



Open Meetings and Public Records Law

Open Meetings Law

2

Wisconsin's Open Meetings Law (OML)

- Wis. Stat. §§ 19.81 to 19.98.
- “[T]he public is entitled to **the fullest and most complete information regarding the affairs of government.**”
- All **meetings of governmental bodies must:**
 - Be preceded by **public notice**.
 - AND**
 - Held in a place that is **open** and **reasonably accessible** to all members of the public

3

Overview

- (1) What is a **governmental body**?
- (2) What is a **meeting**?
- (3) What is required for **public notice** of a meeting?
- (4) Requirements for **open** and **reasonably accessible sessions**
- (5) Enforcement and penalties

4

What is a Governmental Body?

- A **group of people** empowered to **act collectively** with regard to **governmental business**.
 - Not a single individual or official
 - Includes advisory bodies and subcommittees
- Ultimately, what matters is the manner in which the body was created, rather than the nature of its authority.

5

What is a Meeting?

- Wis. Stat. § 19.82 (2) - “[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.”
- Two requirements – The *Showers* test:
 - Purpose – to exercise “responsibilities, authority, power, or duties” of the body
 - Numbers – a “convening of members” to exercise those responsibilities or duties

6

The "Purpose" Requirement

- "Conducting governmental business" is read liberally
 - Not limited to formal or final decision making.
 - Includes preliminary decisions, discussion, and information gathering.
- Interaction among members is not required.

7

"Convening" of Members

- Not limited to face-to face interactions
- Includes situations where members can effectively communicate with each other contemporaneously and exercise authority
- A telephone or video conference – **likely a "convening of members"**
- Written correspondence – **probably not a "convening of members"**

8

Social or Chance Gatherings

- Not a "meeting" unless the gathering is intended to avoid compliance with the law.
- **But** if one-half or more of the members are present, it's **presumed to be a meeting** and the body has the burden of proving that they weren't conducting governmental business

9

The "Numbers" Requirement

- A sufficient number of members to determine the body's course of action is either:
 - The affirmative power to pass an action – a **quorum**
 - OR
 - The negative power to defeat an action – a **negative quorum**
 - ♦ If a simple majority to act – one half of body
 - ♦ If a supermajority (e.g., 2/3 of body) to act – 1/3 of the body plus one

10

Special Topic: Walking Quorums

- Likely a meeting when:
 - A **series of gatherings** among members of a body;
 - Each **smaller in size than a quorum**; and
 - An **agreement is reached—expressly or tacitly—to act** a certain way; and
 - In **sufficient number to control the body**.
- Walking quorums prohibited to prevent circumventing OML through collective agreements or an agent in what would otherwise not be a meeting.

11

Special Topic: Electronic Communications

- More likely meetings subject to OML
- Courts will consider:
 - Number of participants
 - Number of communications
 - Time frame/contemporaneity of communications
- Electronic communications pose unique risk of constituting a walking quorum via "reply all"
- **USE CAUTION:** limit electronic communications to one-way transmissions, minimize content and distribution

12

Notice Requirements

- Every meeting must be preceded by **at least 24 hours notice** to the public.
 - Shorter notice permitted **in an emergency** if 24 hours notice is impossible or impractical, but **in no case may less than 2 hours notice be given**
- Notice must contain:
 - Time
 - Date
 - Place
 - Subject matter - see next slide

13

Notice: Subject Matter

- SCOW says that the description must **reasonably apprise the public of the purpose of the meeting**, considering:
 - The burden of providing more detail
 - The degree of public interest in the subject
 - Whether the subject is non-routine
- **Avoid generic agenda items** such as “old or new business” or “miscellaneous business”

14

“Open” and “Reasonably Accessible”

- Hold meetings in public property and in unlocked rooms within the geographic area the body serves
- Hold in rooms large enough to accommodate all citizens who wish to attend
- Hold in facilities that people with disabilities can access without assistance
- Tele- or video conference can satisfy, so long as public is provided with instructions to access

15

Public Attendance

- OML gives citizens the right to **attend and observe**
- OML doesn't require public comment, but permits it
 - If public comment will be received, it **must be included in the meeting's agenda.**
- During public comment period, the body:
 - **May** receive information and discuss any subject raised by the public
 - **May not** take any formal action

16

Voting

- Unless specifically allowed by law, secret ballots not permitted
- Any member can request a roll call vote
- All motions and roll call votes must be recorded, preserved, and available for public inspection
- Keeping formal minutes not required by OML, but specific statutes governing the body might require it
 - Good practice for recording motions and roll call votes

17

Closed Sessions

- Closed sessions are permitted only in 11 specific circumstances ("exemptions") contained in Wis. Stat. § 19.85(1).
- Must include in notice with statutory basis and explanation.
- All meetings must begin in open session.
- Discussion in closed session is limited to the specific business for which the closed session was authorized
- **Presumption that meeting should be held in open session, and exemptions are limited/narrowly read.**

18

Enforcement

- Wis. Stat. § 19.97 – enforced by attorney general, district attorney, or private citizen
- Private citizens make written complaint to AG or DA.
- If AG or DA decide not to pursue enforcement, private citizen may pursue enforcement action in circuit court
- If successful, the complainant can seek to recover attorney's fees

19

Public Records Law

20

Wisconsin's Public Records Law (PRL)

- **“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.”**
- **Bottom line:** There's a presumption that everything created or maintained by a governmental entity is a public record.

21

Key Terminology

- **Requester:** makes the records request; invokes the PRL.
 - Generally, any person who requests to inspect or a copy of a record.
 - There is generally a greater right to obtain records containing personally identifiable information about the requester, subject to some exceptions.
- **Authority:** Any governmental body specified in statute having custody of a record.
 - DHS is an Authority, as are most of its boards, committees, councils, etc.
- **Custodian:** Vested by the Authority with full legal power to render decisions and carry out the authority's statutory public records responsibilities.

22

Key Terminology: What is a "Record"?

- "Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, **regardless of physical form or characteristics**, which has been **created or is being kept by an authority.**"
- Not everything a public official or employee creates is a record.

23

Exceptions: Not a "Record"

- **By statute, not a "record."**
- **Exceptions are construed narrowly**
- **Notes** – kept for personal use and used to refresh recollection at a later time.
 - E.g., your personal notes from this meeting
- **Drafts**
 - Not a draft if used for the purpose for which it was commissioned.
 - Cannot indefinitely qualify a document as a "draft" to avoid disclosure
- **Preliminary documents** and other similar materials prepared for the originator's personal use or by the originator in the name of the person for whom the originator is working.

24

Exceptions: Not a "Record" (continued)

- **Published material available for sale or at the library.**
- **Purely personal property** with no relation to the office/agency.
- Material with **limited access due to copyright, patent, or bequest.**
- **An identical copy of an otherwise available record.**

25

The Records Request

- The request doesn't have to be made in writing
 - But if a request is made in writing, response must be as well.
- "Magic words" are not required – but must be reasonably specific to subject matter/length of time.
- Requester doesn't have to state the purpose of the request.
- Requester doesn't have to identify themselves.
- Continuing requests not contemplated

26

Responding to the Request

- **Responses are mandatory!**
- Generally, only have to produce records that existed at the time of the request.
- Timing
 - "As soon as practicable and without delay"
 - WI DoJ guidance: generally 10 working days
 - Avoid "arbitrary and capricious" delays
- If there's no record, tell the requester as much
- Denial:
 - Reasons for denial must be specific and sufficient.
 - Inform the requester that the denial is subject to review in circuit court via a mandamus action.

27

Responding: Record Exists

- **Content, not format controls** – any type of written, information recorded and maintained can be a record.
- If there's a record:
 1. Is **disclosure required by law**?
 2. Is **disclosure of the record exempt by law**?
 → If there's a record and the answers to 1. and 2. are no, apply the balancing test.

28

Disclosure Required by Law

- **A few types of records where access expressly required by statute or court decision.**
- Examples:
 - Uniform traffic accident reports.
 - Books and papers "required to be kept" by a sheriff, clerk of circuit court, county registers, etc.
 - Daily arrest logs or police "blotters" are police departments.
- Caution: even if generally entitled, there may be circumstances where access is not permitted.

29

Disclosure Exempt by Law

- Some records exempt from disclosure by state or federal statutes, such as:
 - Patient health care records
 - Mental health records
 - SSNs
 - Medicaid records
- Some records exempt from disclosure by court decisions:
 - Attorney-client privilege
 - "Purely personal emails that evince no violation of law or policy"
- **Exemptions are narrowly construed!**

30

The Balancing Test

- When a record is requested, the record exists, and disclosure isn't required or exempt by law, **custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure**
 - No blanket exceptions permitted – must state specific policy reasons.
- A fact-intensive inquiry performed on a case-by-case basis.

31

Redaction

- A mixed record containing disclosable and non-disclosable information – disclosability not “all or nothing”
- If part of the record is disclosable, redact the information that is not disclosable and produce the record.

32

Electronic Records

- The request must be for an existing record.
 - The authority is not required to create a new record by extracting and compiling information from existing records in a new format.
 - The AG has advised that where information is stored in a database a person can “within reasonable limits” request a data run to obtain the requested information.
- Is the record created or kept by the authority?

33

Closing thoughts

34

Closing thoughts

- The appearance of impropriety can be as damaging as actual misconduct – always err on the side of caution and **consult OLC with specific inquiries**
- If contacted by a member of the public about your subcommittee, encourage them to attend public hearing for more information.
- More guidance from the Office of Open Government at <https://www.doj.state.wi.us/office-open-government/office-open-government-resources>

35
