



## LEGAL ISSUES RELATING TO COUNTY GOVERNMENT

# Court of Appeals Clarifies Procedure for Closed Session

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The Wisconsin Open Meetings Law ensures transparency and accountability to the electorate by providing the public with the right to attend meetings of governmental bodies so the public has access to “the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.”<sup>1</sup> As such, every meeting of a governmental body must initially be convened in open session, and all business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions permitting a closed session applies.<sup>2</sup>

Recently, the Wisconsin Court of Appeals examined the “bargaining exemption” under Wis. Stat. § 19.85(1)(e) in *State ex rel. Oitzinger v. City of Marinette & Marinette Common Council*.<sup>3</sup> The bargaining exemption allows a governmental body to convene in closed session for the purpose of “deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” In the *Oitzinger* decision, which will be examined in this article, the court’s holdings affirmed and clarified the rules regarding the due notice, calling, and conduct of closed sessions of meetings of governmental bodies under the Wisconsin Open Meetings Law.

### ► Background

In the late 2010s, Tyco Fire Products, L.P. was responsible for introducing certain toxic PFAS<sup>4</sup> into the city of

Marinette’s groundwater by flushing its firefighting foam down Marinette’s sanitary sewers into the local wastewater treatment plant and discharging it into the surrounding environment.<sup>5</sup> Tyco’s conduct resulted in a two-fold issue for Marinette. First, PFAS contaminated the wastewater biosolids produced in Marinette’s wastewater treatment process, which had traditionally been repurposed as crop fertilizer, leaving Marinette liable for finding a safe disposal alternative.<sup>6</sup> Second, PFAS contaminated the well water in the neighboring town of Peshtigo.<sup>7</sup>

At the direction of the Wisconsin Department of Natural Resources, Tyco hired a consultant to draft a “Remedial Actions Options Report for Long-Term Drinking Water Supply, Town of Peshtigo” to identify eight long-term drinking water supply alternatives.<sup>8</sup> The report ultimately recommended that affected residences in Peshtigo be connected to the Marinette public water system.<sup>9</sup> In response, Tyco and Marinette entered into two reimbursement agreements: one for Tyco to pay the costs of dehydrating and shipping the contaminated biosolids to a landfill in the state of Oregon; and the second for Tyco to pay Marinette \$75,000 for legal and consulting costs related to providing water service to Peshtigo.<sup>10</sup>

Despite the initial assistance, Marinette still needed a long-term, cost-effective solution for disposing of the contaminated biosolids. The proposed solution was a “donation agreement” between Marinette and Tyco whereby Tyco would pay for Marinette to buy its own equipment for dehydrating the contaminated biosolids prior to being shipped away.<sup>11</sup> Marinette’s city attorney

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negotiated the terms of the donation agreement over the course of four months.<sup>12</sup> Only the mayor of Marinette and the city utilities operations manager provided any substantive input to the donation agreement.<sup>13</sup>

On Oct. 5, 2020, the mayor — relying on the bargaining exemption — posted notice of a closed session for a portion of the Marinette Common Council’s Oct. 6 meeting relating to the donation agreement.<sup>14</sup> No discussion of the donation agreement occurred on the record before the council immediately voted to convene in closed session, and council members were provided copies of the donation agreement for the first time at the start of the closed session.<sup>15</sup> During the closed session, the city attorney and utilities operations manager provided an overview of the donation agreement and disposal plans.<sup>16</sup>

When Douglas Oitzinger, who was an alderperson serving on the common council at the time of the closed sessions, asked what extra costs Marinette would incur in connection with the plan and whether more money should be sought from Tyco, the attorney responded that “they had finished negotiating and they believed [it] was the best deal they could get.”<sup>17</sup> The council then returned to open session, and without further discussion, voted eight-to-one to approve the donation agreement with Oitzinger dissenting.<sup>18</sup>

As for providing water service to Peshtigo, the common council retained Ruekert & Mielke, Inc. to draft a memo identifying the operational, financial and legal challenges posed by the drinking water report alternatives.<sup>19</sup> The memo was provided to the city attorney on July 9, 2020, but it was never provided to the council or the mayor.<sup>20</sup> On Oct. 6, 2020, a public notice announced that on Oct. 7, the council would conduct a “discussion with legal counsel regarding the status of [the] water supply alternative analysis.”<sup>21</sup>

When the Oct. 7 meeting began, the common council moved immediately after roll call to convene in closed session without any discussion of the memo on the record.<sup>22</sup> The consultant and the city attorney proceeded to provide the council a broad synopsis of the technical

and water quality issues, along with the economic and political issues surrounding the memo.<sup>23</sup> At the end of the presentation, the council voted unanimously to adjourn the meeting without further action.<sup>24</sup>

### ► Legal action and analysis

Subsequent to the meetings, Oitzinger filed an action under Wis. Stat. § 19.79(1) alleging that the Oct. 6 and 7 closed sessions were illegal.<sup>25</sup> The Court of Appeals agreed with Oitzinger and held that the Marinette Common Council violated the Wisconsin Open Meetings Law at the Oct. 6 and 7 meetings because (1) the council failed to hold discussions relating to the subject matter of the closed sessions in open session prior to voting to go into closed sessions, and (2) there was no competitive or bargaining reason to enter into closed sessions for either meeting because negotiations of the donation agreement had already been conducted, and there was no negotiation yet underway with Peshtigo to re-route water.<sup>26</sup>

Relying on case law interpreting the Wisconsin Open Meetings Law,<sup>27</sup> the court reaffirmed the concept that a governmental body must (1) begin its discussions in an open session, (2) place the initial discussion of the subject matter on the record, and (3) describe why a specific topic within that discussion requires a closed session prior to voting to go into closed session.<sup>28</sup> In the Oitzinger decision, the court reasoned that the public deserved to know the conclusions offered by the city attorney, utilities operations manager, mayor, and consultant in each respective meeting insofar as such conclusions didn’t implicate sensitive negotiation points.<sup>29</sup>

As such, the court opined that in each meeting, the council should have heard the presentations from the city attorney, utilities operations manager, mayor, or consultant, respectively, and asked questions in open session. If the council determined that conditions or payment terms needed to be discussed, the council could have then moved into closed session.<sup>30</sup>

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This court ruling reiterates that county officials must remain vigilant to ensure they are providing adequate notice and a meaningful discussion of items to be bargained or negotiated prior to entering closed sessions. However, the Oitzinger decision in no way requires governmental bodies to disclose negotiation strategies or other sensitive information in open session. Rather, the decision clarifies that the bargaining exemption only applies to portions of meetings where the government's competitive or bargaining reasons leave "no other option than to close [such] meetings."<sup>31</sup>

Determining exactly when it is appropriate or necessary to close a meeting can be a challenging consideration, but county officials can alleviate much of the difficulty if they adhere to the holdings enumerated above and regularly consult the Wisconsin Open Meetings Law Compliance Guide (accessible at [bit.ly/DOJ-OML](http://bit.ly/DOJ-OML)) and their corporation counsel. County officials are encouraged to work closely with their corporation counsel in drafting closed session agenda items and clear procedures for convening in closed session. ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.*

1. Wis. Stat. § 19.81(1).
2. Wis. Stat. § 19.83.
3. State ex rel. Oitzinger v. City of Marinette, 2025 WI App 19.
4. Per- and polyfluoroalkyl substances (PFAS) "are widely used, long lasting chemicals, components of which break down very slowly over time." U.S. ENVIRONMENTAL PROTECTION AGENCY, PFAS Explained, <https://www.epa.gov/pfas/pfas-explained> (last visited May 5, 2025). "Scientific studies have shown that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals." *Id.*
5. State ex rel. Oitzinger v. City of Marinette & Marinette Common Council, 2025 WI App 19 ¶ 4. (2025).
6. State ex rel. Oitzinger v. City of Marinette & Marinette Common Council at ¶ 5.
7. *Id.* at ¶ 6.
8. *Id.* at ¶ 5.
9. *Id.* at ¶ 6.
10. *Id.* at ¶ 7.
11. *Id.* at ¶ 8.
12. *Id.* at ¶ 9.
13. *Id.*
14. *Id.* at ¶ 10.
15. *Id.* at ¶ 11.
16. *Id.*
17. *Id.* at ¶ 12.
18. *Id.* at ¶ 13.
19. *Id.* at ¶ 14.
20. *Id.* at ¶ 15.
21. *Id.* at ¶ 16.
22. *Id.*
23. *Id.* at ¶ 16.
24. *Id.* at ¶ 17.
25. *Id.* at ¶ 19.
26. *Id.* at ¶¶ 54; 66.
27. See State ex rel. Citizens for Responsible Development v. City of Milton, 2007 WI App 114.
28. Oitzinger at ¶ 38.
29. *Id.* at ¶ 70.
30. *Id.* at ¶ 71.
31. *Id.* at ¶ 32.

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