

WISCONSIN OPEN MEETINGS LAW

§§19.81-19.98, *Wisconsin Statutes*

POLICY

§19.81

- A. Declaration.** The legislature declares that state policy is to
1. 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.”
 2. ensure that meetings of governmental bodies are held in places reasonably accessible to the public.
 3. ensure that such meetings are open to the public unless otherwise expressly provided by law.

B. Interpretation. The Open Meetings Law is to be “liberally construed” (i.e. broadly interpreted) to achieve the purpose of open government. (The rule that penal statutes are strictly construed applies only to the enforcement of forfeitures under the law.)

DEFINITIONS; COVERAGE

A. “Governmental bodies” subject to the Open Meetings Law

1. State & local bodies. 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. §19.82(1). At the local level, bodies covered include school boards, county, village and town boards, city councils, and all their committees, commissions and boards. The term “rule or order” has been broadly interpreted by the attorney general to include formal and informal directives by a governmental body or officer that sets up a body and assigns it duties¹. §19.82(1). The term would include resolutions.

2. Governmental & quasi-governmental corporations; other bodies. In addition to the above, the term “governmental body” under the law includes governmental and quasi-governmental corporations and certain other specified entities. §19.82(1). A governmental or quasi-governmental corporation includes corporations created by the legislature or by other governmental bodies under statutory authorization². A quasi-governmental corporation is subject to the law, even though it was not created by a governmental body, if it has the attributes of a governmental corporation³. However, merely serving a public purpose and receiving more than 50% of its funding from a public source do not in themselves make a corporation a “quasi-governmental corporation.” But when a corporation, such as a local economic development corporation, performs public duties and sufficiently exhibits the characteristics of a governmental corporation, then it falls under the law⁴.

3. Special and advisory bodies. Special study committees and other advisory committees set up by a local officer, the local governing body or by a body it has created are also subject to the law⁵.

4. Collective bargaining. A local governmental body conducting collective bargaining is not subject to the law. However, 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. §§19.82(1) & 19.86.

B. “Meetings” under the Open Meetings Law

1. Definition. 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. §19.82(2). The courts apply a *purpose test* and a *numbers test* to determine if a meeting occurred⁶.

2. Purpose & numbers tests

a. Purpose test. This test is met when discussion, information gathering or decision-making takes place on a matter within the governmental body’s jurisdiction. This test is met even if no votes are taken; mere discussion or information gathering satisfies the test. Notice is therefore required if the *numbers test* is also met.

b. Numbers test. This test is met when there are enough members to determine the outcome of an action. If the *purpose test* is also met, then a meeting occurs under the law. The numbers test may be met if fewer than one-half of the members of the body are present—if such number can determine the outcome. This is called a “negative quorum.” For example, since amending an adopted municipal budget requires a two-thirds vote, a meeting occurs when one-third plus one of the members meet to discuss the matter⁷. (This number can block the required two-thirds vote to pass a budget amendment.)

3. “Walking quorums”; telephone calls; email. A series of gatherings of members of a governmental body may cumulatively meet the numbers test, making a “walking quorum” in violation of the Open Meetings Law if the purpose test is also met⁸. Telephone conference calls among members, when the two tests are met, qualify as meetings, and must be held in such manner as to be accessible to the public, as with use of an effective speaker system⁹. (Telephone conference meetings should be used rarely, and preferably held only after seeking the advice of legal counsel.) A “walking quorum” by successive telephone calls is also subject to the law. Email messages could also be construed to qualify as a meeting of a governmental body, but this method of communicating raises numerous issues under the law concerning such matters as public accessibility and inadvertently meeting the numbers test. The state attorney general discourages members of a governmental body from communicating with each other in this fashion about issues under the body’s authority¹⁰.

4. Multiple meetings. A meeting under the law may occur when a sufficient number of members of one governmental body attend the meeting of another body to gather information about a subject over which they have responsibility. Unless the gathering of the members is by chance, a meeting should be noticed for both bodies¹¹.

5. Certain gatherings not meetings. Chance gatherings, purely social gatherings, and joint attendance at conferences, where the *numbers test* is met, are not meetings if business is not conducted (that is, if the *purpose test* is not met). §19.82(2).

6. Presumption of a meeting. If one-half or more of the members of a governmental body are present, a statutory presumption exists that there is a meeting. This presumption can be overcome by showing that the *purpose test* was not met or that an exception applied. §19.82(2).

7. Town & drainage board exceptions. Limited exceptions to when a “meeting” occurs under the Open Meetings Law have been created for *town boards*, *town sanitary commissions* and *drainage boards* gathering at certain sites. §19.82(2).

a. Exception. The town board may gather at the site of a public works project or highway, street or alley project approved by the board for the sole purpose of inspecting the work, without following the usual notice, accessibility and other requirements under the Open Meetings Law. §60.50(6).

b. Notice. To come under this exception, the town board chairperson or designee must notify news media by telephone or fax of the upcoming inspection, if the media have filed a written request for notice of “such inspections in relation to that project.”

c. Report. After the inspection, the town board chairperson or designee must submit a report describing the inspection at the next town board meeting.

d. Prohibition on taking action. No town board action may be taken at the inspection site.

e. Sanitary commissions & drainage boards. The same exception and requirements apply to town sanitary commissions gathering at one of their public works projects, with the notice and reporting duties performed by the commission president or designee. §60.77(5)(k). A similar provision applies to drainage district boards gathering at specified sites. §88.065(5)(a).

NOTICE & ACCESS

A. Accessibility. The place of meeting must be reasonably accessible to the public, including persons with disabilities. §19.82(3). Accordingly, the facility chosen for a meeting must be sufficient for the number of people reasonably expected to attend¹².

B. Public notice; posting. Public notice is required for every meeting of a governmental body. §§19.83 & 19.84. This notice may be accomplished by posting in places likely to be seen by the public; a minimum of three locations is recommended¹³. The notice requirements of other applicable statutes must be followed. Although paid, published newspaper notices are *not* required by the Open Meetings Law, other specific statutes may require them¹⁴. §19.84. If notices are published, posting is still recommended.

C. Notice to media. Notice must be provided to news media who have requested it in writing. §19.84(1)(b). Notice may be given in writing, by telephone¹⁵, voice mail, fax or email. Written methods are preferable because they create a record that can be used to show compliance with this notice requirement. Notice must also be provided to the governmental unit’s official newspaper, or, if there is no official newspaper, it must be sent to a news medium likely to give notice in the area.

D. Notice of certain disciplinary & employment matters. Actual notice must be given to an employee or licensee of any evidentiary hearing or meeting at which final action may be taken at a closed session regarding dismissal, demotion, licensing, discipline, investigation of charges or the grant or denial of tenure. §19.85(1)(b). The notice must contain a statement that the affected employee or licensee has the right to demand that such hearing or meeting be held in open session.

E. Timing of public notice. At least a 24-hour notice of a meeting is required; however, if 24 hours is impossible or impractical for good cause, a shorter notice may be given, but in no case may the notice be less than 2 hours. §19.84(3). This “good cause” provision allowing short notice should be used sparingly and only when truly necessary.

F. Separate public notice required. A separate notice for each meeting is required. §19.84(4). A general notice of a body’s upcoming meetings is not sufficient¹⁶.

G. Public notice contents

1. Items shown. Notice must specify the time, date, place and subject matter of the meeting. §19.84(2).

2. Specificity. The notice must be “reasonably likely to apprise members of the public and the news media” of the subject matter of the meeting. §19.84(2). In other words, the notice must be specific enough to let people interested in a matter know that it will be addressed.

3. Anticipated closed session. If a closed session on an item is anticipated, notice of such item and closed session must be given, and the statutory citation allowing closure should be cited. §19.84(2).

4. Consideration limited. Consideration of matters in open and closed session is limited to the topics specified in the notice, except as noted in 5. §§19.84(2) & 19.85(1)(intro.).

5. Public comment. The notice may provide for a period of “*public comment*.” During this period the body may receive information from members of the public and discuss such matters (but may not take action on them unless properly noticed). §§19.83(2) & 19.84(2).

H. Openness; recording & photographing. Meetings must be open to all persons, except when closed for a specific purpose according to law (see following heading). §§ 19.81(2) & 19.83(1). In addition, the governmental body meeting must make a “reasonable effort to accommodate” persons wishing to record, film or photograph the meeting, provided that such acts do not interfere with the meeting or the rights of participants. §19.90.

PERMITTED EXEMPTIONS FOR HOLDING CLOSED SESSIONS

A. Policy; strict construction of exemptions. The Open Meetings Law generally declares that it is state policy to provide the public with “the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business,” and that the law must be interpreted liberally to achieve this purpose (except for the forfeiture provisions, which are interpreted strictly). §19.81(1) & (4). The law further provides that sessions must generally be open to the public. §19.83(1). In light of these provisions, the exemptions in §19.85 that allow closed sessions must be interpreted strictly and narrowly, rather than broadly¹⁷. Any doubt as to the applicability of an exemption or, if an exemption applies, the need to close the session should be resolved in favor of openness. A closed session may be held only for one or more of the 13 specified statutory exemptions to the requirement that meetings be held in open session. The following 7 exemptions (B—J) are of interest to local government bodies.

B. “Case” deliberations. Deliberating on a case which was the subject of a quasi-judicial hearing. §19.85 (1)(a). Note: this exemption should seldom be used in light of the narrow judicial interpretation given to it¹⁸.

C. Employee discipline; licensing; tenure. Considering dismissal, demotion, licensing, or discipline of a public employee or licensee, the investigation of charges against such person, considering the grant or denial of tenure, and the taking of formal action on any of these matters. The employee or licensee may demand that a meeting that is an evidentiary hearing or a meeting at which final action may be taken under this exemption be held in open session. Employees and licensee must be given actual notice of such hearing or meeting and their right to demand an open session. §19.85 (1)(b). If this demand is made, the session must be open.

D. Employee evaluation. Considering employment, promotion, compensation or performance evaluation data of an employee. §19.85 (1)(c).

E. Criminal matters. Considering specific applications of probation or parole, or strategy for crime prevention or detection. §19.85 (1)(d).

F. Purchases; bargaining. Deliberating or negotiating the purchase of public property, investment of public funds, or conducting other specified public business when competitive or bargaining reasons require a closed session. §19.85 (1)(e).

G. Burial sites. Deliberating on a burial site if discussing in public would likely result in disturbance of the site. §19.85 (1)(em).

H. Damaging personal information. Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons, except where the subject's right to open the meeting (item C above) applies. This exemption may be used only if public discussion would be likely to have a *substantial adverse effect* on the reputation of the person involved. §19.85 (1)(f). Note that this exemption applies to "specific persons" rather than the narrower class of public employee or licensees (item C above.)

I. Legal consultation. Conferring with legal counsel about strategy regarding current or *likely* litigation. §19.85 (1)(g).

J. Confidential ethics opinion. Considering a request for confidential written advice from a local ethics board. §19.85 (1)(h).

CONDUCTING PERMITTED CLOSED SESSIONS

A. Public notice. Notice of a contemplated closed session must describe the subject matter and should specify the specific statutory exemption(s) allowing closure. §19.84(2) & 19.85(1).

B. Convening in open session. The body must initially convene in open session. §19.85(1)(intro.).

C. Procedure to close. To convene in closed session, the body's presiding officer must announce in open session, prior to the vote, the nature of the business to be considered in closed session and the specific statutory exemption(s) allowing closure. This announcement must be made part of the record. A motion to go into closed session must be made and a vote taken so

that the vote of each member can be determined. §19.85(1)(intro.). The motion, second and vote must likewise be made a part of the record.

D. Limits on reconvening in open session. Once a body convenes in closed session it may not reconvene in open session for at least 12 hours, *unless* public notice of its intent to return to open session was given in the original notice of the meeting. §19.85(2).

E. Unanticipated closed session. The body may go into an unanticipated closed session, if the need arises, on an item specified in the public notice¹⁹. In such case, the closed session item should be placed at the end of the agenda because the body cannot reconvene in open session without having given prior public notice. This provision on unanticipated closed sessions is very narrow. Whenever time allows, the 24-hour notice provision must be followed, or, at a minimum, when there is good cause, the 2-hour notice can be used to give an amended notice of the meeting indicating a closed session on an item that was not previously anticipated.

F. Recording actions. As with open sessions, motions and votes made in closed session must be recorded. §19.88. Whenever feasible, votes should be taken in open session.

G. Matters considered. The body may consider only the matter(s) for which the session was closed. §19.85(1)(intro.).

VOTING & RECORDS

A. Requiring recording of each member's vote. A member of a governmental body may require that each member's vote be ascertained and recorded. §19.88(2).

B. Recording votes; Public Records Law applicability. In general, motions, seconds and any roll call votes must be recorded, preserved and made available to the extent prescribed in the Public Records Law (§§19.32-19.39). §19.88. Vote results, even if not by roll call, should likewise be recorded. Certain statutes may require that each member's vote be recorded. For example, motions, seconds and the votes of each member to convene in closed session must be recorded. §19.85(1). In addition, various provisions outside of the Open Meetings Law require keeping minutes of proceedings²⁰.

C. Narrow secret ballot exception. Although secret ballots are generally prohibited under the Open Meetings Law, a narrow exception allows a governmental body to use secret ballots to elect the body's officers. §19.88(1). For example, a city council may so elect its president and a committee may so elect its chair (unless the chair is otherwise designated). This narrow exception does not allow secret balloting to fill offices of the governmental unit, such as vacancies in the office of chief executive officer or on the governing body.

SUBUNITS

§19.84(6)

A. Definition. Subunits are created by the parent body and consist only of members of the parent body²¹.

B. Applicability of Open Meetings Law; exceptions

1. Generally, meetings of subunits are subject to the advance public notice requirements of the law.
2. However, a subunit, such as a committee of a governing body, may meet without prior public notice during the parent body's meeting, during its recess or immediately after the meeting to discuss noticed subjects of the parent body's meeting.

C. Procedure. To allow the subunit to meet without prior public notice, the presiding officer of the *parent body* must publicly announce the time, place and subject matter (including any contemplated closed session) of the subunit in advance at the meeting of the parent body.

D. Attendance at closed sessions. Members of the parent body may attend closed sessions of a subunit unless the rules of the parent body provide otherwise. §19.89.

PENALTIES & ENFORCEMENT

§§19.96 & 19.97

A. Coverage. All members of a governmental body are subject to the law's penalty provisions. E.g., if a committee consists of two governing body members and one citizen member, the law applies to the citizen member just as it does to the other members.

B. Penalties; liability

1. Forfeitures; personal liability. Forfeitures (\$25-\$300) can be levied against governmental body members who violate the Open Meetings Law. No reimbursement for forfeitures is allowed.

2. Voiding actions. A court may void any actions taken by the governmental body at a meeting in violation of the Open Meetings Law.

3. Prevention & self-protection. Media and persons unhappy with actions of the body are the ones most likely to bring complaints of Open Meetings Law violations. Members can prevent problems by making sure, at the beginning of a meeting, that the meeting was properly noticed. Members should also be sure that topics considered were specified in the notice (unless they are brought up under the public comment agenda item²²) and that proper procedures for closed meetings are followed. Useful protection can come from a clerk's log documenting proper notice, particularly when shorter notice is given or the notice is amended. Members can protect themselves from personal liability by voting to prevent violations, such as by voting against going into an improper closed session. However, if a meeting goes forward over a member's motion or vote in objection, the objecting member may still participate in the meeting.

C. Bringing an enforcement action. A person may file a verified complaint (see following heading) with the district attorney (DA) to enforce the Open Meetings Law. If the DA does not begin an action within 20 days, the person may bring the action and receive actual costs and reasonable attorney fees if he or she prevails. The attorney general (AG) may also enforce the law, but these matters are almost always viewed as local matters, for the DA to enforce, rather than of statewide concern appropriate for the AG.

REFERENCE & ADVICE

Refer to §§19.81-19.98 of the *Wisconsin Statutes* for the specific wording of the law; the statutes may be accessed on the internet at <http://folio.legis.state.wi.us/>. Advice on the Open Meetings

Law is available from the county corporation counsel, municipal attorney or the Wisconsin Department of Justice. *Wisconsin Open Meetings Law, A Compliance Guide (2001)*, by the Wisconsin Department of Justice, may be found on the internet at <http://www.doj.state.wi.us/dls/spar.asp>. This guide contains a copy of a verified complaint. The Local Government Center has videotapes on the law, available through county Extension offices. On the internet, go to <http://www.uwex.edu/lgc/>, click on “Publications” and scroll down to “Video Tapes” for information on ordering.

¹ 78 *Op. Att’y Gen.* 67 (1989).

² 66 *Op. Att’y Gen.* 113 (1977).

³ 80 *Op. Att’y Gen.* 129 (1991).

⁴ In 80 *Op. Att’y Gen.* 129 (1991), the attorney general opined that the Milwaukee Economic Development Corporation was a “quasi-governmental corporation” under the law. It was created by two private citizens and a public employee. Factors important in the determination included: the bylaws required 4 of 9 directors to be city officials; the city appointed the corporation’s officers; and the corporation was located in a city building, used city equipment and was staffed by city employees.

⁵ *State v. Swanson*, 92 Wis.2d 310 (1979), 78 *Op. Att’y Gen.* 67 (1989).

⁶ *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 102 (1987); *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis.2d 553 (1993).

⁷ This was the situation in the *Showers* case, above.

⁸ *Showers*, 135 Wis.2d at 92, 100 (quoting *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 687 (1976)).

⁹ 69 *Op. Att’y Gen.* 143 (1980).

¹⁰ See the *Compliance Guide*, p. 6, cited above under “Reference & Advice.”

¹¹ *Badke*, 173 Wis.2d 553, 561.

¹² *Badke*, 173 Wis.2d 553, 580-81.

¹³ 66 *Op. Att’y Gen.* 93 (1977).

¹⁴ 66 *Op. Att’y Gen.* 230, 231 (1977); *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979).

¹⁵ 65 *Op. Att’y Gen.* Preface (1976).

¹⁶ 63 *Op. Att’y Gen.* 509 (1974).

¹⁷ *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 70 (1993).

¹⁸ See *Hodge*, above.

¹⁹ 66 *Op. Att’y Gen.* 106 (1977).

²⁰ See, e.g., §§59.23(2)(a), 61.25(3) & 62.09(11)(b) requiring county, village and city clerks to keep a record of proceedings of their respective governing bodies.

²¹ 74 *Op. Att’y Gen.* 38 (1985).

²² §§19.83(2) & 19.84(2). See brief discussion under “Notice & Access” at F. 5.

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