1. Posting a notice in at least 3 public places,
2. Posting in a least one public place and placing a notice electronically on the governmental body's Internet site, or
3. By paid publication in a news medium.<sup>32</sup>

It is further required that each posting place or publication be "likely to give notice to person's affected."<sup>33</sup> The Open Meetings Law provides that paid published news medium notice is one method notice methods, but other statutes may require a published notice. If a paid newspaper publication is used to give notice, confirmation that it was in fact published in a timely fashion should be secured before the meeting convenes.<sup>34</sup>

The Open Meetings Law also requires providing notice to the news media.<sup>35</sup> Notice may be in writing, by telephone, voice mail, fax or email. Written methods are best for accuracy and because doing so creates a record of the notice that can later be used as proof of compliance with the notice to news media requirement. Notice must be given to any news media that has made a written request, as well as to the official newspaper for the governmental unit. If there is no official newspaper, then notice must be sent to the news medium that is likely to give notice in the area. The newspaper does not have to print the notice and you do not have to pay to publish the notice, but you must send the notice to the newspaper whether they publish it or not.<sup>36</sup>



The notice must state the time, date, and place of the meeting. If a closed session is anticipated, the notice must include the item to be considered and a citation to the particular statute justifying the closed session (see “Permitted Exemptions for Holding Closed Sessions,” below).<sup>37</sup>

The notice must also state the subject matter of the meeting. Discussion on any action or matter is limited to the topics specified in the notice (there is a limited exception for a public comment period, which is discussed below). The content of the notice must be “reasonably likely to apprise the public” of what will be addressed at the meeting.<sup>38</sup> In other words, the subject matter must be specific enough to let people interested in a subject matter know that it will be addressed at the meeting.

Courts reviewing and enforcing compliance with the Open Meetings Law will determine if the notice is specific enough on a case-by-case basis. That means what may be adequate subject matter notice in one instance may not be adequate in a different instance. For example, a notice stating, “employee contracts” could be adequate, but if it includes the contract of a controversial employee, then “employee contracts” would not be specific enough to satisfy the Open Meetings Law.<sup>39</sup>

The Wisconsin Supreme Court gave three factors to consider when determining if notice of subject of a meeting is reasonably specific:

1. The burden of providing more detailed notice. This factor balances specificity with the efficient conduct of public business.
2. Whether the subject matter is of particular interest to the public. This factor considers the number of people interested and the intensity of interest.
3. Whether the subject involves a non-routine action that the public would be unlikely to anticipate. This factor recognizes there may be less need for specificity with routine matters and more need for specificity where novel issues are involved.<sup>40</sup>

The attorney general’s office advises that any generic notice that contains expected reports or comments by a member, official, or presiding officer should state the topics that will be addressed in the report. The attorney general’s office further advises that generic subjects, such as “old business,” “new business,” “agenda revisions,” or “such other matters as authorized by law,” and fail to include further subject matter identification are inherently insufficient notice.<sup>41</sup>

A separate notice is required before each meeting of the governmental body. A general notice that is meant to cover a period of time (i.e., a week, a month) is not allowed. Notice must be given at least 24 hours prior to the meeting. The Open Meetings Law says that for “good cause” a shorter time for notice may be given; however, it must be at least two hours in advance of the meeting. Forgetting the notice or negligence is not good cause. Remember that the purpose of the law is a well-informed public, so any doubts about good cause should be resolved in favor of the public.

The presiding officer of the governmental body is responsible to give notices under the Open Meetings Law, or someone he or she designates.<sup>42</sup> Because including the meeting agenda into the notice is the most common means of providing notice of the subject matter of the meeting, this

part of law can be misunderstood to state that the presiding officer “controls” the agenda. That is neither the language nor the intent of the statute. The statute only assigns responsibility and accountability for meeting notices to the presiding officer, but agenda setting process more properly the subject to the body's local procedural rules.

The Open Meetings Law does not require public participation in a meeting. A governmental body may, but is not obligated to, provide for a period of “public comment” during a meeting. During that period, the governmental body may receive information from members of the public, but only limited responses or discussion is permitted if comments are on a subject matter not included in the notice.<sup>43</sup>

Meetings must be open to all persons, except when closed for a specific permitted purpose (*see below*). An open meeting means that it is reasonably accessible to members of the public.<sup>44</sup> Accessible also means “reasonable effort” to accommodate persons who want to record, video, or photograph the meeting, provided that those activities do not interfere with the meeting or rights of other participants.<sup>45</sup>

## Permitted Exemptions For Holding Closed Sessions

Some subjects if discussed in an open meeting could actually be adverse to the public interest. Consider if the meeting subject is purchasing a parcel of real estate the municipality needs, and the board wants to consider acceptable terms to authorize for negotiation. Typically, an administrator or staff person is given an acceptable range of prices to use in negotiation, but if the possible terms and prices are discussed in open session, bargaining power will be compromised as the seller will know the highest price the municipality has authorized. To avoid possible harm to the public interest, the Open Meetings Law sets forth specific exceptions that permit conducting business on limited subject matter in a closed session.

Remember that the purpose of the Open Meetings Law is providing the public with “the fullest and most complete information regarding the affairs of government as is compatible with conduct of government business,” and the Open Meetings Law is to be construed liberally in favor of achieving that purpose.<sup>46</sup> Another general requirement of the Open Meetings Law is that all governmental business shall be conducted in open session.<sup>47</sup> Considering these requirements of the statutes, the exemptions in Wis. Stat. § 19.85 must be construed strictly and narrowly.<sup>48</sup> If there is any doubt of whether a closed session exemption applies to the meeting subject matter in question, whether to close the meeting should be resolved in favor of openness.<sup>49</sup>

A closed session may be held for one or more of 11 specified exemptions in the statutes. The following exemptions are of interest to local government bodies.

- **“Case” deliberations - Wis. Stat. § 19.85(1)(a).** This narrow exemption considers a “case” to be the subject of a quasi-judicial hearing that has many aspects of a court case: adversaries, witnesses, direct, and cross examination of witnesses.<sup>50</sup>
- **Employee discipline, licensing, tenure, and employee evaluation- Wis. Stat. § 19.85 (1)(b) & (c).** Two open meeting exemptions involve one or more public employees. Closed

sessions are permitted under Wis. Stat. § 19.85 (1)(b), when the subject is the dismissal, demotion, licensing, tenure, or discipline of a public employee. Wis. Stat. § 19.85 (1)(c), permits closed session when considering employment, promotion, compensation, or performance evaluation. These two exemptions do not include all employee related subjects, but facts and information about a specific employee(s). It does not grant an exemption when discussing policies involving a department or all employees in general.<sup>51</sup> Neither can consideration of action to fill a vacancy on the governmental body or appointments to committees be in closed session.<sup>52</sup>

If a closed session is to consider employee dismissal, demotion, or discipline and there is an evidentiary hearing or final action is contemplated, then the employee may demand that the hearing or meeting be in open session. Employees must be given notice of such closed hearings or sessions, and be advised of their right to have it take place in open session. However, the employee does not have the right to demand the meeting be in closed session.<sup>53</sup>

- **Criminal matters - Wis. Stat. §19.85(1)(d).** This exemption allows closed sessions to consider strategies for crime prevention or detection. It also allows closed session to consider probation or parole, but this is not a local government function.
- **Purchases and competitive bargaining - Wis. Stat. §19.85(1)(e).** This is the exemption mentioned in the introduction to this segment of this chapter. Closed sessions are allowed when deliberating or negotiating the purchase of public property, investment of public funds, or other specified public business, when competitive or bargaining reasons require a closed session. The competitive or bargaining reasons must relate to reasons benefiting the governmental body, not a private party's desire for confidentiality.<sup>54</sup>
- **Burial sites - Wis. Stat. § 19.85(1)(em).** Deliberating on a burial site if discussing it in public would likely result in disturbance of the site.
- **Damaging personal information - Wis. Stat. § 19.85(1)(f).** Closed session is permitted when considering financial, medical, social or personal histories, or disciplinary data of specific persons. It also includes preliminary consideration of specific personnel problems or investigation of charges against a specific person, except when that person's right to an open meeting applies (see "Employee discipline, licensing, tenure" above). This exception can only be used if discussion in an open meeting would have a substantial adverse effect on the reputation of the person involved. This exemption applies to "specific persons" as compared to a small classification of public employees (see "Employee discipline, licensing, tenure" above.)
- **Legal consultation - Wis. Stat. § 19.85(g).** Conferring with legal counsel who is giving written or oral advice about strategy to be adopted in litigation in which the governmental body is or is likely to be involved.
- **Confidential ethics opinion - Wis. Stat. § 19.85(1)(h).** Used to consider a request for confidential written advice from a local ethics board.

## Conducting Permitted Closed Session

The Open Meetings Law spells out a specific process to meet in closed session. Notice must be given of a contemplated closed session. The notice must describe the subject matter and specify the specific statutory exemption(s) allowing the closed session.<sup>55</sup> The notice of the subject matter of a closed session must be specific enough to allow the members voting on a motion for closed session and the public to discern whether the subject is authorized for closed session under Wis. Stat. §19.85(1).

To go into a closed session, the meeting must begin in open session. The body's presiding officer must announce the authority and subject of the proposed closed session. The announcement must be included in the meeting minutes or record. A motion to go into closed session must be made and seconded, followed by a vote so that each member's vote can be determined. The motion, the second, and the vote must be part of the meeting record.<sup>56</sup> Once a body goes into closed session it cannot reconvene in open session for 12 hours, unless public notice was given in the original notice of its intent to return to open session.<sup>57</sup>

If the need arises, the body can go into closed session on an item specified in the public notice.<sup>58</sup> In such a case, the closed session item should be placed at the end of the agenda because the body cannot reconvene in open session when there was not a notice of the closed session. This is a very narrow provision, and whenever time allows, 24-hour notice must be given, or if there is good cause, at least two-hour notice could be used to give an amended notice that includes an indication that a closed session was not originally contemplated.

As with open sessions, motions and votes in closed session must be recorded. Whenever feasible, votes should be taken in open session, unless voting is an integral part of the closed session and the reason for going into closed session would be defeated or compromised by votes in open session.<sup>59</sup>

Only matters for which the session was closed may be considered in closed session.<sup>60</sup> All governmental body members may participate in closed session, including those that voted against closed session. This includes a committee meeting in closed session, even if members are not on that committee, unless the governing body has a formal rule or ordinance allowing for the exclusion of members who are not serving on the committee.<sup>61</sup> The body has discretion to admit anyone to a closed session that they deem necessary to conduct the business of the closed session.<sup>62</sup>

## Voting & Records

Generally, motions, seconds, and any roll call votes must be recorded, preserved, and made available to the extent prescribed by the Public Records Law.<sup>63</sup> (See the "Wisconsin Public Records" chapter of this handbook.). Certain statutes require each member's vote to be recorded; for example, Wis. Stat. § 19.85, discussed above, requires each member's vote to be recorded to convene in closed session. Wis. Stat. § 59.23(2)(a), requires county clerks to keep a record of the board proceeding, including the vote of each supervisor. The Open Meetings Law provides that any member of a governmental body may require a roll call vote.<sup>64</sup>

## Penalties & Enforcement (Wis. Stats. §§ 19.96 & 19.97)

Violations of the Open Meetings Law are punishable by a court imposing a civil forfeiture penalty or a fine of \$25 to \$300 against members who attended a meeting in violation of the law, or a presiding officer who violated the notice requirement. These amounts are the base penalty and, with mandatory court costs and assessments, a \$300 forfeiture can reach over \$500. Any forfeiture imposed must be paid by the members themselves and cannot be reimbursed by the governmental unit.<sup>65</sup> If the enforcement involves an improper closed session, members who voted against convening in closed session have a defense to the charge.<sup>66</sup>

In addition, a court enforcing the Open Meetings Law has the power to void any action taken at a meeting in violation of the Open Meetings Law. There may be other remedies, such as an injunction, that the court may order.<sup>67</sup> A court also can order that the reasonable costs of prosecuting the violation can be recovered.

To start an enforcement action, any person may file a complaint under oath, known as a "verified complaint," with the county district attorney (DA). If the DA does not bring an enforcement action within 20 days, the person may bring his or her own enforcement action in the name of the state. If successful, violators can be required to pay the actual costs and reasonable attorney fees of bringing the court action. In some cases, the attorney general's office may bring an enforcement action.

These penalties are serious, but even allegations of Open Meetings Law violations often have a devastating effect on public trust in the governmental body and its members. There is also the personal embarrassment to the members and political consequences. On the other hand, being mindful of the purpose and requirements of the Open Meeting Law is a means to build public trust.

## Reference & Advice

Refer to Wis. Stat. §§ 19.81-19.98 for the specific wording of the law. The Wisconsin Department of Justice has created the Office of Open Government, which has a website where you will find Open Meetings Law statutes, *Wisconsin Open Meetings Law, A Compliance Guide (2018)*, and other resources: <https://www.doj.state.wi.us/office-open-government/office-open-government-resources>. Advice on the Open Meetings Law is available from the county corporation counsel, a municipal attorney, or the Wisconsin Department of Justice. The UW-Extension Local Government Center (LGC) has resources available including a video on the law which is available through the LGC's website, <http://lgc.uwex.edu>.

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- <sup>1</sup> Wis. Stat. § 19.81 (3).
- <sup>2</sup> *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 79 (1987); *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis.2d 553, 571 (1993).
- <sup>3</sup> For example: *Badke*, 173 Wis.2d 553 at 570 (1993); *Journal Times v. City of Racine Bd. of Police and Fire Comm'rs*, 2015 WI 56 ¶ 46.
- <sup>4</sup> *Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, ¶16.
- <sup>5</sup> Wis. Stat. § 19.82(1).
- <sup>6</sup> 78 Op. Att'y Gen. 67.
- <sup>7</sup> *Open Meeting Law Compliance Guide*, p. 4 - 5 (2018).
- <sup>8</sup> *Krueger v. Appleton Area Scholl District*, 2017 WI 70, ¶¶24-26.
- <sup>9</sup> *Wisconsin Counties*, September 2017, p.12; *The Municipality*, October 2017, p.23 (Governing Bodies 398 & 399).
- <sup>10</sup> Wis. Stat. §19.82(1).
- <sup>11</sup> *State v. Beaver Dam Area Development Corp.*, 2008 WI 90, ¶44.
- <sup>12</sup> *Beaver Dam*, ¶45
- <sup>13</sup> *Beaver Dam*, ¶72.
- <sup>14</sup> *Beaver Dam*, ¶66.
- <sup>15</sup> *Beaver Dam*, ¶78.
- <sup>16</sup> *Beaver Dam*, ¶¶73, 74.
- <sup>17</sup> *Beaver Dam*, ¶75.
- <sup>18</sup> *Wis. Prof'l Police Ass'n, Inc. v. Wis. Counties Ass'n*, 2014 WI App 106.
- <sup>19</sup> Wis. Stat. §§19.82(1) & 19.86.
- <sup>20</sup> Wis. Stat. §19.82(2).
- <sup>21</sup> See note 2, above.
- <sup>22</sup> This was the situation in the *Showers* case, above.
- <sup>23</sup> *Showers*, 135 Wis.2d at 92, 100 (quoting *State ex. rel. Lynch v. Conta*, 71 Wis.2d 662, 687 (1976)).
- <sup>24</sup> 69 Op. Att'y Gen. 143 (1980).
- <sup>25</sup> *Open Meeting Law Compliance Guide*, p. 11 (2018).
- <sup>26</sup> *Badke*, 173 Wis.2d 553, 571.
- <sup>27</sup> July 26, 2016, correspondence from Assistant Attorney General Paul Ferguson to John Bodnar, Winnebago County Corporation Counsel, and Scott Ceman, Winnebago County District Attorney.
- <sup>28</sup> Wis. Stat. § 19.82(3).
- <sup>29</sup> *Badke*, 173 Wis.2d 553, 580-81.
- <sup>30</sup> Wis. Stat. §§ 19.83 & 19.85.
- <sup>31</sup> Wis. Stat. § 19.84(4).
- <sup>32</sup> Wis. Stat. §19.84(1)(b)1,2 &3(2020)
- <sup>33</sup> Note: *Wis. Stat. §19.84(1)(b)2*, does not say that the Internet site notice has to be in a manner "likely to give notice to the public," but given policies of the Open Meetings Law, the notice should be placed in a manner to facilitate access by the public.
- <sup>34</sup> *Open Meeting Law Compliance Guide*, p. 14 (2018).
- <sup>35</sup> Wis. Stat. § 19.84(1)(b).
- <sup>36</sup> Wis. Stat. § 19.84(1)(b).
- <sup>37</sup> Wis. Stat. § 19.85(2).
- <sup>38</sup> Wis. Stat. §19.84(2).
- <sup>39</sup> *State ex rel Buswell v. Tomah*, 2007 WI 71.
- <sup>40</sup> *State ex rel Buswell v. Tomah*, 2007 WI 71, ¶¶29-31.
- <sup>41</sup> *Compliance Guide*, p. 17 (2018); *AG-Thompson Informal Correspondence*, September 3, 2004.; *AG-Ericson Informal Correspondence*, April 22, 2009.
- <sup>42</sup> Wis. Stat. §19.84(1)(b).
- <sup>43</sup> Wis. Stat. § 19.84(2).
- <sup>44</sup> Wis. Stat. § 19.82(3).
- <sup>45</sup> Wis. Stat. § 19.90.

- <sup>46</sup> Wis. Stat. § 19.81(1) & (4).
- <sup>47</sup> Wis. Stat. §19.83(1).
- <sup>48</sup> *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 70 (1993).
- <sup>49</sup> See 74 Op. Att'y Gen. 70, 73 (1985).
- <sup>50</sup> See *Hodge*, above.
- <sup>51</sup> *Oshkosh NW. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486 (Ct. App. 1985).
- <sup>52</sup> 76 Op. Att'y Gen 276 (1987) an 74 Op. Att'y Gen 70, 72 (1985)
- <sup>53</sup> *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, Ct. App. 1985).
- <sup>54</sup> *State ex rel. Citizens v. City of Milton*, 2007 WI App 114, ¶.15-14 ¶
- <sup>55</sup> Wis. Stat. §§ 19.84(2) & 19.85(1).
- <sup>56</sup> Wis. Stat. § 19.85(1).
- <sup>57</sup> Wis. Stat. § 19.85(2).
- <sup>58</sup> 66 Op. Att'y Gen. 106 (1973).
- <sup>59</sup> *Open Meeting Law Compliance Guide*, p. 29-30 (2018).
- <sup>60</sup> Wis. Stat. § 19.85(1).
- <sup>61</sup> Wis. Stat. § 19.89).
- <sup>62</sup> *Informal correspondence to Shuh, December 15, 1988.*
- <sup>63</sup> Wis. Stat. §§ 19.88 & 985.01(6).
- <sup>64</sup> Wis. Stat. §19.88(2).
- <sup>65</sup> 66 Op Att'y Gen. 226 (1977).
- <sup>66</sup> Wis. Stat. § 19.96.
- <sup>67</sup> Wis. Stat. § 19.97(3).