



WISCONSIN DEPARTMENT
of HEALTH SERVICES

Open Meetings and Public Records Law Overview

Open Meetings Law

Wisconsin's Open Meetings Law (OML)

- “[T]he public is entitled to the fullest and most complete information regarding the affairs of government.” Wis. Stat. § [19.81\(1\)](#).
- 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.
- **Provisions of OML are construed liberally to achieve these purposes.** See Wis. Stat. § [19.81\(4\)](#).

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Key concepts

- 1 What is a **Governmental Body**?
- 2 What constitutes a **meeting**?
- 3 **Public notice** requirements
- 4 **Open** and **reasonably accessible sessions**
- 5 When are **closed sessions** authorized?
- 6 Enforcement and penalties

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What is a Governmental Body?

- Wis. Stat. § [19.82 \(1\)](#).
- “[S]tate or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order.”
 - Any kind of collective governmental entity.
 - Created by constitution, statute, ordinance, rule or order.
- “[G]overnmental or quasi-governmental corporation”

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What is a Governmental Body?

Collective Governmental Entity

- Must be a group of people – not an individual.
- Must have collective identity and purpose.
- A group with **determinative membership**, an **expectation that it will meet regularly** and **act collectively** in relation to governmental business.
- Includes advisory bodies – do not need final decision-making power
- Includes formally constituted subunits
- Not an *ad hoc* gathering or group of administrative staff

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What is a Governmental Body?

"Created by constitution, statute, ordinance, rule, or order"

- Refers to **how the body is created** – not the kind of power it wields
- WI Constitution, statutes, ordinances and rules
- "Order" not expressly defined
 - Includes any formal or informal directive to create a body and assign it some governmental responsibilities.
 - Assigned by governmental official or entity that has the power to delegate those duties.

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What Constitutes 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."

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What Constitutes a Meeting?

The Showers Test

- A meeting occurs when:
 - Members convene for the **purpose** of conducting governmental business;
- AND**
- The **number** of members present is sufficient to determine the body's course of action.
- ***State ex rel Newspapers v. Showers***, 135 Wis. 2d 77 (1987)

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What Constitutes a Meeting?

The Showers Test: Purpose - 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”

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What Constitutes a Meeting?

The Showers Test: Purpose - conducting governmental business

- “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.
- *State ex rel Badke v. Greendale Vill. Bd.*, 173 Wis. 2d 553 (1993): the village board met the “purpose” requirement when a quorum regularly attended each plan committee meeting to hear information on a matter within the board’s realm of authority.

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What Constitutes a Meeting?

The Showers Test: Numbers

- A sufficient number of members to determine the body’s course of action is either:
 - The affirmative power to pass an action – usually 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

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What Constitutes a Meeting?

The Showers Test: Numbers - walking quorums

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

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What Constitutes a Meeting?

Social or chance gatherings – not a meeting

- Social/chance gatherings are not a “meeting” unless the purpose of the gathering is to avoid compliance with the OML.
- **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

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What Constitutes a Meeting?

Electronic communications – likely a meeting

- Email, IMs, texts, etc.
- More likely to amount to meetings subject to OML
- Courts will consider:
 - Number of participants
 - Number of communications
 - Time frame/contemporaneity of communications
- Electronic communications pose unique risk: reply all, ease of communicating with multiple people, etc.
- **USE CAUTION:** limit electronic communications to one-way transmissions, minimize content and distribution

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Public Notice Requirements

- Every meeting must be preceded by **at least 24 hours notice** to the public. Wis. Stat. § 19.84 (3).
 - 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**
- Wis. Stat. § [19.84\(1\)\(b\)](#) – notice must be given to all of the following:
 - The public.
 - Any news media who have filed a written request for such notice.
 - To the official newspaper of the area.
- DHS Policy: send to DHS Notices inbox at least 5 business days before the date of the meeting.

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Public Notice Requirements

How to notify the public

- Wis. Stat. § [19.84\(1\)](#) - Notice to public may be given in one of the following ways:
 - Post in at least 3 public places likely to give notice to persons affected.
 - Post in at least one public place likely to give notice to persons affected **and** posting a notice [electronically](#).
 - By paid publication in a news medium likely to give notice to persons affected.

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Public Notice Requirements

Notice to requesting news media and official newspaper

- If news media files written request for notice, the body cannot charge a fee. [77 Op. Att'y Gen. 312](#) (1988).
- The official newspaper or news medium likely to give notice is not required to print the notice, and the body is not required to pay for publication. *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979).

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Public Notice Requirements

Content of public notice

- Wis. Stat. § [19.84 \(2\)](#) - Notice must contain:
 - Time
 - Date
 - Place
 - Subject matter
- DHS Open Meeting Notice [F-01755](#) and Instructions [F-01755A](#) on the Workweb.

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Public Notice Requirements

Content of public notice

- SCOW: description must reasonably apprise the public of the purpose of the meeting, considering these relevant circumstances:
 - 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,” “agenda revisions” or “miscellaneous business”
- If a possible closed session is anticipated, the notice must include the subject matter of the closed session.

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Public Notice Requirements

Meeting Minutes

- OML requires the body to create and preserve a record of all motions and roll-call votes at meetings. Wis. Stat. § [19.88\(3\)](#).
- DHS meets this obligation by keeping Open Meeting Minutes - [F-01922](#)
- At minimum, minutes should include:
 - Documentation of attendance
 - Summary of business addressed at the meeting
 - Motions and roll call votes of each meeting
- Submit draft minutes to DHS Notices Inbox for posting until final minutes are approved

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Open and Reasonably Accessible

- “[A]ll meetings . . . shall be **publicly held in places reasonably accessible** to members of the public and **shall be open** to all citizens at all times **unless otherwise expressly provided by law.**” Wis. Stat. § [19.81\(2\)](#).
- “‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times” Wis. Stat. § [19.82\(3\)](#).

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Open and Reasonably Accessible

Location and accessibility

- Hold meetings in property open to the public 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.

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Open and Reasonably Accessible

Remote meetings

- OML does not require all meetings be held in person.
[69 Op. Att'y Gen. 143](#)
- Video or teleconference can be acceptable.
 - But, if viewing a complex diagram or hearing significant witness testimony, it might not be reasonably accessible
- If conducting a remote meeting, include:
 - A hyperlink and any passwords to access the meeting
 - A telephone option for those without internet

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Open and Reasonably Accessible

Remote meetings – special considerations

- Additional accommodations to consider:
 - No internet or phone access
 - Deaf or hard of hearing
- Conduct of remote meetings:
 - Encourage whoever is speaking to identify themselves
 - Limit speaking over one another
- Recordings not required, but can help ensure access if you record and post online afterward.

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Open and Reasonably Accessible

Citizen participation – public comment

- 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 notice**
- During public comment period, the body:
 - **May** receive information and discuss any subject raised by the public
 - **May not** take any formal action
- Wis. Stat. §§ [19.83\(2\)](#), [19.84\(2\)](#).

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Open and Reasonably Accessible

Citizen participation - recording

- Wis. Stat. § [19.90](#)
 - Body must also make reasonable efforts to accommodate anyone who wants to film, record, or photograph the session.
 - But recording or photographing the session cannot disrupt the meeting.

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Open and Reasonably Accessible

Voting

- Unless specifically allowed by law, secret ballots not permitted.
- Any member of the body can request a roll call vote.
- All motions and roll call votes must be recorded, preserved, and available for public inspection.

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Closed sessions

- Closed sessions are permitted only in 11 specific circumstances (“exemptions”) contained in Wis. Stat. § [19.85\(1\)](#).
- **Presumption that meeting should be held in open session, and exemptions are limited and narrowly read.**

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Closed sessions (continued)

- All meetings must begin in open session.
- Motion to go into closed session must pass a vote.
- Before going into closed session:
 - Presiding officer must announce the statutory basis for the closed session and the business that will be considered
 - A motion to go into closed session must be made and carried, with each member’s vote recorded in the minutes.
- Discussion in closed session is limited to the specific business for which the closed session was authorized.

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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.

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Public Records Law

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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.”**
- There's a presumption that everything created or maintained by a governmental entity is a public record.
- Wis. Stat. §§ [19.31-19.39](#)

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Overview

- 1 PRL Terminology
- 2 What is a Public Record?
- 3 Receiving a Public Records Request
- 4 Processing a Public Records Request

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PRL Terminology

Key individuals under in the PRL

- **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.

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PRL Terminology

"Record"

- **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.**" Wis. Stat. § [19.32\(2\)](#).

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What is a Public Record?

- Not everything a public official or employee creates is a public record subject to disclosure.
- Be mindful of the presumption that everything created or maintained by a governmental entity is a public record.

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What is a Public Record?

- A “record” under the PRL includes:
 - Materials not created by the authority, but in the authority’s possession.
 - Contractor’s records.
 - Electronic records:
 - ♦ Data in a database
 - ♦ Emails
 - ♦ Audio and video
 - ♦ Social media.

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What is a Public Record?

Exceptions

- By statute, **exceptions are not a “record.”**
- If it meets an exception, disclosure likely not required.
- **Exceptions are construed *narrowly***

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What is a Public Record?

Exceptions

- **Notes** – kept for personal use and used to refresh recollection at a later time.
 - E.g., your personal notes from this meeting
- **Drafts** prepared for originator's *personal use*.
 - 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.

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What is a Public Record?

Exceptions, continued

- **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.**

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Receiving a Public Records Request

The PRR, generally

- In order to be **sufficient**, the PRR must:
 - Reasonably describe the information or records requested.
 - Be reasonably specific as to time or subject matter.
- The custodian should not have to guess what the requestor wants.

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Receiving a Public Records Request

The form of the PRR

- **Verbal or in writing**
 - If a request is made in writing, response must be as well.
 - If a verbal request is made, best practice to summarize verbal request and confirm in writing
- “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 under PRL

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Receiving a Public Records Request

Rights of the requester

- **Inspection**
 - Requester may choose to inspect a record.
 - Must provide facilities for inspection.
 - Reasonable restrictions may be imposed.
- **Copies**
 - Requester entitled to a copy of the record.
 - Custodian may decide whether the requester can copy the record or if agency will do so.
 - Must provide facilities for copying.

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Processing a Public Records Request

Process, generally

- After receipt of PRR, forward to the authority's records custodian.
- The authority then begins a search for any responsive records that are subject to disclosure
- If a record exists, presumption that record will be disclosed unless:
 - Exempt from disclosure
 - Withheld or redacted under the balancing test

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Processing a Public Records Request

Process, generally continued

- **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

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Processing a Public Records Request

No record/denial

- 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.
 - If challenged via mandamus, the court will examine the sufficiency of the reasons stated in the letter.

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Processing a Public Records Request

Record Exists

- **Reminder: *content*, not format, controls.**
- 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 to determine whether record should be disclosed.

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Processing a Public Records Request

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.

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Processing a Public Records Request

Disclosure exempt by law

- Some records exempt from disclosure by state or federal statutes
 - Health care services review records under § 146.38
 - 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!**

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Processing a Public Records Request

The balancing test

- When a record is requested, the record exists, and access isn't expressly required or exempt, 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.

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Processing a Public Records Request

Redaction

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

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Processing a Public Records Request

Electronic records

- Is the request 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?

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Closing thoughts

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Closing thoughts

- OML and PRL issues can be complex and fact specific – analysis of all relevant facts necessary
 - **On close questions, courts will prefer an interpretation of the law that favors open government.**
- The appearance of impropriety can be as damaging as actual misconduct – always err on the side of caution.
- More guidance from the Office of Open Government at <https://www.doj.state.wi.us/office-open-government/office-open-government-resources>