

In the Board Room – Advanced Topics in Open Meetings and Public Records

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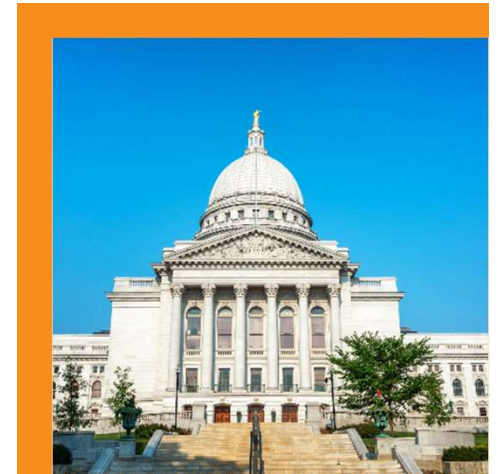


Overview

1. The Basics of Public Records Law and Open Meetings Law
2. Public Records:
 - a. “Purely Personal Email” Exception
 - b. Social Media
 - c. Costs of Storage of Electronic Records
3. Open Meetings:
 1. Walking Quorum
 2. Closed Session Questions

The Basics

Public Records Law





The Basics – Presumption of Transparency

Wis. Stat. § 19.31: The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

“Transparency and oversight are essential to honest, ethical governance.”
John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862.



The Basics – Presumption of Transparency

- Courts interpret the public records law in light of this policy declaration to foster transparent government. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 40.
- Purpose of the Wisconsin public records law: To shed light on the workings of government and the official acts of public officers and employees and the “goal is to provide access to records that assist the public in becoming an informed electorate.” See *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998); *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 73.



The Basics – Public Records

Wis. Stat. § 19.32(2) – Definition of “Record”: Any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.

- Must be created or kept in connection with official purpose or function of the agency.
- Content determines whether a document is a “record,” not medium, format, or location.



The Basics – Public Records

Wis. Stat. § 19.32(2) – Definition of “Record”:

- Includes:
 - Handwritten, typed, or printed documents
 - Maps and charts
 - Electronic records and communications, including photographs, films, tape recordings, and any other medium on which electronically generated or stored data is recorded or preserved
 - Contractor’s records (with some limitations)



The Basics – Public Records

Wis. Stat. § 19.32(2) – Definition of “Record”:

- Email sent or received on an authority’s computer system is a record. *This includes personal email sent by officers or employees of the authority.*
- Email conducting government business sent or received on the personal email account of an authority’s officer or employee also constitutes a record.
- Not everything a public official or employee creates is a public record.



The Basics – Public Records

What is not a “Record”:

- Drafts, notes, preliminary documents, and similar materials prepared for the originator’s personal use or by the originator in the name of a person for whom the originator is working.
 - Narrowly construed exception
 - Careful analysis required
- Published material available for sale or at the library



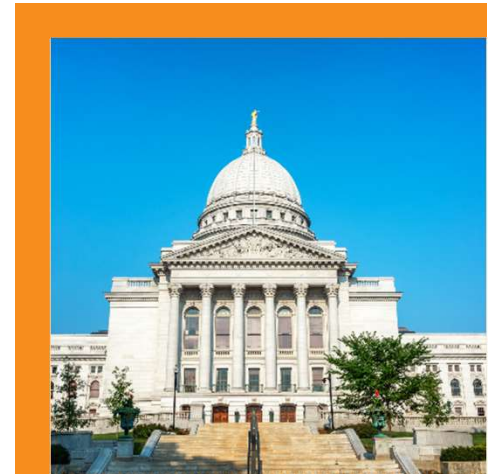
The Basics – Public Records

What is not a “Record”:

- Materials which are *purely the personal property* of the custodian and have no relation to his or her office AND evince no violation of law or policy.
- Note: Personal email sent or received on an authority’s computer system is a record.
- If a purely personal email is sent or received on an authority’s computer system, it is still a “record,” although it need not be disclosed if “purely personal.” (NOT a balancing test issue)

The Basics

Open Meetings Law





The Basics – Open Meetings

Wis. Stat. § 19.81 establishes the Public Policy Behind Open Meetings:

“[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.”

The purpose of the Open Meetings Law is to give the public the fullest and most complete information concerning the affairs of government. This requires liberal construction.



The Basics – Open Meetings

Key Point: The open meetings law applies to every “meeting” of a “governmental body.”

The terms “meeting” and “governmental body” are defined in Wis. Stat. § 19.82(1) and (2).



The Basics – Open Meetings

Wis. Stat. § 19.82(1) defines “Governmental Bodies”:

“[A] state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; ... or a formally constituted subunit of any of the foregoing...”

Even bodies that are purely advisory are subject to the law if they are created by constitution, statute, ordinance, rule or order.



The Basics – Open Meetings

Wis. Stat. § 19.82(2) defines “Meetings”:

“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. 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...”



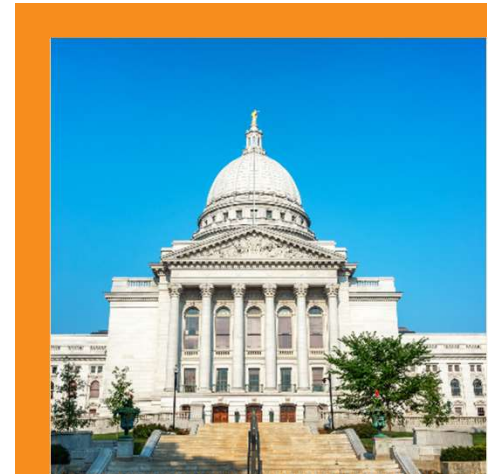
The Basics – Open Meetings

The Showers Test: Purpose and Number

The statutory definition of a “meeting” applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is 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.

Special Considerations

Public Records Law





Public Records and Personal Emails

Wis. Stat. § 19.32(2): “Purely Personal” = materials that are purely the personal property of the custodian and have no relation to his or her office
THAT EVINCE NO VIOLATION OF LAW OR POLICY.

- We generally focus on personal emails, but the “purely personal” standard also applies to other communications, such as text messages, instant messages, and chat functions.
- General rule: Any emails or other electronic communications related to official duties, the affairs of government, and the official acts of the authority’s officers and employees is not purely personal.



Public Records and Personal Communications

Wis. Stat. § 19.32(2): “Purely Personal” = materials that are purely the personal property of the custodian and have no relation to his or her office.

- The communication is still a record, but disclosure is not necessary if “purely personal.”
- Narrowly construed exception.



Public Records and Personal Communications

Wis. Stat. § 19.32(2) “Purely Personal”:

- Examples:
 - Emails with family news.
 - General communications with friends or family that do not relate to official duties.



Public Records and Personal Communications

Wis. Stat. § 19.32(2) “Purely Personal”:

- Examples of communications NOT deemed purely personal:
 - Text messages between Board members during a meeting.
 - Encrypted messages of any type by state employees (Michigan) or elected officials (Colorado).
 - General communications with friends or family that do not relate to official duties.
 - Content that relates to official functions or responsibilities may qualify as “purely personal” and depend upon circumstances.



Public Records and Personal Communications

Government Business Emails, Calls, and Documents on Private Accounts:

- These materials may be “records”
- Content determines whether something is a “record, ” not the medium, format, or location
- Recommendation: Conduct a careful search of all relevant accounts
- Personal materials on the same private accounts are not subject to disclosure.

An aerial photograph of a city with various buildings and greenery. A semi-transparent white banner is overlaid across the middle of the image, containing the title text.

Attorney General Guidance (July 28, 2010)

In order to comply with the holding in *Schill*, a records custodian is responsible to screen e-mails that fall within the scope of a request in order to determine whether, in fact, the contents are purely personal and evince no violation of law or policy. If so, the e-mails need not be released. In making this judgment, however, records custodians should be mindful of the policy behind the Public Records Law. It is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31. Therefore, the “purely personal e-mail” exception to disclosure should be narrowly applied. If there is any aspect of the e-mail that may shed light on governmental functions and responsibilities, the relevant content must be released as any other record would be released under the Public Records Law. If a document contains both personal and non-personal content, a records custodian may redact portions of the document so that the purely personal information is not released.



Attorney General Guidance (July 28, 2010) cont.

Individuals who are concerned about misuse of public resources—i.e., personal use of government e-mail—should not be deterred from making public records requests that might reveal the misuse. In particular, an individual may request existing records containing statistical information, including the number of e-mails (personal and business) and the time and dates of the personal e-mails over a specified period. Moreover, if an individual has made a request and has a reasonable basis to believe that withheld e-mails were not purely personal, he or she may commence a legal action to compel release and ask the court to conduct an in camera review of the disputed e-mail to determine if the custodian made the proper judgment.



Public Records and Personal Communications

Board Members *must* cooperate in preservation and disclosure.

- How can leadership do that??
- Focus: What is the County's process for preserving the social media records?



Public Records and Personal Emails

Accomplishing cooperation of Board and employees in preservation and disclosure of records:

- Board Rules
- Signed statement of understanding upon election/oath of office
- Written guidance, such as in Board Member job description or Employee Handbook
- Specific and up to date policies describing all the platforms that may include public records
- Training



Public Records and Social Media

General Rules:

- Information posted by County Departments to social media sites is likely to be a public record and must be retained according to the record retention schedule where any of the following apply:
 - The information is unique and not available elsewhere
 - Contains evidence of the Department's policies and procedures
 - Is being used to conduct the Department's work
 - Has been authorized by the Department, or contains information for which there is a business need

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Public Records and Social Media

General Rules:

- When the public posts information concerning any aspect of a Department's work to a Department's social media site, that information is a public record.
- Even personal posts or pages that relate back to County business may be a public record.

From the Public Records Board:

Identifying a Social Media Record

Posting on Social Media creates a record. It may need long term retention if:

- Conveys official government unit information.
- Contains evidence of the government unit's policies, procedures, or mission.
- Has been authorized by the government unit or contains information for which there is a business need.
- Contains feedback, such as public comments or posts, received via social media.
- Contains intra-office communication needed to document decisions made or actions taken.

Information and posts typically NOT considered a public record are those that are access/reference copies, or duplicates of official records already being retained elsewhere.

Social Media Best Practices

Understand current policies: Prior to using social media, make sure you understand your government unit's current policies and procedures.

Identify public records and platforms: Identify and document what constitutes a public record in social media platforms used by your government unit. Also identify intra-office communication tools where records might be created, such as instant messaging platforms, and therefore need to be retained and managed.

Content management: Clarify custodian of content and responsibility for managing the records.

Training: Communicate records policies and provide training on how social media records will be managed.

Monitor usage: Monitor the ongoing use of social media platforms.

Monitor the landscape: Incorporate recordkeeping practices and requirements into terms of service with third-parties when possible. Monitor any changes to third-party terms of service on social media platforms that may affect the management of records.



What is the Retention Period for Social Media Posts?

Wis. Stat. § 19.35(5): Governs retention following receipt of a request:

- No destruction until the request is granted or until at least 60 days after the authority denies the request
- 90 days if requester is committed or incarcerated
- No destruction during enforcement action

Wis. Stat. § 59.52(4) does not define retention period

Wis. Stat. § 16.61(3): Public Records Board may establish minimum period of retention, but have they???



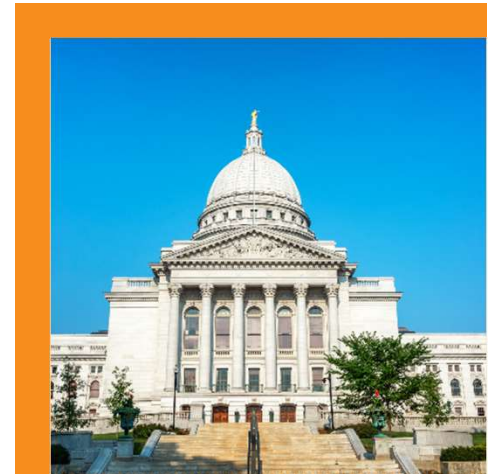
Public Records and Cost of Storage

An example of Wisconsin's Public Records Law not keeping up with technological advances and costs to counties...

- Counties must retain all electronic records, including emails, text messages, chats, meeting data, photos/video, database materials, and so on....
- No exception due to cost, amount of storage needed, or any other reason.
- Option: Revisit records retention schedules.
- As of now, no guidance from State Public Records Board or Attorney General relating to costs of electronic record storage.

Special Considerations

Open Meetings Law





Open Meetings - Walking Quorum

Walking Quorum:

- A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *Showers*, 135 Wis. 2d at 92.
- The critical element of a walking quorum is an agreement to act uniformly. If there is no tacit or express agreement, exchanges among separate groups of members may take place without violating the Open Meetings law.



Open Meetings - Walking Quorum

Look to Purpose: Engaging in Government Business?

- “Governmental Business” refers to any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body’s realm of authority. *Showers*, 135 Wis. 2d at 102-03.
- A governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body’s realm of authority. *Badke v. Greendale Village Board*, 173 Wis. 2d 553, 573-74 (1993).
- But... no meeting occurred where a quorum of school board members attended a gathering of town residents but did not collect information on a subject the school board had the potential to decide. *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77 (Ct. App. 1987).

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Open Meetings – Social Media

Walking Quorums and Social Media:

Key Point: Counties must remain cognizant of the potential for social media groups, pages, and accounts of various board members to develop into “walking quorums,” which can covertly affect the proper transparent functioning of county government.



Open Meetings – Social Media

- Written communications transmitted by electronic means, such as email, instant messaging, blogging, or other social media, also may constitute a “convening of members.”
- AG: Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*i.e.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise Open Meetings Law concerns.



Open Meetings – Social Media

- If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body.
- In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.



Open Meetings – Closed Sessions

A fundamental contradiction to required transparency.....

Requires specific statutory exception found in Wis. Stat. § 19.85(1). Most common:

- Wis. Stat. § 19.85(1)(b) - Employee performance, compensation or promotion, discipline or discussion of performance.
Warning: Wis. Stat. § 19.85(1)(b) and hearing requirement.



Open Meetings – Closed Sessions

Wis. Stat. § 19.85(1)(e) - Negotiations of public business.

Wis. Stat. § 19.85(1)(g) – Conferring with legal counsel who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in *which it is or is likely to become involved*.

- No specific standard for *“likely to become involved”*
- Purpose is to render oral or written advice concerning strategy
- Weighing of options in litigation or potential litigation



Open Meetings – Closed Sessions

Agenda language is key!

Attendees: Government body has wide discretion to admit anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the closed session. This may include:

- Staff
- Other professionals serving the county
- Sub-unit of governing body must allow members of the governing body unless adopted rules state otherwise



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