

## Central Sands Groundwater County Coalition (CSGCC)

December 9, 2019, 1:30 pm

Hancock Agricultural Research Station  
N3909 County Rd V, Hancock, WI

1. Convene as full group
2. Introductions
3. Action Item – CSGCC Organizational structure – Discuss and Develop  
    Invited guests/co-facilitators  
        Nathan Sandwick, Community Development Educator - Portage County  
        UW – Madison Extension  
  
        Daniel Foth, Local Government Specialist  
        UW – Madison Local Government Center
4. Groundwater-related updates
  - a. New nitrogen in drinking water videos – Wisconsin's Green Fire  
<https://wigreenfire.org/nitrate-waters-and-health-videos/>
  - b. Other
5. Agenda items for next meeting
6. Schedule next meeting
7. Convene as workgroups
  - a. Communication (large conference room)
  - b. Technical (large conference room)
  - c. Supervisors (meeting room downstairs)
8. Adjourn



## Electronic Meetings

*Dan Hill, Local Government Specialist  
January 2014*

*This Fact Sheet is part of a series of publications produced by the UW-Extension's Local Government Center. More information about open government and open meetings laws, as well as a variety of other topics, can be found on our website, <http://lgc.uwex.edu>.*

### Introduction

As technology advances and becomes more economical and more accessible, local government officials consider the appropriate use of telecommunications for their participation in the meetings of local governmental bodies. Conducting meetings electronically—via phone conference, webinar, or videoconference—has many advantages. It saves money, participation is convenient, it allows for participation by those who otherwise could not attend, scheduling is easier, and the meeting can be archived with the press of a button.

Electronic meetings can present issues for participants, however. Problems with the technology that occur during the meeting could prevent meaningful participation. There may be training needed for all members to use the technology properly to allow for effective participation in the proceedings. Chairing an electronic meeting takes different skills than those needed in a face-to-face meeting. Key messages that are communicated through body language and voice intonation are lost during an electronic meeting, thus increasing the likelihood for miscommunication. Finally, participants in electronic meetings miss out on the bonding and relationship building that occurs during meetings when everyone physically attends.

### Wisconsin Open Meetings Law Implications

Beyond the advantages and disadvantages of electronic meetings, officials must also weigh the implications of Wisconsin's open meetings law on participating in meetings of governmental bodies through electronic media. The intent of the open meetings law is captured in its first two paragraphs:

**§19.81(1)** *In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.<sup>1</sup>*

**§19.81(2)** *To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to*

<sup>1</sup> Wis. Stat. §§ 19.81(1)

*members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.<sup>2</sup>*

## Attorney General's Opinions

As long ago as 1980, the Wisconsin Attorney General issued an opinion stating that teleconference calls are acceptable, but are not the most desirable way to conduct a meeting of a governmental body and should be used sparingly, while keeping in mind the intent of the open meetings law.<sup>3</sup> The opinion makes several critical points.

Just because the members of a governmental body participating in a conference call are not in the same room together, does not mean that they are not convened. The Attorney General notes that to argue otherwise would allow members of a governmental body to circumvent the law merely by conducting their business via any number of electronic media.

The opinion also states that if the public and the media can effectively monitor the proceedings, then a teleconference may be considered to provide reasonable access. Important here is that the public and media have the same access to the discussion as the members of the governmental body who are participating in the meeting. A meeting conducted via electronic equipment that did not allow for the public and the media to effectively monitor the proceedings would not be in compliance with the law.

The Attorney General identifies a number of specific kinds of meetings that would be inappropriate for teleconferences. The list includes, hearings that require public input, settings where seeing the demeanor or body language of someone giving testimony might be important, and when complex plans, drawings, and charts are displayed and explained.

This 1980 opinion also cites an earlier Attorney General opinion<sup>4</sup>, in which the Attorney General provides this broad caution: *The test to be utilized is whether the meeting place is "reasonably accessible," and that is a factual question to be determined in each case.*

Interestingly, the opinion notes that electronic meetings that are properly conducted have the potential to make meetings *more* accessible to the public than the traditional meeting held in a single location where members of the governmental body are physically present. For example, this could be the case if the meeting were conducted with multiple public listening sites.

## Guidance for Local Government

Of course, in 1980, the Attorney General could not have envisioned the advances in video-conferencing technology. The opinion only referred to meetings conducted via audio teleconference. Nevertheless, it seems clear that, no matter what technology they employ, local units of government should use electronic means only sparingly to conduct meetings, and only when the technology does not interfere with the public's right to effectively monitor the proceedings. Local government bodies who choose to meet via electronic technology should keep these points in mind.

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<sup>2</sup> Wis. Stat. §§ 19.81(2)

<sup>3</sup> 69 Op. Att'y Gen. 143-146 (1980)

<sup>4</sup> 67 Op. Att'y Gen. 126 (1978)

## Need for a Special Local Rule

Units of government anticipating that they may need to meet electronically should adopt a local rule that would authorize the body and its committees to conduct meetings electronically. Most local units of government in Wisconsin have adopted Robert's Rules of Order, Newly Revised (RONR) as their parliamentary authority. RONR does not authorize electronic meetings, unless they are authorized in the bylaws<sup>5</sup>, thus the need for the unit of government to adopt its own local rule. (Note: There is no statute that allows a member to *demand* the right to participate electronically. It is a request, subject to the established local rule.) If a governmental body adopts a local rule authorizing electronic participation in meetings, the body should also consider adopting additional rules that address member participation. Among these additional rules might be:

- How the governmental body will respond to a request of a member(s) to participate electronically in a meeting. Who responds to the request—the chair, the clerk? How far in advance of the meeting must the request be made?
- The criteria to be used to allow electronic participation. Only to be used to establish a quorum? Only one member of the body? Only emergency/special situations, or is a member who spends winter months in Arizona allowed to participate monthly?
- Any limits on electronic participation.

## Limits on Who Connects Electronically

If all members of a governmental body are in separate locations and attend a meeting via speaker phones, it is hard to imagine that a citizen attending the meeting would be able to truly monitor which governmental body member was speaking and how each voted on an issue of concern to that citizen. In this example, one could question whether the meeting was reasonably accessible to members of the public and whether the public had the fullest and most complete information regarding the affairs of government.

If only one member of the governmental body calls into the meeting and the remaining members are physically located in the same room communicating with the remote member via a speaker phone, the public could more easily monitor the proceedings. It would be clear to all attending who was speaking at the other end of the conference line. In this scenario, it is more likely that the public would have reasonable access to the proceedings.

## Meeting Management

**Need for a Physical Meeting Location.** When a meeting will be held electronically a central meeting place must also be identified where members of the governmental body and the public may gather.

**Simultaneous Participation.** The format chosen for the electronic meeting should provide for communication by all of the members at the same time, just as though all the members were present in the same room.

**Obtaining the Floor.** For small boards and committees meeting face-to-face in a single location, obtaining permission to address the body rarely becomes an issue. Members rely on

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<sup>5</sup> Robert, Henry M. *Robert's Rules of Order, Newly Revised*. (2011) 11<sup>th</sup> Edition. p 97. Philadelphia: DaCapo Press.

body language and other cues to note when another member wants to speak and when it is appropriate to speak. These cues are not apparent during electronic meetings, so the presiding officer should let the members know what they should do to obtain the floor.

**Quorum.** Business cannot be conducted during a meeting of a local governmental body unless a quorum is present. The presiding officer will need to identify ways to assure that a quorum is achieved and maintained throughout the meeting.

**Voting.** Voice votes, the most common method of voting among local units of government in Wisconsin, can be confusing when taken during a teleconference meeting. It is nearly impossible to determine if a quorum has voted. It is also difficult to determine how many votes were in favor of the motion and the number opposed. When meeting electronically, the preferred method of voting, albeit a bit slower, is the roll call vote.

**Closed Sessions.** Closed sessions present another layer of challenges. Officials who meet electronically and need to move into executive session will need to have procedures in place to ensure that unwelcome guests cannot enter or remain in the closed session. Once the body returns to open session from the closed session, non-participants must have a way of being notified that they are welcome to rejoin the meeting.

### **Choose Appropriate, Reliable Technology**

**Glitches.** Often, the local officials choose to meet electronically because it allows the body to achieve a quorum that might not otherwise have been achieved. This may occur on small boards or committees if a member suffers an injury that limits travel or a member has to leave town unexpectedly. The members of the governmental body who decide that they want to meet in this fashion will certainly want to have confidence that the equipment will operate properly throughout the meeting. They may decide that it is better to employ a tried and true technology, such as an audio conference, versus a more advanced technology, like a webinar, that without good internet access might fail during the meeting. A technology that becomes inoperable could result in a loss of a quorum when the remote member became disconnected, thereby defeating the original purpose for convening the meeting electronically. It is advisable for the governmental body to have a backup plan in place in the event that a technical problem occurs during the meeting.

**Volume.** Equipment chosen to broadcast to the public should be sufficient to make the speaker's voice heard in the rear of a crowded meeting room. Certain mobile phones may be inaudible to the public attending the meeting and thus limit their access to the proceedings.

**Visibility.** Visibility could become an issue that interferes with the public's access rights if the device in the meeting room does not display images that allow the public to monitor the proceedings. A meeting held via video conference, for example, could present a monitoring problem for the public if the size of the screen in the meeting room is too small or provides insufficient clarity.

## **Conclusion**

While the Attorney General has opined that teleconferences may be conducted in such a way as to comply with the open meetings law, local government officials would do well to use electronic

media sparingly and cautiously. Meetings of governmental bodies that connect members via teleconferences, videoconference, or webinars should be extraordinary occurrences, rather than the ordinary. At the very least, a local rule should be adopted for fair, consistent, and effective use of electronic communications for meetings.

## **Acknowledgments**

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Local  
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# FACT SHEET NO. 1

## *Open Government*

# Wisconsin Open Meetings Law

*Revised by Philip J. Freeburg, J.D., Local Government Educator,  
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February 2018*

## **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>

Notice can be given by posting notice in places where the public is likely to see it; a minimum of three places is recommended.<sup>32</sup> The Open Meetings Law does not require paid published newspaper notices, 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>33</sup> Posting online is a good supplement to other methods, but it is not recommended as a substitute for other means of notice to the public.<sup>34</sup> Recent legislation allows publishing legal notices on the governmental body's website; however, it did not change the requirement that notice "be given in a manner reasonably likely to apprise the public," and the policy favoring full and complete information (See Wis. Stat. § 985.02 regarding electronic posting of legal notices).

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 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 county 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 business 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>

## **Penalites & 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> 66 Op. Att'y Gen. 230, 231 (1977); *Martin v. Wray*, 473 F. Supp. 1131, 1137 (E.D. Wis. 1979).

<sup>33</sup> *Open Meeting Law Compliance Guide*, p. 14 (2018).

<sup>34</sup> *AG-Peck Informal Correspondence*, April 17, 2006.

<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).



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- <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).