CITY OF JANESVILLE
Wisconsin's Park Place

SOCIAL MEDIA USE POLICY

PURPOSE

To address the fast-changing landscape of the Internet and the way citizens communicate and obtain information online, City of Janesville Departments/Divisions/Offices may consider using social media technologies. Where appropriate, the use of social media technologies in work-related activities, events, and announcements is encouraged to enhance customer service, increase citizen involvement, and to further the goals of the organization.

The City Manager has an overriding and legitimate interest and expectation in deciding what is "spoken" on behalf of the City on social media sites. It is the policy of the City that a standard for interaction with social media tools and their associated technology is hereby established.

GUIDELINES

1. All City of Janesville social media site proposals and uses are subject to prior review and approval by the City Manager's Office.
2. City social media sites are an extension of the City's communication infrastructure.
3. The City's official website (www.ci.janesville.wi.us) will remain the City's primary and predominant Internet presence.
    a. The best and most appropriate uses of social media tools fall generally into two categories:
        i. As channels for disseminating time-sensitive information as quickly as possible (e.g. emergency information, cancellations/closures).
        ii. As marketing/promotional channels that increase the City's ability to broadcast its messages to the widest possible audience (e.g. recreation programming information).
    b. Whenever reasonable, content posted to a City social media site should also be available on the City's official website.
    c. Whenever reasonable, content posted to a City social media site should contain links directing users back to the City's official website for in-depth information, forms, documents and online services necessary to conduct business with the City.
4. Social media accounts will be maintained by Authorized Users, who must be approved as an agent of the social media account by the appropriate Department/Division/Office Director and City Manager's Office.
5. Authorized Users are responsible for the content and upkeep of assigned Department/Division/Office social media sites.
6. All City social media sites and the conduct of Authorized Users shall comply with all appropriate City policies and standards.
7. City social media sites are subject to State of Wisconsin and City of Janesville public records laws. Any content maintained in a social media format that is related to City business, including a list of subscribers and posted communication, is a public record.

Content related to City business shall be maintained in an accessible format so that it can be readily produced in response to a public records request.

8. Wisconsin State law and relevant City records retention schedules apply to social media formats and their content.
9. Social media sites shall clearly indicate that any content posted or submitted for posting are subject to public disclosure.
10. The City Manager's Office reserves the right to restrict or remove any content that is deemed in violation of this Social Media Use policy, the Terms of Use Agreement, and/or any applicable law found not to be in accord with City purposes and policies, or for any other reason.
11. Any exceptions to the policy are subject to the prior review and approval of the City Manager.

RESPONSIBILITIES

CITY MANAGER'S OFFICE

- Reviews proposals for new social media accounts and grants formal approval.
- Provides counsel to Departments/Divisions/Offices as to the appropriate use of the social media tools and guidance as to the types of information that may be posted.
- Monitors content on Department/Division/Office social media accounts to ensure adherence to the guidelines in this policy. Inappropriate use may result in the removal of the content and/or page or account from these social media sites.
- Maintains credentials for social media accounts.
- Manages public records requests for information found on City social media sites through the City's record retention service.

CITY ATTORNEY'S OFFICE

- Reviews and approves any changes or additions to the Terms of Use Agreement, as requested.
- Renders opinions on matters regarding disclaimers, terms of use, and privacy concerns as they arise.
- Provides opinions on matters of public records, in accordance with any applicable federal, state, and local laws.

DEPARTMENTS/DIVISIONS/OFFICES

Establishing a Social Media Account

- Contact the City Manager's Office to discuss objectives and desired outcomes for utilizing social media and to help determine the site's effectiveness in reaching the Department's/Division/Office's communication objectives.
- Obtain prior formal approval from the City Manager's Office to proceed with any proposed social media account.
- The Department/Division/Office Director shall specify all initial Authorized Users for the project prior to establishing any social media account.
- Obtain a completed and signed Authorized User Agreement Form for each employee responsible for managing social media accounts and return signed agreement(s) to the City Manager's Office.
- Establish the social media account using a City e-mail address and provide the account user name and password to the City Manager's Office, including all subsequent modifications to credentials.

Operating and Maintaining a Social Media Account

- Include an introductory statement that clearly specifies the work-related purpose and topical scope of the social media site. The City's website link should accompany the purpose statement.
- When reasonable, social media accounts should link back to the City website for the purpose of downloading any forms, documents, and other information.
- Conspicuously post the approved Terms of Use Agreement.
- Enable features for public comments, if such capability exists, and comply with and enforce the posted Terms of Use Agreement.
- Maintain compliance with all applicable federal, state, and local laws related to public records requests and records retention.
- Authorized Users shall monitor their sites at least once each work day and update content (e.g. post, tweet) at least once each week.
- When practical and in accordance with Personnel Policy 3.04, as from time to time amended or renumbered, questions and comments received from citizens on social media should be responded to within 48 hours to better serve the public and encourage conversation on social media.
- When social media account credentials are unknown by the City Manager's Office or intentionally excluded from the archive, Department/Division/Office account holders manage public records requests for information found on social media sites.

TERMS OF USE AGREEMENT

It shall be the policy of the City that the following agreement must be conspicuously posted on each social media site established and maintained by the City, if such capability exists. The agreement will also be posted on the City's website (www.ci.janesville.wi.us) for easy access.

<u>Social Media Terms of Use Agreement</u>

While this is an open forum, please keep your comments clean and appropriate. Inappropriate comments are subject to deletion by the administrator of this account. If you do not comply with the terms of use outlined below, your message will be removed. If you post inappropriate content a second time, your profile may be blocked or banned indefinitely from posting any more information to the site. If the first violation is found to be egregious, at the discretion of the City Manager, your message will be removed and your profile may be blocked or banned immediately.

This forum is not monitored at all times. Do NOT use this forum to report emergency situations or time-sensitive issues.

Please remember the following rules when posting:

- All content is subject to public records law.
- Content should be related to the subject matter of the social media site where it is posted.
- **If your post violates any of the below rules, it will be deleted:**
    - Content that is graphic, obscene, or explicit.
    - Content that is abusive, threatening, hateful, or intended to defame anyone or any organization.
    - Content that suggests or encourages illegal activity.
    - Content that promotes, fosters, or perpetuates discrimination on the basis of race,

creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability, gender identity, sexual orientation, lawful source of income, or arrest/conviction record.
  - Content posted by persons whose profile picture or avatar, username, or e-mail address contains any of the aforementioned prohibited conduct.
  - Solicitations or advertisements, including but not limited to, promotion or endorsement of any private financial, commercial, or non-governmental agency.
  - Content attempting to defame or defraud any person or private financial, commercial, or governmental agency.
  - Content that compromises the safety or security of the public or public systems.
- You participate at your own risk and take personal responsibility for your comments, your username, and all information provided.
- The appearance of external links on this site does not constitute official endorsement by or on behalf of the City.
- Any public records request for information found on City of Janesville social media sites shall be directed to the City Clerk-Treasurer's Office.
- For more information, please contact the City Manager's Office at (608) 755-3177.

DEFINITIONS

Social Media - are forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos). This policy covers all social media tools, both current and future.

Social Media Account - shall mean any registration, login credential, tool, forum, website, or network that is created or maintained by a Department, Division, or Office for the purpose of establishing or perpetuating a social media presence.

Authorized User - shall mean any employee, and all persons acting on their behalf, who has been authorized by their Department/Division/Office Director and registered with and approved by the City Manager's Office to establish, create, edit, or maintain any social media account and the posts it may contain in the transaction of official business of the City.

Post - shall mean any e-mail, message, picture, graphic, image, advertisement, notification, feed, stream, transmission, broadcast, podcast, video, instant message, text message, blog, microblog, status update, wall post, comment, and any and all other forms, means, or attempts at collaboration or communication that is uploaded, posted to, or otherwise displayed on or transmitted by, any social media account or network.

CITY OF JANESVILLE
SOCIAL MEDIA USE POLICY - AUTHORIZED USER AGREEMENT FORM

Name: _____ Employee ID: _____

Position/Title: _____

Department: _____ Division: _____

Approved by _____

Department/Division/Office Director (Director Signature) (Date)

Approved by _____

City Manager's Office (Signature) (Date)

Social Media Site (e.g. Facebook, Twitter, etc.): _____

Account Username: _____

Account Password: _____

I agree to use City-approved social media sites for City business as appropriate and in compliance with the Social Media Use Policy. I understand that I must have prior approval from my Department and/or Division Director and the City Manager's Office to create a social media account on behalf of the City. I also understand that I am responsible for all postings made by me on City social media sites, including, but not limited to, those made in the comments sections.

I acknowledge that all City-approved social media accounts are considered to be property of the City and may be monitored. I understand that employees do not have privacy rights or interests in the use of City social media sites and the postings, data, access to, and distribution of such materials is subject to public records laws. I also agree to immediately forward all public records requests to the City Clerk-Treasurer's Office for response.

I understand that content on City social media sites shall be managed according to the Social Media Terms of Use Agreement. I agree to immediately hide or remove all content in violation of the Social Media Terms of Use Agreement.

If I identify myself as a City of Janesville employee or have a public facing position for which my City of Janesville association is known to the general public, then I will ensure my personal social media profile(s) and related content (even if it is personal and not an official nature) is consistent with how I wish to present myself as a City of Janesville employee and professional.

I agree to review the social media site at least once each work day and update the site at least once per work week.

I acknowledge that any abuse of any City social media account, including, but not limited to, violation of the rules and guidelines set forth in this Policy or in any current or future modified policy, can be grounds for disciplinary action including discharge from my employment with the City of Janesville.

_____

Printed Name Signature Date

MEDIA POLICY

Administrative Policy on Media Relations

GOAL:

The City of MUNICIPALITY intends to manage media communication with its residents, businesses and visitors by creating a Media Policy. The purpose of this policy is to identify employees who are empowered to speak for the City on significant communications in order to ensure the accurate dissemination of information. It is intended to reduce the likelihood of conflicting, unauthorized information from being released which may be inaccurate and misrepresentative. This policy applies to all employees while acting in the scope of their employment.

It is the policy of the City to foster and encourage an atmosphere of openness in dealing with the media. The release of (or dissemination of) accurate, timely information to the media and public is important not only in complying with the Open Meeting Law, but in maintaining good media relations and fostering an informed public.

The policy is not intended to address public officials. Issues concerning any elected official's contact with the media are exclusively within the purview of the City Council and are presumed to restrict any and all information discussed in closed session pursuant to ss 19.85 until it can be released.

POLICY:

1. The Mayor is the final authority for the City's media communications, with the exception of common or routine public safety issues. All city employees should notify the Mayor's Office about any non-routine media inquiry. The majority of City media requests are initiated when the media contacts a Department Head or Designee.
2. Because the media often works on tight deadlines, it is important that all departments respond as soon as possible when a request is made. Specific guidelines for responding to media requests follow. Inquiries from the news media are given a high priority by the City of Municipality. Requests for information should be responded to as effectively as possible.
    - Every effort should be made to ensure that all information released is accurate. Designated City staff should also assist the media to meet their deadlines.
    - City staff

CITY SPOKESPERSONS:

Unless otherwise authorized, the City's spokespersons are:

1. Mayor and City Council members
2. Communications Manager
3. Department Heads and/or Designees
4. City Attorney, City Clerk
5. Police Department and Fire Department Chiefs and/or Designees

6. Exceptions regarding departmental spokespersons may be made at the discretion of the Department Head with approval of the Mayor.

ROUTINE MEDIA INQUIRIES:

1. Any media inquires received by other City personnel should be referred immediately to the Department Head or Designee.

2. An appropriate response to the media is "I'm sorry I don't have the full information regarding the issue. I will give your request to my Department Head, who will respond to you as soon as he/she is available."

    - Obtain the reporter's name, phone number, topic of story and deadline.
    - Inquire if the reporter has reached out to other departments at the City
3. Before you respond, check with colleagues to see if they have received a similar call to coordinate your answer and provide the most accurate information.

SENSITIVE OR CONTROVERSIAL ISSUES:

1. All television, radio, newspaper or other media inquiries regarding sensitive or controversial issues should always be referred immediately to the employee's Department Head or Designee who will contact the Mayor and coordinate a response.

2. The Mayor and/or Department Head will designate a single spokesperson. The following are examples of <u>potential sensitive issues,</u> which should be reported immediately to the Mayor or your Department Head:

    - Controversial statements, accusations or debates occurring in meetings or advisory boards, committees, or commissions.
    - Disruptions in City services such as broken water mains, water distribution problems, power outages, transit system service delays, garbage collection, sewer system back-ups or lift station outages.
    - Personnel issues such as misconduct, suspensions, employee work stoppages, or terminations.
    - Emergencies such as fires, explosions or accidents that result in damage to City or private property, or injury or death to City personnel.
    - Industrial accidents that involve injury or death to contractor's employees or vendors doing business with the City.
    - Accidents on City property resulting in injury or death to citizens, i.e. a fall in a City building, or drowning at a city park or riverfront.
    - Pending or resolved litigation
    - Incidents involving City personnel and injury or death
        i. Police chase accident, or work vehicle traffic accident.
        ii. Police shooting
        iii. Allegations of a criminal nature

LITIGATION, PERSONNEL AND ELECTION ISSUES:

1. Generally the business conducted by the City of MUNICIPALITY is public and therefore, is public information. Inquiries regarding pending litigation, matters involving a significant exposure to litigation and certain personnel related information are exceptions. (Contact your Department Head or the City Attorney with questions regarding public information or the Open Records Law.)
2. Inquiries regarding pending litigation or exposure to litigation should be referred to the City Attorney and the Mayor.
3. Inquiries regarding personnel related information should be referred to the Human Resources Department and the Mayor.
4. Inquiries regarding election and campaign issues should be referred to the City Clerk or Deputy City Clerk. The City Clerk will contact the Mayor and City Attorney as appropriate.
5. If it appears that other City staff is likely to be interviewed as part of the same story, a post-interview briefing may be in order. Allow other staff members to be informed of what was covered in order to avoid conflicting statements.

PERSONAL POINTS OF VIEW:

1. It is recognized that all employees have the right to their personal point of view regarding any issue. However, personal points of view may conflict with official City policy.
2. City employees who write letters to the editor of any newspaper may not use official City stationery. If an employee chooses to identify himself or herself as a City employee in any personal letter or e-mail to the editor, **he or she must include a statement that the views set forth in the letter do not represent the view of the City. The letter must clearly explain that it contains the employee's personally held opinion(s).**
3. Similar disclaimers must be given if an employee addresses a public meeting, participates in a radio talk show, or is interviewed for a radio or television program, unless the employee is officially representing the City under direction of the Mayor.
4. Employees who are representing the City in any of the above formats must identify themselves as an Official Spokesperson for the City. No employee shall speak as an Official Representative of a different City Department than their own without the prior approval of that Department.
5. **City employees posting to social media sites must follow the same guidance and give the same disclaimers.**

CITY INITIATED INFORMATION:

1. City staff is encouraged to think of new and creative ways of engaging the news media, including proactively suggesting positive news coverage.

2. Proactive media contact is initiated through the Mayor and Department Heads. This includes issuing press releases and media advisories, and personal contacts with reporters and editors for non-routine news coverage.
3. Departments seeking publicity for events or activities should bring the issue to the Mayor's Staff Meeting as soon as practical to ensure the best media coverage of their activities. Departments should not initiate non-routine news media contacts before notifying the Mayor.
4. Construction or repair projects that require barricades, rerouting of traffic, detours and/or any other service interruptions should be discussed with the Department Head and passed on to the Mayor with enough lead time to get the message out and avoid any embarrassment to the City.

May 2019

Wisconsin Open Meetings Law Compliance Guide

Wisconsin Department of Justice
Attorney General Josh Kaul

Message from the Office of Open Government

It is imperative that we recognize that transparency is the cornerstone of democracy and that citizens cannot hold elected officials accountable in a representative government unless government is performed in the open.

The Wisconsin Department of Justice (DOJ) plays an important role in ensuring Wisconsin's open government laws are properly and faithfully executed by public officials. The Office of Open Government has worked to reduce DOJ's average public record response times. The office also makes available online a snapshot of all public records requests pending each week, average monthly response times for the office, and responses to public records requests that may be of public interest. DOJ responds to hundreds of inquiries every year concerning issues related to the open meetings law and the public records law, and instructs on open government at dozens of conferences, seminars, and training sessions. In these ways, the Office of Open Government provides resources and services to all state, regional, and local government entities and citizens.

Wisconsin's open government laws promote democracy by ensuring that all state, regional and local governments conduct their business with transparency. Wisconsin citizens have a right to know how their government is spending their tax dollars and exercising the powers granted by the people. This guide is a resource for everyone to understand and exercise their right to access their government.

This compliance guide may be accessed, downloaded or printed free of charge from the DOJ website, by visiting https://www.doj.state.wi.us/. Please share this guide with your constituencies and colleagues.

Records custodians and all those who perform public duties are encouraged to contact the Office of Open Government if we can be of assistance.

Office of Open Government
Paul M. Ferguson, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
Public Records/Open Meetings (PROM) Help Line: (608) 267-2220

Disclaimer

This guide provides an overview of the law and compiles information provided by DOJ in response to inquiries submitted over the course of several decades. This guide is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

This guide does not provide answers to every question that may arise regarding the open meetings law. Although this guide is updated periodically, it reflects the current law as of the date of its publication, and it may be superseded or affected by newer versions and/or changes in the law. This guide does not create an attorney-client relationship. You should consult with an attorney for specific information and advice when necessary and appropriate.

Wisconsin Open Meetings Law Compliance Guide

May 2019

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The 2019 edition of the *Wisconsin Open Meetings Law Compliance Guide* results from the efforts of the Office of Open Government, as well as the following Wisconsin Department of Justice personnel, all of whom are acknowledged and appreciated:

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POLICY OF THE OPEN MEETINGS LAW

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. The state's open meetings law declares that:

> 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.[1]

In order to advance this policy, the open meetings law requires that "all meetings of all state and local governmental bodies 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."[2] There is thus a presumption that meetings of governmental bodies must be held in open session.[3] Although there are some exemptions allowing closed sessions in specified circumstances, they are to be invoked sparingly and only where necessary to protect the public interest. The policy of the open meetings law dictates that governmental bodies convene in closed session only where holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law."[4]

The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes.[5] This rule of liberal construction applies in all situations, except enforcement actions in which forfeitures are sought.[6] Public officials must be ever mindful of the policy of openness and the rule of liberal construction in order to ensure compliance with both the letter and spirit of the law.[7]

WHEN DOES THE OPEN MEETINGS LAW APPLY?

The open meetings law applies to every "meeting" of a "governmental body."[8] The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).

Definition of "Governmental Body"

- **Entities That Are Governmental Bodies**

A "governmental body" is defined as:

> [A] state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district

[1] Wis. Stat. § 19.81(1).
[2] Wis. Stat. § 19.81(2).
[3] *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987).
[4] *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).
[5] Wis. Stat. § 19.81(4); *State ex rel. Badke v. Vill. Bd. of Greendale*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19, 278 Wis. 2d 388, 692 N.W.2d 304 ("The legislature has issued a clear mandate that we are to vigorously and liberally enforce the policy behind the open meetings law.").
[6] Wis. Stat. § 19.81(4).
[7] *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 6, 300 Wis. 2d 649, 731 N.W.2d 640 ("The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored.").
[8] Wis. Stat. § 19.83.

under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.[9]

This definition includes multiple parts, the most important of which are discussed below.

- **State or Local Agencies, Boards, and Commissions**

The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order . . . ."[10] This list of entities is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that these entities are defined primarily in terms of the manner in which they are created, rather than in terms of the type of authority they possess. Purely advisory bodies are therefore subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order.[11]

The words "constitution," "statute," and "ordinance," as used in the definition of "governmental body," refer to the constitution and statutes of the State of Wisconsin and to ordinances promulgated by a political subdivision of the state. The definition thus includes state and local bodies created by Wisconsin's constitution or statutes, including condemnation commissions created by Wis. Stat. § 32.08, as well as local bodies created by an ordinance of any Wisconsin municipality. It does not, however, include bodies created solely by federal law or by the law of some other sovereign.

State and local bodies created by "rule or order" are also included in the definition. The term "rule or order" has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties.[12] This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department, or division.[13]

Thus, for example, in *State ex rel. Krueger v. Appleton Area School District Board of Education*, the Wisconsin Supreme Court held that a curriculum committee, "created by" school board rule and given the delegated authority to review and select educational materials for the school board's approval, was subject to open meetings laws.[14]

- First, it was a "committee" under Wis. Stat. § 19.82(1), not an ad hoc gathering, because it was comprised of a defined membership of individuals selected pursuant to the procedures set forth in the school board's policy handbook, and its members were empowered to vote on how the school board should exercise its collective authority as a body.[15]

- Second, it was "created by . . . rule" under Wis. Stat. § 19.82(1), because the school board handbook policy was authorized by school board rule, thereby authorizing and enabling the

[9] Wis. Stat. § 19.82(1).
[10] Wis. Stat. § 19.82(1).
[11] *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).
[12] 78 Op. Att'y Gen. 67, 68–69 (1989).
[13] *See* 78 Op. Att'y Gen. 67.
[14] *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70, ¶¶ 27–34, 376 Wis. 2d 239, 898 N.W.2d 35.
[15] *Id*. ¶¶ 28-31.

committee to be created. The school board rule also prescribed the procedures for school district employees to follow in reviewing educational materials and presenting them to the school board for approval. Read together, the school board rule and the board-approved handbook policy therefore authorized committees like the one at issue to be created, and also authorized such committees to exercise the school board's delegated authority over curriculum review for the school district.[16]

- In so holding, the Wisconsin Supreme Court explained that it did not matter that two individual district employees decided to put the rule and handbook policy in motion to form the committee. It also did not matter that neither the school board rule nor the handbook policy had provisions that created or mentioned the committee by name. Nor did it matter that the committee deviated from the handbook's procedures in making its recommendations to the school board for a specific course's curriculum. Rather, the dispositive factor was that the school board's handbook policy authorized such review committees to be created for the purposes of reviewing curriculum materials and making recommendations to the school board for adoption.[17]

A group organized by its own members pursuant to its own charter, however, is not created by any governmental directive and thus is not a governmental body, even if it is subject to governmental regulation and receives public funding and support. The relationship of affiliation between the University of Wisconsin Union and various student clubs thus is not sufficient to make the governing board of such a club a governmental body.[18]

The Wisconsin Supreme Court or Wisconsin Attorney General have concluded that the following entities are state or local bodies that are subject to the open meetings law by virtue of having been created by constitution, statute, ordinance, resolution, rule or order:

- **State or Local Bodies Created by Constitution, Statute, or Ordinance**
  - ◊ A municipal public utility managing a city-owned public electrical utility.[19]
  - ◊ Departments of formally constituted subunits of the University of Wisconsin system or campus.[20]
  - ◊ A town board, but not an annual or special town meeting of town electors.[21]
  - ◊ A county board of zoning adjustment authorized by Wis. Stat § 59.99(3) (1983) (now Wis. Stat. § 59.694(1)).[22]
  - ◊ A public inland lake protection and rehabilitation district established by a county or municipality, pursuant to Wis. Stat. §§ 33.21 to 33.27.[23]

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[16] *Krueger*, 2017 WI 70, ¶¶ 32–34, 43.
[17] *Id*. ¶¶ 35–40.
[18] Penkalski Correspondence (May 4, 2009).
[19] 65 Op. Att'y Gen. 243 (1976).
[20] 66 Op. Att'y Gen. 60 (1977).
[21] 66 Op. Att'y Gen. 237 (1977).
[22] Gaylord Correspondence (June 11, 1984).
[23] DuVall Correspondence (Nov. 6, 1986).

- **State or Local Bodies Created by Resolution, Rule, or Order**

  - ◊ A committee created by a school board's policy handbook to review and select education materials for the board's approval.[24]

  - ◊ A committee appointed by the school superintendent to consider school library materials.[25]

  - ◊ A citizen's advisory group appointed by the mayor.[26]

  - ◊ An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director, or Property Manager of that department.[27]

  - ◊ A consortium of school districts created by a contract between districts; a resolution is the equivalent of an order.[28]

  - ◊ An industrial agency created by resolution of a county board under Wis. Stat. § 59.57(2).[29]

  - ◊ A deed restriction committee created by resolution of a common council.[30]

  - ◊ A school district's strategic-planning team whose creation was authorized and whose duties were assigned to it by the school board.[31]

  - ◊ A citizen's advisory committee appointed by a county executive.[32]

  - ◊ An already-existing numerically definable group of employees of a governmental entity, assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, when the group's meetings include the subject of the chief administrative officer's directive.[33]

  - ◊ A Criminal Justice Study Commission created by the Wisconsin Department of Justice, the University of Wisconsin Law School, the State Bar of Wisconsin, and the Marquette University Law School.[34]

  - ◊ Grant review panels created by a consortium which was established pursuant to an order of the Wisconsin Commissioner of Insurance.[35]

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[24] *Krueger*, 2017 WI 70, ¶ 27.
[25] Staples Correspondence (Feb. 10, 1981).
[26] Funkhouser Correspondence (Mar. 17, 1983).
[27] 78 Op. Att'y Gen. 67.
[28] I-10-93 (Oct. 15, 1993).
[29] I-22-90 (Apr. 4, 1990).
[30] I-34-90 (May 25, 1990).
[31] I-29-91 (Oct. 17, 1991).
[32] Jacques Correspondence (Jan. 26, 2004).
[33] Tylka Correspondence (June 8, 2005).
[34] Lichstein Correspondence (Sept. 20, 2005).
[35] Katayama Correspondence (Jan. 20, 2006).

- ◊ A joint advisory task force established by a resolution of a Wisconsin town board and a resolution of the legislature of a sovereign Indian tribe.[36]

- ◊ A University of Wisconsin student government committee, council, representative assembly, or similar collective body that has been created and assigned governmental responsibilities pursuant to Wis. Stat. § 36.09(5).[37]

- **Governmental or Quasi-Governmental Corporations**

The definition of "governmental body" also includes a "governmental or quasi-governmental corporation," except for the Bradley sports center corporation.[38] The term "governmental corporation" is not defined in either the statutes or the case law interpreting the statutes. It is clear, however, that a "governmental corporation" must at least include a corporation established for some public purpose and created directly by the state legislature or by some other governmental body pursuant to specific statutory authorization or direction.[39]

The term "quasi-governmental corporation" also is not defined in the statutes, but its definition was discussed by the Wisconsin Supreme Court in *State v. Beaver Dam Area Development Corp.* (*"BDADC"*).[40] In that decision, the court held that a "quasi-governmental corporation" does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status.[41] The court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative.[42] The factors set out by the court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation's records.[43]

In adopting this case-specific, multi-factored "function, effect or status" standard, the Wisconsin Supreme Court followed a 1991 Attorney General opinion.[44] Prior to 1991, however, Attorney General opinions on this subject emphasized some of the more formal aspects of

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[36] I-04-09 (Sept. 28, 2009).
[37] I-05-09 (Dec. 17, 2009).
[38] Wis. Stat. § 19.82(1).
[39] *See* 66 Op. Att'y Gen. 113, 115 (1977).
[40] *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295.
[41] *Id.* ¶¶ 33–36.
[42] *Id.* ¶¶ 7–8, 63 n.14, 79.
[43] *Id.* ¶ 62.
[44] *See* 80 Op. Att'y Gen. 129, 135 (1991) (Milwaukee Economic Development Corporation, a Wis. Stat. ch. 181 corporation organized by two private citizens and one city employee, is a quasi-governmental corporation); *see also* Kowalczyk Correspondence (Mar. 13, 2006) (non-stock, non-profit corporations established for the purpose of providing emergency medical or fire department services for participating municipalities are quasi-governmental corporations).

quasi-governmental corporations. Those opinions should now be read in light of the *BDADC* decision.[45]

In March 2009, the Attorney General issued an informal opinion which analyzed the *BDADC* decision in greater detail and expressed the view that, out of the numerous factors discussed in that decision, particular weight should be given to whether a corporation serves a public function and has any private functions.[46] When a private corporation contracts to perform certain services for a governmental body, the key considerations in determining whether the corporation becomes quasi-governmental are whether the corporation is performing a portion of the governmental body's public functions or whether the services provided by the corporation play an integral part in any stage—including the purely deliberative stage—of the governmental body's decision-making process.[47]

In January 2019, the Wisconsin Court of Appeals also analyzed the *BDADC* decision further, and held that, while all the non-exhaustive factors set forth in *BDADC* are relevant and no one factor is outcome determinative, a "primary consideration" is whether the private corporation is funded exclusively on public tax dollars or interest generated on those dollars.[48]

- **State Legislature**

Generally speaking, the open meetings law applies to the state legislature, including the senate, assembly, and any committees or subunits of those bodies.[49] The law does not apply to any partisan caucus of the senate or assembly.[50] The open meetings law also does not apply where it conflicts with a rule of the legislature, senate, or assembly.[51] Additional restrictions are set forth in Wis. Stat. § 19.87.

- **Subunits**

A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body.[52] If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a "subunit" subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board. Even a committee with only two members is considered a "subunit," as is a committee that is only advisory and that has no power to make binding decisions.[53]

Groups that include both members and non-members of a parent body are not "subunits" of the parent body. Such groups nonetheless frequently fit within the definition of a "governmental

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[45] *See* 66 Op. Att'y Gen. 113 (volunteer fire department organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 73 Op. Att'y Gen. 53 (1984) (Historic Sites Foundation organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 74 Op. Att'y Gen. 38 (corporation established to provide financial support to public broadcasting stations organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); Geyer Correspondence (Feb. 26, 1987) (Grant County Economic Development Corporation organized by private individuals under Wis. Stat. ch. 181 is not a quasi-governmental corporation, even though it serves a public purpose and receives more than fifty percent of its funding from public sources).
[46] I-02-09 (Mar. 19, 2009).
[47] *Id.*
[48] *State ex rel. Flynn v. Kemper Ctr., Inc.*, 2019 WI App 6, ¶¶ 14–16, 385 Wis. 2d 811, 924 N.W.2d 218.
[49] Wis. Stat. § 19.87.
[50] Wis. Stat. § 19.87(3).
[51] Wis. Stat. § 19.87(2).
[52] 74 Op. Att'y Gen. 38, 40 (1985).
[53] Dziki Correspondence (Dec. 12, 2006).

body"—*e.g.*, as advisory groups to the governmental bodies or government officials that created them.

Any entity that fits within the definition of "governmental body" must comply with the requirements of the open meetings law. In most cases, it is readily apparent whether a particular body fits within the definition. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements.

- **Entities That Are Not Governmental Bodies**

  - **Governmental Offices Held by a Single Individual**

    The open meetings law does not apply to a governmental department with only a single member.[54] Because the term "body" connotes a group of individuals, a governmental office held by a single individual likewise is not a "governmental body" within the meaning of the open meetings law. Thus, the open meetings law does not apply to the office of coroner or to inquests conducted by the coroner.[55] Similarly, the Attorney General has concluded that the open meetings law does not apply to an administrative hearing conducted by an individual hearing examiner.[56]

  - **Bodies Meeting for Collective Bargaining**

    The definition of "governmental body" explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under subchapters I, IV, or V of Wis. Stat. ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law.[57] A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining.[58] The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law, including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining.[59] The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement under subchapters I, IV, or V of Wis. Stat. ch. 111 in closed session.[60]

  - **Bodies Created by the Wisconsin Supreme Court**

    The Wisconsin Supreme Court has held that bodies created by the court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law.[61] Thus, generally speaking, the open meetings law does not apply to the court or bodies created by the court. In the *Lynch* case, for example, the court held that the former open meetings law, Wis. Stat. § 66.77(1) (1973), did not apply to the Wisconsin Judicial Commission, which is responsible for handling misconduct complaints against judges. Similarly, the Attorney General has indicated that the open meetings law does not apply to: the Board of Attorneys Professional

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[54] *Plourde v. Habhegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130.
[55] 67 Op. Att'y Gen. 250 (1978).
[56] Clifford Correspondence (Dec. 2, 1980).
[57] Wis. Stat. § 19.82(1).
[58] Wis. Stat. § 19.82(1)
[59] 66 Op. Att'y Gen. 93, 96-97 (1977).
[60] Wis. Stat. § 19.85(3).
[61] *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976).

Responsibility;[62] the Board of Bar Examiners;[63] or the monthly judicial administration meetings of circuit court judges, conducted under the authority of the court's superintending power over the judiciary.[64]

- **Ad Hoc Gatherings**

Although the definition of a governmental body is broad, some gatherings are too loosely constituted to fit the definition. Thus, *Conta* holds that the directive that creates the body must also "confer[] collective power and define[] when it exists."[65] *Showers* adds the further requirement that a "meeting" of a governmental body takes place only if there are a sufficient number of members present to determine the governmental body's course of action.[66] In order to determine whether a sufficient number of members are present to determine a governmental body's course of action, the membership of the body must be numerically definable. The Attorney General's Office thus has concluded that a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power.[67]

The definition of a "governmental body" is only rarely satisfied when groups of a governmental unit's employees gather on a subject within the unit's jurisdiction. Thus, for example, the Attorney General concluded that the predecessor of the current open meetings law did not apply when a department head met with some or even all of his or her staff.[68] Similarly, the Attorney General's Office has advised that the courts would be unlikely to conclude that meetings between the administrators of a governmental agency and the agency's employees, or between governmental employees and representatives of a governmental contractor were "governmental bodies" subject to the open meetings law.[69] However, where an already-existing numerically definable group of employees of a governmental entity are assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, the group's meetings with respect to the subject of the directive are subject to the open meetings law.[70]

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[62] OAG 67-79 (July 31, 1979) (unpublished) (the Board of Attorneys Professional Responsibility was the predecessor to the Office of Lawyer Regulation).
[63] Kosobucki Correspondence (Sept. 6, 2006).
[64] Constantine Correspondence (Feb. 28, 2000).
[65] *Conta*, 71 Wis. 2d at 681.
[66] *Showers*, 135 Wis. 2d at 102.
[67] Godlewski Correspondence (Sept. 24, 1998).
[68] 57 Op. Att'y Gen. 213, 216 (1968).
[69] Peplnjak Correspondence (June 8, 1998).
[70] Tylka Correspondence (June 8, 2005).

Definition of "Meeting"

A "meeting" is defined as:

> [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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . .[71]

The statute then excepts the following: an inspection of a public works project or highway by a town board; or inspection of a public works project by a town sanitary district; or the supervision, observation, or collection of information about any drain or structure related to a drain by any drainage board.[72]

- **The *Showers* Test**

  The Wisconsin Supreme Court has held that the above statutory definition of a "meeting" applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body's course of action.[73]

  - **The Purpose Requirement**

    The first part of the *Showers* test focuses on the purpose for which the members of the governmental body are gathered. They must be gathered to conduct governmental business. *Showers* stressed that "governmental business" refers to any formal or informal action, including discussion, decision, or information gathering, on matters within the governmental body's realm of authority.[74] Thus, in *Badke*,[75] the Wisconsin Supreme Court held that the village board conducted a "meeting," as defined in the open meetings law, when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a development plan that was subject to the board's approval. The court stressed that a governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority.[76] The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business.[77] The court also held that the gathering of town board members was not chance or social because a majority of town board members attended plan commission meetings with regularity.[78] In contrast, the court of appeals concluded in *Paulton v. Volkmann*,[79] that no meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject the school board had the potential to decide.

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[71] Wis. Stat. § 19.82(2).
[72] Wis. Stat. § 19.82(2).
[73] *Showers*, 135 Wis. 2d at 102.
[74] *Id.* at 102–03.
[75] *Badke*, 173 Wis. 2d at 572–74.
[76] *Id.* at 573–74.
[77] *Id.* at 574–76.
[78] *Id.* at 576.
[79] *Paulton v. Volkmann*, 141 Wis. 2d 370, 375–77, 415 N.W.2d 528 (Ct. App. 1987).

- **The Numbers Requirement**

  The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. People often assume that this means that the open meetings law applies only to gatherings of a majority of the members of a governmental body. That is not the case because the power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal. Therefore, a gathering of one-half of the members of a body, or even fewer, may be enough to control a course of action if it is enough to block a proposal. This is called a "negative quorum."

  Typically, governmental bodies operate under a simple majority rule in which a margin of one vote is necessary for the body to pass a proposal. Under that approach, exactly one-half of the members of the body constitutes a "negative quorum" because that number against a proposal is enough to prevent the formation of a majority in its favor. Under simple majority rule, therefore, the open meetings law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body's realm of authority.

  The size of a "negative quorum" may be smaller, however, when a governmental body operates under a super majority rule. For example, if a two-thirds majority is required for a body to pass a measure, then any gathering of more than one-third of the body's members would be enough to control the body's course of action by blocking the formation of a two-thirds majority. *Showers* made it clear that the open meetings law applies to such gatherings, as long as the purpose requirement is also satisfied (*i.e.*, the gathering is for the purpose of conducting governmental business).[80] If a three-fourths majority is required to pass a measure, then more than one-fourth of the members would constitute a "negative quorum," etc.

- **Convening of Members**

  When the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action, there is no meeting within the meaning of the open meetings law.[81] Nevertheless, the phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a "convening of members" under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange.

  - **Written Correspondence**

    The circulation of a paper or hard copy memorandum among the members of a governmental body, for example, may involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Accordingly, the Attorney General has long taken the position that such written communications generally do not constitute a "convening of members" for purposes of the open

[80] *Showers*, 135 Wis. 2d at 101–02.
[81] Katayama Correspondence (Jan. 20, 2006).

meetings law.[82] Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it is still unlikely that a Wisconsin court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

- **Telephone Conference Calls**

A telephone conference call, in contrast, is very similar to an in-person conversation and thus qualifies as a convening of members.[83] Under the *Showers* test, therefore, the open meetings law applies to any conference call that: (1) is for the purpose of conducting governmental business and (2) involves a sufficient number of members of the body to determine the body's course of action on the business under consideration. To comply with the law, a governmental body conducting a meeting by telephone conference call must provide the public with an effective means to monitor the conference. This may be accomplished by broadcasting the conference through speakers located at one or more sites open to the public.[84]

- **Electronic Communications**

Written communications transmitted by electronic means, such as email, instant messaging, blogging, or other social media, also may constitute a "convening of members," depending on how the communication medium is used. Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body.[85] In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.[86]

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

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[82] Merkel Correspondence (Mar. 11, 1993).
[83] 69 Op. Att'y Gen. 143 (1980).
[84] 69 Op. Att'y Gen. 143, 145.
[85] Krischan Correspondence (Oct. 3, 2000).
[86] Schmiege Correspondence (Aug. 22, 2018).

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies. Nevertheless, because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority.[87] Members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting.[88]

- **Walking Quorums**

The requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.[89] In *Conta*, the court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality.[90] The court commented that any attempt to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the open meetings law.[91] The requirements of the open meetings law thus cannot be circumvented by using an agent or surrogate to poll a quorum of the members of governmental bodies through a series of individual contacts. Such a circumvention "almost certainly" violates the open meetings law.[92] In contrast, simply keeping track of the votes of less than a negative quorum of the members of a governmental body is "hardly indicative" of a walking quorum.[93]

The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.[94] The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject.[95] In contrast, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation.[96]

- **Multiple Meetings**

When a quorum of the members of one governmental body attend a meeting of another governmental body under circumstances where their attendance is not chance or social, in order to gather information or

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[87] Krischan Correspondence (Oct. 3, 2000); Benson Correspondence (Mar. 12, 2004).
[88] I-01-10 (Jan. 25, 2010).
[89] *Showers*, 135 Wis. 2d at 92 (quoting *Conta*, 71 Wis. 2d at 687).
[90] *Conta*, 71 Wis. 2d at 685–88.
[91] *Id.* at 687.
[92] Clifford Correspondence (Apr. 28, 1986) (individual polling of every member is a prohibited walking quorum); Herbst Correspondence (July 16, 2008) (individually polling of a quorum of members is a prohibited walking quorum).
[93] *State ex rel. Zecchino v. Dane Cty. Bd. of Supervisors*, 2018 WI App 19, ¶¶ 11–14, 380 Wis. 2d 453, 909 N.W.2d 203 (individual polling of less than a negative quorum of members is not a prohibited walking quorum).
[94] *Id.* ¶ 10.
[95] Kay Correspondence (Apr. 25, 2007); Kittleson Correspondence (June 13, 2007).
[96] Huff Correspondence (Jan. 15, 2008); *see also* I-01-10 (Jan. 25, 2010) (use of email voting to decide matters fits the definition of a "walking quorum" violation of the open meetings law).

otherwise engage in governmental business regarding a subject over which they have decision-making responsibility, two separate meetings occur, and notice must be given of both meetings.[97] The Attorney General has advised that, despite the "separate public notice" requirement of Wis. Stat. § 19.84(4), a single notice can be used, provided that the notice clearly and plainly indicates that a joint meeting will be held and gives the names of each of the bodies involved, and provided that the notice is published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved.[98]

The kinds of multiple meetings presented in the *Badke* case, and the separate meeting notices required there, must be distinguished from circumstances where a subunit of a parent body meets during a recess from or immediately following the parent body's meeting, to discuss or act on a matter that was the subject of the parent body's meeting. In such circumstances, Wis. Stat. § 19.84(6) allows the subunit to meet on that matter without prior public notice.

- **Burden of Proof as to Existence of a Meeting**

The presence of members of a governmental body does not, in itself, establish the existence of a "meeting" subject to the open meetings law. The law provides, however, that if one-half or more of the members of a body are present, the gathering is presumed to be a "meeting."[99] The law also exempts any "social or chance gathering" not intended to circumvent the requirements of the open meetings law.[100] Thus, where one-half or more of the members of a governmental body rode to a meeting in the same vehicle, the law presumes that the members conducted a "meeting" which was subject to all of the requirements of the open meetings law.[101] Similarly, where a majority of members of a common council gathered at a lounge immediately following a common council meeting, a violation of the open meetings law was presumed.[102] The members of the governmental body may overcome the presumption by proving that they did not discuss any subject that was within the realm of the body's authority.[103]

Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of proving that the gathering constituted a "meeting" subject to the law.[104] That burden may be satisfied by proving: (1) that the members gathered to conduct governmental business and (2) that there was a sufficient number of members present to determine the body's course of action.

Again, it is important to remember that the overriding policy of the open meetings law is to ensure public access to information about governmental affairs. Under the rule of liberally construing the law to ensure this purpose, any doubts as to whether a particular gathering constitutes a "meeting" subject to the open meetings law should be resolved in favor of complying with the provisions of the law.

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[97] *Badke*, 173 Wis. 2d at 577.
[98] Friedman Correspondence (Mar. 4, 2003).
[99] Wis. Stat. § 19.82(2).
[100] Wis. Stat. § 19.82(2).
[101] Karstens Correspondence (July 31, 2008).
[102] Dieck Correspondence (Sept. 12, 2007).
[103] *Id*.
[104] *Showers*, 135 Wis. 2d at 102.

WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

The two most basic requirements of the open meetings law are that a governmental body:

(1) give advance public notice of each of its meetings, and

(2) conduct all of its business in open session, unless an exemption to the open session requirement applies.[105]

Notice Requirements

Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how, and to whom notice must be given, as well as what information a notice must contain.

- **To Whom and How Notice Must Be Given**

  The chief presiding officer of a governmental body, or the officer's designee, must give notice of each meeting of the body to: (1) the public; (2) any members of the news media who have submitted a written request for notice; and (3) the official newspaper designated pursuant to state statute or, if none exists, a news medium likely to give notice in the area.[106]

  The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public.[107] As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves.[108] Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves.[109] If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published.[110] Meeting notices may also be posted at a governmental body's website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice.[111] Nothing in the open meetings law prevents a governmental body from determining that multiple notice methods are necessary to provide adequate public notice of the body's meetings.[112] If a meeting notice is posted on a governmental body's website, amendments to the notice should also be posted.[113]

  The chief presiding officer must also give notice of each meeting to members of the news media who have submitted a written request for notice.[114] Although this notice may be given in writing or by telephone,[115] it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists.[116]

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[105] Wis. Stat. § 19.83.
[106] Wis. Stat. § 19.84(1)(b).
[107] 66 Op. Att'y Gen. 93, 95.
[108] 66 Op. Att'y Gen. 93, 95.
[109] 63 Op. Att'y Gen. 509, 510–11 (1974).
[110] Kaufmann Correspondence (Apr. 24, 2019).
[111] Peck Correspondence (Apr. 17, 2006).
[112] Skindrud Correspondence (Mar. 12, 2009).
[113] Eckert Correspondence (July 25, 2007).
[114] Wis. Stat. § 19.84(1)(b); *Lawton*, 2005 WI App 16, ¶¶ 3–4, 7.
[115] 65 Op. Att'y Gen. Preface, v–vi (1976).
[116] 65 Op. Att'y Gen. 250, 251 (1976).

Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings.[117]

In addition, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area.[118] The governmental body is not required to pay for and the newspaper is not required to publish such notice.[119] Note, however, that the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published.[120]

When a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law.[121] However, violations of those other statutory requirements are not redressable under the open meetings law. For example, the open meetings law is not implicated by a municipality's alleged failure to comply with the public notice requirements of Wis. Stat. ch. 985 when providing published notice of public hearings on proposed tax incremental financing districts.[122] Where a class 1 notice under Wis. Stat. ch. 985 has been published, however, the public notice requirement of the open meetings law is also thereby satisfied.[123]

- **Contents of Notice**

  - **In General**

    Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof."[124] The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice.[125] The Attorney General's Office has advised that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2).[126]

    A frequently recurring question is how specific a subject-matter description in a meeting notice must be. Prior to June 13, 2007, this question was governed by the "bright-line" rule articulated in *State ex rel. H.D. Enterprises II, LLC v. City of Stoughton*.[127] Under that standard, a meeting notice adequately described a subject if it identified "the general topic of items to be discussed" and the simple heading "licenses," without more, was found sufficient to apprise the public that a city council would reconsider a previous decision to deny a liquor license to a particular local grocery store.[128]

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[117] 77 Op. Att'y Gen. 312, 313 (1988).
[118] Wis. Stat. § 19.84(1)(b); *Lawton*, 2005 WI App 16, ¶¶ 3–4, 7.
[119] 66 Op. Att'y Gen. 230, 231 (1977).
[120] Kaufmann Correspondence (Apr. 24, 2019).
[121] Wis. Stat. § 19.84(1)(a).
[122] *See* Boyle Correspondence (May 4, 2005).
[123] Stalle Correspondence (Apr. 10, 2008).
[124] Wis. Stat. § 19.84(2).
[125] 66 Op. Att'y Gen. 68, 70 (1977).
[126] Schuh Correspondence (Oct. 17, 2001).
[127] *State ex rel. H.D. Enters. II, LLC v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999).
[128] *Id.* at 486–87.

On June 13, 2007, the Wisconsin Supreme Court overruled *H.D. Enterprises* and announced a new standard to be applied prospectively to all meeting notices issued after that date.[129] In *State ex rel. Buswell v. Tomah Area School District*, the court held that a public notice for a closed session for the purpose of "consideration and/or action concerning employment/negotiations with district personnel pursuant to Wis. Stat. § 19.85(1)(c)" was vague, misleading and legally insufficient, where the school board tentatively approved a collective bargaining agreement between it and the teacher's union.[130] In reaching that conclusion, the court determined that "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business."[131] This reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances."[132] In making that determination, the factors to be considered include: "[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate."[133]

The first factor "balances the policy of providing greater information with the requirement that providing such information be 'compatible with the conduct of governmental affairs.' Wis. Stat. § 19.81(1)."[134] The determination must be made on a case-by-case basis.[135] "[T]he demands of specificity should not thwart the efficient administration of governmental business."[136]

The second factor takes into account "both the number of people interested and the intensity of that interest," though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis.[137]

The third factor considers "whether the subject of the meeting is routine or novel."[138] There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed.[139] "Novel issues may . . . require more specific notice."[140]

Whether a meeting notice is reasonable, according to the court, "cannot be determined from the standpoint of when the meeting actually takes place," but rather must be "based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know."[141] Once reasonable notice has been given, "meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it."[142] However, "a meeting cannot address topics

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[129] *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
[130] *Id.* ¶¶ 6–7, 37–38, 41.
[131] *Id.* ¶ 3.
[132] *Id.* ¶ 22.
[133] *Id.* ¶ 28.
[134] *Buswell*, 2007 WI 71, ¶ 29.
[135] *Id.*
[136] *Id.*
[137] *Id.* ¶ 30.
[138] *Id.* ¶ 31.
[139] *Id.*
[140] *Id.*
[141] *Id.* ¶ 32.
[142] *Id.* ¶ 34.

unrelated to the information in the notice."[143] The Attorney General has similarly advised, in an informal opinion, that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business.[144]

Whether a meeting notice reasonably apprises the public of the meeting's subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body.[145]

In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed. In an unpublished, post-*Buswell* decision, the court of appeals determined that a meeting notice for a closed session of a school board under Wis. Stat. § 19.85(1)(c) for the purpose of "[d]iscussion of the role, duties, and responsibilities of the [l]ibrary [d]irector and evaluation of job performance and possible action" gave sufficient public notice of the board's discussion of the discipline and termination of the library director.[146] The court reasoned that, under *Buswell*, the "sufficiency of the notice will be based on the knowledge of the person posting notice at the time when it is posted."[147]

- **Generic Agenda Items**

Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all.[148] Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss.[149] If such a notice is meant to indicate an intent to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting.[150]

Likewise, the Attorney General has advised that the practice of using such designations as "mayor comments," "alderman comments," or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful."[151] Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting

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[143] *Id.*
[144] I-05-93 (Apr. 26, 1993).
[145] Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).
[146] *State ex rel. Wanninger v. City of Manitowoc Pub. Library Bd.*, No. 2011AP1059, 2012 WL 1192048, ¶¶ 19–21 (Wis. Ct. App. Apr. 11, 2012) (unpublished).
[147] *Id.* ¶ 21 (citing *Buswell*, 2007 WI 71, ¶ 32).
[148] Becker Correspondence (Nov. 30, 2004); Heupel Correspondence (Aug. 29, 2006).
[149] Erickson Correspondence (Apr. 22, 2009).
[150] *Id.*
[151] Rude Correspondence (Mar. 5, 2004).

process than the public has, they should be held to a higher standard of specificity regarding the subjects they intend to address.[152]

o Action Agenda Items

The Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken."[153] The *Buswell* decision inferred from this that "adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified."[154] Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *Badke*[155]—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend.[156] The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law.[157] Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting.[158]

Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given.[159]

o Notice of Closed Sessions

The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)."[160] The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized.[161] Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session.[162] In *State ex rel. Schaeve v. Van Lare*, the court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "to conduct a hearing to consider the possible discipline of a public employee" was sufficient.[163]

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[152] Thompson Correspondence (Sept. 3, 2004).
[153] *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.
[154] *Buswell*, 2007 WI 71, ¶ 37 n.7.
[155] *Badke*, 173 Wis. 2d at 573-74, 577–78.
[156] *Buswell*, 2007 WI 71, ¶ 26; *Olson*, 2002 WI App 64, ¶ 15.
[157] *Olson*, 2002 WI App 64, ¶ 15.
[158] Herbst Correspondence (July 16, 2008).
[159] Bukowski Correspondence (May 5, 1986).
[160] *Buswell*, 2007 WI 71, ¶ 37 n.7.
[161] 66 Op. Att'y Gen. 93, 98.
[162] Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007).
[163] *State ex rel. Schaeve v. Van Lare,* 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985).

- **Time of Notice**

The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least 24 hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting.[164]

No Wisconsin court decisions or Attorney General opinions discuss what constitutes "good cause" to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental business.[165] If there is any doubt whether "good cause" exists, the governmental body should provide the full twenty-four-hour notice.

When calculating the twenty-four hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. Posting notice of a Monday meeting on the preceding Sunday is, therefore, inadequate, but posting such notice on the preceding Saturday would suffice, as long as the posting location is open to the public on Saturdays.[166]

Wisconsin Stat. § 19.84(4) provides that separate notice for each meeting of a governmental body must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a governmental body plans to hold over a given week, month, or year does not comply with the notice requirements of the open meetings law.[167] Similarly, a meeting notice that states that a quorum of various town governmental bodies may participate at the same time in a multi-month, on-line discussion of town issues fails to satisfy the "separate notice" requirement.[168]

University of Wisconsin departments and their subunits, as well as the Olympic ice training rink, are exempt from the specific notice requirements in Wis. Stat. § 19.84(1)–(4). Those bodies are simply required to provide notice "which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice."[169] Also exempt from the specific notice requirements are certain meetings of subunits of parent bodies held during or immediately before or after a meeting of the parent body.[170]

- **Compliance with Notice**

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice.[171] There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time.[172] Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date.[173]

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[164] Wis. Stat. § 19.84(3).
[165] Wis. Stat. § 19.81(1), (4).
[166] Caylor Correspondence (Dec. 6, 2007).
[167] *See* 63 Op. Att'y Gen. 509, 513.
[168] Connors/Haag Correspondence (May 26, 2009).
[169] Wis. Stat. § 19.84(5).
[170] *See* Wis. Stat. § 19.84(6).
[171] *Buswell*, 2007 WI 71, ¶ 34.
[172] Stencil Correspondence (Mar. 6, 2008).
[173] Black Correspondence (Apr. 22, 2009).

Open Session Requirements

- **Accessibility**

In addition to requiring advance public notice of every meeting of a governmental body, the open meetings law also requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times."[174] Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Every meeting of a governmental body must initially be convened in "open session."[175] All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies.[176]

The requirement that meeting locations be reasonably accessible to the public and open to all citizens at all times means that governmental bodies must hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings.[177] Absolute access is not, however, required.[178] In *Badke*, for instance, the Wisconsin Supreme Court concluded that a village board meeting that was held in a village hall capable of holding 55–75 people was reasonably accessible, although three members of the public were turned away due to overcrowding.[179] Whether a meeting place is reasonably accessible depends on the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility.

The policy of openness and accessibility favors governmental bodies holding their meetings in public places, such as a municipal hall or school, rather than on private premises.[180] The law prohibits meetings on private premises that are not open and reasonably accessible to the public.[181] Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered "reasonably accessible." A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public's right to information about governmental affairs.

The policy of openness and accessibility also requires that governmental bodies hold their meetings at locations near to the public they serve. Accordingly, the Attorney General has concluded that a school board meeting held forty miles from the district which the school board served was not "reasonably accessible" within the meaning of the open meetings law.[182] The Attorney General advises that, in order to comply with the "reasonably accessible" requirement, governmental bodies should conduct all their meetings at a location within the territory they serve, unless there are special circumstances that make it impossible or impractical to do so.[183]

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[174] Wis. Stat. § 19.81(2).
[175] *See* Wis. Stat. §§ 19.83, 19.85(1).
[176] Wis. Stat. § 19.83.
[177] *Badke*, 173 Wis. 2d at 580–81.
[178] *Id.*
[179] *Id.* at 561, 563, 581.
[180] *See* 67 Op. Att'y Gen. 125, 127 (1978).
[181] Wis. Stat. § 19.82(3).
[182] Miller Correspondence (May 25, 1977).
[183] I-29-91 (Oct. 17, 1991).

Occasionally, a governmental body may need to leave the place where the meeting began in order to accomplish its business—*e.g.*, inspection of a property or construction projects. The Attorney General's Office has advised that such off-site business may be conducted consistently with the requirements of the open meetings law, as long as certain precautions are taken. First, the public notice of the meeting must list all of the locations to be visited in the order in which they will be visited. This makes it possible for a member of the public to follow the governmental body to each location or to join the governmental body at any particular location. Second, each location at which government business is to be conducted must itself be reasonably accessible to the public at all times when such business is taking place. Third, care must be taken to ensure that government business is discussed only during those times when the members of the body are convened at one of the particular locations for which notice has been given. The members of the governmental body may travel together or separately, but if half or more of them travel together, they may not discuss government business when their vehicle is in motion, because a moving vehicle is not accessible to the public.[184]

- **Access for Persons with Disabilities**

The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities."[185] In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *without* assistance.[186] In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *with* assistance.[187] In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible without assistance.

The Americans with Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities.

- **Tape Recording and Videotaping**

The open meetings law grants citizens the right to attend and observe meetings of governmental bodies that are held in open session. The open meetings law also grants citizens the right to tape record or videotape open session meetings, as long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, as long as the activity does not interfere with the meeting.[188]

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[184] Rappert Correspondence (Apr. 8, 1993); Musolf Correspondence (July 13, 2007).
[185] 69 Op. Att'y Gen. 251, 252 (1980).
[186] *See* Wis. Stat. §§ 19.82(3), 101.13(1); 69 Op. Att'y Gen. 251, 252.
[187] 69 Op. Att'y Gen. 251, 253.
[188] Wis. Stat. § 19.90.

In contrast, the open meetings law does not require a governmental body to permit recording of an authorized closed session.[189] If a governmental body wishes to record its own closed meetings, it should arrange for the security of the records to prevent their improper disclosure.[190]

- **Citizen Participation**

In general, the open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies, but does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting.[191] There are some other state statutes that require governmental bodies to hold public hearings on specified matters.[192] Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings.[193]

Although it is not required, the open meetings law does permit a governmental body to set aside a portion of an open meeting as a public comment period.[194] Such a period must be included on the meeting notice. During such a period, the body may receive information from the public and may discuss any matter raised by the public. If a member of the public raises a subject that does not appear on the meeting notice, however, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. In addition, the body may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice.[195]

- **Ballots, Votes, and Records, Including Meeting Minutes**

No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body.[196] For example, a body cannot vote by secret ballot to fill a vacancy on a city council.[197] If a member of a governmental body requests that the vote of each member on a particular matter be recorded, a voice vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who is present for the vote.[198] A governmental body may not use email ballots to decide matters, even if the result of the vote is later ratified at a properly noticed meeting.[199]

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings.[200] This requirement applies to both open and closed sessions.[201] Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording.[202] As long as the body creates and preserves a record of all motions and roll-call votes, it is not required by the open meetings law to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may

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[189] 66 Op. Att'y Gen. 318, 325 (1977); Maroney Correspondence (Oct. 31, 2006).
[190] 66 Op. Att'y Gen. 318, 325.
[191] Lundquist Correspondence (Oct. 25, 2005).
[192] *See, e.g.*, Wis. Stat. §§ 65.90(4) (requiring public hearing before adoption of a municipal budget), 66.1105(4)(a) (requiring public hearing before creation of a tax incremental finance district).
[193] Zwieg Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006).
[194] Wis. Stat. §§ 19.83(2), 19.84(2).
[195] Sayles Correspondence (Aug. 4, 2017).
[196] Wis. Stat. § 19.88(1).
[197] 65 Op. Att'y Gen. 131 (1976).
[198] I-95-89 (Nov. 13, 1989).
[199] I-01-10 (Jan. 25, 2010).
[200] Wis. Stat. § 19.88(3).
[201] De Moya Correspondence (June 17, 2009).
[202] I-95-89 (Nov. 13, 1989).

prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law.[203]

The open meetings law does not specify a timeframe in which a body must create a record of all motions and roll-call votes. In the absence of a specific statutory timeframe, issues can arise. In *Journal Times v. City of Racine Board of Police and Fire Commissioners*,[204] the Racine Board of Police and Fire Commissioners voted on a motion in a closed session meeting, but did not contemporaneously create a record of the motion. Instead, the motion was included in the minutes of the meeting, which were not finished and approved by the Commission until three months after the meeting. In a non-party brief, DOJ argued that Wis. Stat. § 19.88(3) should be construed as requiring that a record of all motions must be made at the time of the meeting in question or as soon thereafter as practicable.[205] While the court resolved the case on other grounds without deciding this issue, as a best practice, it is advisable that the motions and roll call votes of a meeting of a governmental body be recorded at the time of the meeting or as soon thereafter as practicable.

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be, the general legislative policy of the open meetings law is 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."[206] In light of that policy, it seems clear that a governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted.[207]

Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a meaningful record of that decision.[208] "Consent agendas," whereby a body discusses individual items of business under separate agenda headings, but takes action on all discussed items by adopting a single motion to approve all the items previously discussed, are likely insufficient to satisfy the recordkeeping requirements of Wis. Stat. § 19.88(3).[209]

Wisconsin Stat. § 19.88(3) also provides that meeting records created under that statute—whether for an open or a closed session—must be open to public inspection to the extent prescribed in the state public records law. Because the records law contains no general exemption for records created during a closed session, a custodian must release such items unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public.[210] There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. But the custodian still must separate information that can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the

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[203] I-20-89 (Mar. 8, 1989); s*ee, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk), 60.33(2)(a) (town clerk), 61.25(3) (village clerk), 62.09(11)(b) (city clerk), 62.13(5)(i) (police and fire commission), 66.1001(4)(b) (plan commission), 70.47(7)(bb) (board of review).

[204] *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563.

[205] Non-party Brief of Wisconsin Department of Justice at 6, *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56 (No. 2013AP1715).

[206] Wis. Stat. § 19.81(1).

[207] De Moya Correspondence (June 17, 2009).

[208] Huebscher Correspondence (May 23, 2008).

[209] Perlick Correspondence (May 12, 2005).

[210] De Moya Correspondence (June 17, 2009).

closed session ceases to exist, all records of the session must then be provided to any person requesting them.[211]

WHEN IS IT PERMISSIBLE TO CONVENE IN CLOSED SESSION?

Every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies.[212]

Notice of Closed Session

The notice provision in Wis. Stat. § 19.84(2) requires that, if the chief presiding officer of a governmental body is aware that a closed session is contemplated at the time he or she gives public notice of the meeting, the notice must contain the subject matter of the closed session.

If the chief presiding officer was not aware of a contemplated closed session at the time he or she gave notice of the meeting, that does not foreclose a governmental body from going into closed session under Wis. Stat. § 19.85(1) to discuss an item contained in the notice for the open session.[213] In both cases, a governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) before going into closed session.

Procedure for Convening in Closed Session

Every meeting of a governmental body must initially be convened in open session.[214] Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually.[215] Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session.[216] Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure. For example, Wis. Stat. § 19.85(1)(c) allows governmental bodies to use closed sessions to interview candidates for positions of employment, to consider promotions of particular employees, to consider the compensation of particular employees, and to conduct employee evaluations—each of which is a different reason that should be identified in the meeting notice and in the motion to convene into closed session.[217] Similarly, merely identifying and quoting from a statutory exemption does not adequately announce what particular part of the governmental body's business is to be considered under that exemption.[218] Enough specificity is needed in describing the subject matter of the contemplated closed meeting to enable the members of the governmental body to intelligently vote on the motion to close the meeting.[219] If several exemptions are relied on to authorize a closed discussion of several subjects, the motion should make it clear which exemptions correspond

[211] *See* 67 Op. Att'y Gen. 117, 119 (1978).
[212] Wis. Stat. § 19.83.
[213] 66 Op. Att'y Gen. 106, 108 (1977).
[214] Wis. Stat. §§ 19.83, 19.85(1).
[215] *Schaeve*, 125 Wis. 2d at 51.
[216] 66 Op. Att'y Gen. 93, 97-98.
[217] Reynolds/Kreibich Correspondence (Oct. 23, 2003).
[218] Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007).
[219] Heule Correspondence (June 29, 1977); *see also Buswell*, 2007 WI 71, ¶ 37 n.7.

to which subjects.[220] The governmental body must limit its discussion in closed session to the business specified in the announcement.[221]

Authorized Closed Sessions

Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session.[222] Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed.[223] The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session.[224]

The following are some of the most frequently cited exemptions.

- **Judicial or Quasi-Judicial Hearings**

  Wisconsin Stat. § 19.85(1)(a) authorizes a closed session for "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body." In order for this exemption to apply, there must be a "case" that is the subject of a quasi-judicial proceeding.[225] The Wisconsin Supreme Court held that the term "case" contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit.[226] An example of a governmental body that considers "cases" and thus can convene in closed session under Wis. Stat. § 19.85(1)(a), where appropriate, is the Wisconsin Employment Relations Commission.[227] Bodies that consider zoning appeals, such as boards of zoning appeals and boards of adjustment, may not convene in closed session.[228] The meetings of town, village, and city boards of review regarding appeals of property tax assessments must also be conducted in open session.[229]

- **Employment and Licensing Matters**

  - **Consideration of Dismissal, Demotion, Discipline, Licensing, and Tenure**

    Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for:

    > Considering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter . . . .

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[220] Brisco Correspondence (Dec. 13, 2005).
[221] Wis. Stat. § 19.85(1).
[222] Krueger Correspondence (Feb. 13, 2019).
[223] *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *Citizens for Responsible Dev.*, 2007 WI App 114, ¶ 8.
[224] *See* 74 Op. Att'y Gen. 70, 73 (1985).
[225] *Hodge*, 180 Wis. 2d at 72; *cf. State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals of Milwaukee*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963) (allowing zoning appeal boards to deliberate in closed session after hearing, decided before the Legislature added the "case" requirement in 1977).
[226] *Hodge*, 180 Wis. 2d at 74.
[227] 68 Op. Att'y Gen. 171 (1979).
[228] Wis. Stat. §§ 59.694 (counties), 60.65(5) (towns), 62.23(7)(e)3. (cities); White Correspondence (May 1, 2009).
[229] Wis. Stat. § 70.47(2m).

If a closed session for such a purpose will include an evidentiary hearing or final action, then the governmental body must give the public employee or licensee actual notice of that closed hearing and/or closed final action. Evidentiary hearings are characterized by the formal examination of charges and by taking testimony and receiving evidence in support or defense of specific charges that may have been made.[230] Such hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the governmental body's action might impose substantial stigma or disability upon the person.[231]

Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session. The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person's employment or license.[232]

Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal.[233]

- **Consideration of Employment, Promotion, Compensation, and Performance Evaluations**

The second exemption which relates to employment matters authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility."[234]

The Attorney General's Office has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ.[235] The Attorney General's Office has also concluded that this exemption is sufficiently broad to authorize convening in closed session to interview and consider applicants for positions of employment.[236]

An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility."[237] Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee.[238]

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[230] 66 Op. Att'y Gen. 211, 214 (1977).
[231] *Id.*
[232] *See State ex rel. Epping v. City of Neillsville Common Council*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998); Johnson Correspondence (Feb. 27, 2009).
[233] *Schaeve*, 125 Wis. 2d at 40.
[234] Wis. Stat. § 19.85(1)(c).
[235] Caturia Correspondence (Sept. 20, 1982).
[236] *Id.*
[237] Wis. Stat. § 19.85(1)(c).
[238] 76 Op. Att'y Gen. 276 (1987).

The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information."[239] It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees.[240] Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general.[241] The section authorizes closure to determine increases in compensation for specific employees.[242] Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term,[243] but not to determine whether to reduce or increase staffing, in general.

- **Consideration of Financial, Medical, Social, or Personal Information**

The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

> 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 par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

An example is where a state employee was alleged to have violated a state law.[244] This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation, however, the vote should be in open session.[245]

At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session.[246]

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[239] *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985).
[240] *See* 80 Op. Att'y Gen. 176, 177–78 (1992). *See also Buswell*, 2007 WI 71, ¶ 37 (noting that Wis. Stat. § 19.85(1)(c) "provides for closed sessions for considering matters related to *individual* employees").
[241] 80 Op. Att'y Gen. 176, 178–82.
[242] 67 Op. Att'y Gen. 117, 118.
[243] *See* 66 Op. Att'y Gen. 211, 213.
[244] *See Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990).
[245] 74 Op. Att'y Gen. 70, 72.
[246] *Id.*

- **Conducting Public Business with Competitive or Bargaining Implications**

A closed session is authorized for "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session."[247] This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining.[248]

Governmental officials must keep in mind, however, that this exemption applies only when "competitive or bargaining reasons require a closed session."[249] The exemption is restrictive rather than expansive.[250] When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure.[251] An announcement of a contemplated closed session under Wis. Stat. § 19.85(1)(e) that provides only a conclusory assertion that the subject of the session will involve competitive or bargaining issues is inadequate because it does not reflect how the proposed discussion would implicate the competitive or bargaining interests of the body or the body's basis for concluding that the subject falls within the exemption.[252]

The use of the word "require" in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting.[253] On the facts as presented in *Citizens for Responsible Development*, the court thus found that a desire or request for confidentiality by a private developer engaged in negotiations with a city was not sufficient to justify a closed session for competitive or bargaining reasons.[254] Nor did the fear that public statements might attract the attention of potential private competitors for the developer justify closure under this exemption, because the court found that such competition would be likely to benefit, rather than harm, the city's competitive or bargaining interests.[255] Similarly, holding closed meetings about ongoing negotiations between the city and private parties would not prevent those parties from seeking a better deal elsewhere. The possibility of such competition, therefore, also did not justify closure under Wis. Stat. § 19.85(1)(e).[256] The exemption did, however, allow the city to close those *portions* of its meetings that would reveal its negotiation strategy or the price it planned to offer for a purchase of property, but it could not close other parts of the meetings.[257] The competitive or bargaining interests to be protected by a closed session under Wis. Stat. § 19.85(1)(e) do not have to be shared by every member of the body or by every municipality participating in an intergovernmental body.[258]

Consistent with the above emphasis on the word "require" in Wis. Stat. § 19.85(1)(e), the Attorney General has advised that mere inconvenience, delay, embarrassment, frustration, or even speculation as to the probability of success would be an insufficient basis to close a meeting.[259] Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect negotiations with

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[247] Wis. Stat. § 19.85(1)(e).
[248] 66 Op. Att'y Gen. 93, 96 (the opinion advised that governmental bodies that are not formed exclusively for collective bargaining comply with the open meetings law when meeting for the purpose of developing negotiating strategy).
[249] Wis. Stat. § 19.85(1)(e).
[250] *Citizens for Responsible Dev.*, 2007 WI App 114, ¶¶ 6–8.
[251] *Id.* ¶ 10.
[252] Wirth/Lamoreaux Correspondence (May 30, 2007).
[253] *Citizens for Responsible Dev.*, 2007 WI App 114, ¶ 14.
[254] *Id.* ¶¶ 13–14.
[255] *Id.* ¶ 14 n.6.
[256] *Id.* ¶¶ 15–16.
[257] *Id.* ¶ 19.
[258] *State ex rel. Herro v. Vill. of McFarland*, 2007 WI App 172, ¶¶ 16–19, 303 Wis. 2d 749, 737 N.W.2d 55.
[259] Gempeler Correspondence (Feb. 12, 1979).

a third party, but not where the discussions might be one of several factors that indirectly influence the outcome of those negotiations.[260] The meetings of a governmental body also may not be closed in a blanket manner merely because they may at times involve competitive or bargaining issues, but rather may only be closed on those occasions when the particular meeting is going to involve discussion which, if held in open session, would harm the competitive or bargaining interests at issue.[261] Once a governmental body's bargaining team has reached a tentative agreement, the discussion whether the body should ratify the agreement should be conducted in open session.[262]

- **Conferring with Legal Counsel with Respect to Litigation**

  The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for "[c]onferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

  The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

  There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

- **Remaining Exemptions**

  The remaining exemptions in Wis. Stat. § 19.85(1) authorize closure for:

  1. Considering applications for probation or parole, or considering strategy for crime detection or prevention.[263]

  2. Specified deliberations by the state council on unemployment insurance and the state council on worker's compensation.[264]

  3. Specified deliberations involving the location of a burial site.[265]

  4. Consideration of requests for confidential written advice from the government accountability board or from any county or municipal ethics board.[266]

Who May Attend a Closed Session

A frequently asked question concerns who may attend the closed session meetings of a governmental body. In general, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the

[260] Henderson Correspondence (Mar. 24, 1992).
[261] I-04-09 (Sept. 28, 2009).
[262] 81 Op. Att'y Gen. 139, 141 (1994).
[263] Wis. Stat. § 19.85(1)(d).
[264] Wis. Stat. § 19.85(1)(ee), (eg).
[265] Wis. Stat. § 19.85(1)(em).
[266] Wis. Stat. § 19.85(1)(h).

meeting.[267] If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provide otherwise.[268] Where enough non-members of a subunit attend the subunit's meetings that a quorum of the parent body is present, a meeting of the parent body occurs, and the notice requirements of Wis. Stat. § 19.84 apply.[269]

Voting in an Authorized Closed Session

The Wisconsin Supreme Court has held that Wis. Stat. § 14.90 (1959), a predecessor to the current open meetings law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in closed session.[270] The court reasoned that "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process."[271]

In *Schaeve*,[272] the Wisconsin Court of Appeals commented on the propriety of voting in closed session under the current open meetings law. The court indicated that a governmental body must vote in open session unless an exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session.[273] The court's statement was not essential to its holding and it is unclear whether the supreme court would adopt a similar interpretation of the current open meetings law.

Given this uncertainty, the Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session.[274]

None of the exemptions in Wis. Stat. § 19.85(1) authorize a governmental body to consider in closed session the ratification or final approval of a collective bargaining agreement negotiated by or for the body.[275]

Reconvening in Open Session

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within 12 hours after completion of a closed session, unless public notice of the subsequent open session is given "at the same time and in the same manner" as the public notice of the prior open session.[276] The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public present that the session is open.[277]

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[267] Schuh Correspondence (Dec. 15, 1988).
[268] Wis. Stat. § 19.89.
[269] *Badke*, 173 Wis. 2d at 579.
[270] *Cities Serv. Oil Co.*, 21 Wis. 2d at 538.
[271] *Id.* at 539.
[272] *Schaeve*, 125 Wis. 2d at 53.
[273] *Schaeve*, 125 Wis. 2d at 53.
[274] *Accord Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided).
[275] Wis. Stat. § 19.85(3); 81 Op. Att'y Gen. 139.
[276] Wis. Stat. § 19.85(2).
[277] Claybaugh Correspondence (Feb. 16, 2006).

WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?

Enforcement

Both the Attorney General and the district attorneys have authority to enforce the open meetings law.[278] In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys' familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence.[279] Under certain circumstances, the Attorney General may elect to prosecute complaints involving a matter of statewide concern.

A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney.[280] Actions to enforce the open meetings law are exempt from the notice of claim requirements of Wis. Stat. § 893.80.[281] The verified complaint must be signed by the individual and notarized and should include available information that will be helpful to investigators, such as: identifying the governmental body and any members thereof alleged to have violated the law; describing the factual circumstances of the alleged violations; identifying witnesses with relevant evidence; and identifying any relevant documentary evidence. The district attorney has broad discretion to determine whether a verified complaint should be prosecuted.[282] An enforcement action brought by a district attorney or by the Attorney General must be commenced within two years after the cause of action accrues or be barred.[283]

Proceedings to enforce the open meetings law are civil actions subject to the rules of civil procedure, rather than criminal procedure, and governed by the ordinary civil standard of proof, rather than a heightened standard of proof such as would apply in a criminal or quasi-criminal proceeding. Accordingly, enforcement of the open meetings law does not involve such practices as arrest, posting bond, entering criminal-type pleas, or any other aspects of criminal procedure. Rather, an open meetings law enforcement action is commenced like any civil action by filing and serving a summons and complaint. In addition, the open meetings law cannot be enforced by the issuance of a citation, in the way that other civil forfeitures are often enforced, because citation procedures are inconsistent with the statutorily-mandated verified complaint procedure.[284]

If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within 20 days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law.[285] Although an individual may not bring a private enforcement action prior to the expiration of the district attorney's twenty-day review period, the district attorney may still commence an action even though more than 20 days have passed. It is not uncommon for the review and investigation of open meetings complaints to take longer than 20 days.

Court proceedings brought by private relators to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred.[286] If a private relator brings an enforcement action and prevails, the court is authorized to grant broad relief, including a declaration that the law was violated,

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[278] Wis. Stat. § 19.97(1).
[279] 65 Op. Att'y Gen. Preface, ii.
[280] *See* Wis. Stat. § 19.97(1).
[281] *E-Z Roll Off, LLC v. Cty. of Oneida*, 2011 WI 71, ¶ 21, 335 Wis. 2d 720, 800 N.W.2d 421 (citing *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)).
[282] *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979).
[283] *See* Wis. Stat. § 893.93(2)(a).
[284] Zwieg Correspondence (Mar. 10, 2005).
[285] *Lawton*, 2005 WI App 16, ¶ 15; Wis. Stat. § 19.97(4); *see also Fabyan v. Achtenhagen*, 2002 WI App 214, ¶¶ 10-13, 257 Wis. 2d 310, 652 N.W.2d 649 (complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; *i.e.*, the caption must bear the title "State ex rel." or the court lacks competency to proceed).
[286] Wis. Stat. § 893.93(2)(a); *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6, 265 Wis. 2d 674, 666 N.W.2d 104.

civil forfeitures where appropriate, and the award of the actual and necessary costs of prosecution, including reasonable attorney fees.[287] Attorney fees will be awarded under this provision where such an award will provide an incentive to other private parties to similarly vindicate the public's rights to open government and will deter governmental bodies from skirting the open meetings law.[288]

Relief for alleged violations of the open meetings law cannot be sought under the public records law. In *Journal Times*,[289] the plaintiff newspaper brought a mandamus action under Wis. Stat. § 19.37(2)(a), claiming, in part, that the defendant commission, by not contemporaneously creating a record of a motion at a closed-session meeting, had violated the requirement in Wis. Stat. § 19.88(3) of the open meetings law that all motions and roll call votes must be recorded, preserved, and open to public inspection to the extent required by the public records law. The court held, in part, that the newspaper could not seek relief under the public records law for the alleged violation of the open meetings law.[290]

Penalties

Any member of a governmental body who "knowingly" attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between $25 and $300 for each violation.[291] Any forfeiture obtained in an action brought by the district attorney is awarded to the county.[292] Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state.[293]

The Wisconsin Supreme Court has defined "knowingly" as not only positive knowledge of the illegality of a meeting, but also awareness of the high probability of the meeting's illegality or conscious avoidance of awareness of the illegality.[294] The court also held that knowledge is not required to impose forfeitures on an individual for violating the open meetings law by means other than attending a meeting held in violation of the law. Examples of "other violations" are failing to give the required public notice of a meeting or failing to follow the procedure for closing a session.[295]

A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member's votes on all relevant motions prior to the violation were inconsistent with the cause of the violation.[296]

A member who is charged with a violation other than knowingly attending a meeting held in violation of the law may be permitted to raise the additional statutory defense that the member did not act in his or her official capacity. In addition, in *Swanson*,[297] and *Hodge*,[298] the Wisconsin Supreme Court intimated that a member of a governmental body can avoid liability if he or she can factually prove that he or she relied, in good faith and in an open and

[287] Wis. Stat. § 19.97(4).
[288] *Buswell*, 2007 WI 71, ¶ 54.
[289] *Journal Times*, 2015 WI 56.
[290] *Id.* ¶ 51.
[291] Wis. Stat. § 19.96.
[292] Wis. Stat. § 19.97(1).
[293] Wis. Stat. § 19.97(1), (2), (4).
[294] *Swanson*, 92 Wis. 2d at 319.
[295] *Id.* at 321.
[296] Wis. Stat. § 19.96.
[297] *Swanson*, 92 Wis. 2d at 319.
[298] *Hodge*, 180 Wis. 2d at 80.

unconcealed manner, on the advice of counsel whose statutory duties include the rendering of legal opinions as to the actions of the body.[299]

A governmental body may not reimburse a member for a forfeiture incurred as a result of a violation of the law, unless the enforcement action involved a real issue as to the constitutionality of the open meetings law.[300] Although it is not required to do so, a governmental body may reimburse a member for his or her reasonable attorney fees in defending against an enforcement action and for any plaintiff's attorney fees that the member is ordered to pay. The city attorney may represent city officials in open meetings law enforcement actions.[301]

In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action. Thus, in *Hodge*,[302] the court voided the town board's denial of a permit, taken after an unauthorized closed session deliberation about whether to grant or deny the permit.[303] A court may award any other appropriate legal or equitable relief, including declaratory and injunctive relief.[304]

In enforcement actions seeking forfeitures, the provisions of the open meetings law must be narrowly construed due to the penal nature of forfeiture. In all other actions, the provisions of the law must be liberally construed to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."[305] Thus, it is advisable to prosecute forfeiture actions separately from actions seeking other types of relief under the open meetings law.

Interpretation by Attorney General

In addition to the methods of enforcement discussed above, the Attorney General also has express statutory authority to respond to requests for advice from any person as to the applicability of the open meetings and public records laws.[306] This differs from other areas of law, in which the Attorney General is only authorized to give legal opinions or advice to specified governmental officials and agencies. Because the Legislature has expressly authorized the Attorney General to interpret the open meetings law, the Wisconsin Supreme Court has acknowledged that the Attorney General's opinions in this area should be given substantial weight.[307]

Citizens with questions about matters outside the scope of the open meetings and public records laws should seek assistance from a private attorney. Citizens and public officials with questions about the open meetings law or the public records law are advised to first consult the applicable statutes, the corresponding discussions in this compliance guide and in DOJ's Public Records Law Compliance Guide, court decisions, and prior Attorney General

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[299] *See State v. Tereschko*, No. 00-3290, 2001 WL 537491, ¶¶ 9–10 (Wis. Ct. App. May 22, 2001) (unpublished) (declining to find a knowing violation where school board members relied on the advice of counsel in going into closed session); *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974) (interpreting Wis. Stat. § 946.13(1) (private interest in public contract)); *cf. Journal/Sentinel, Inc. v. Shorewood Sch. Bd.*, 186 Wis. 2d 443, 452–55, 521 N.W.2d 165 (Ct. App. 1994) (school board may not avoid duty to provide public records by delegating the creation and custody of the record to its attorneys).

[300] 66 Op. Att'y Gen. 226 (1977).

[301] 77 Op. Att'y Gen. 177, 180 (1988).

[302] *Hodge*, 180 Wis. 2d at 75–76.

[303] *Cf. State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436 (supreme court did not void a statute adopted by the legislature because a legislative committee did not comply with notice requirements of the open meetings law); *Epping*, 218 Wis. 2d at 524 n.4 (arguably unlawful closed session deliberation does not provide basis for voiding subsequent open session vote); *State ex rel. Ward v. Town of Nashville*, No. 00-0973, 2001 WL 881704, ¶ 30 (Wis. Ct. App. Aug. 7, 2001) (unpublished) (declining to void an agreement made in open session, where the agreement was the product of three years of unlawfully closed meetings).

[304] Wis. Stat. § 19.97(2).

[305] Wis. Stat. § 19.81(1), (4).

[306] Wis. Stat. §§ 19.39, 19.98.

[307] *BDADC*, 2008 WI 90, ¶¶ 37, 44–45. *See also Krueger*, 2017 WI 70, ¶ 39 (adopting the Attorney General's opinion that, under open meetings law, a committee is created whenever a government body, by rule, "authorizes the committee and assigns the duties and functions of the committee" (quoting 78 Op. Att'y Gen. 67, 69)) .

opinions and to confer with their own private or governmental attorneys. In the rare instances where a question cannot be resolved in this manner, a written request for advice may be made to DOJ. In submitting such requests, it should be remembered that DOJ cannot conduct factual investigations, resolve disputed issues of fact, or make definitive determinations on fact-specific issues. Any response will thus be based solely on the information provided.

Appendix A

Open Meetings Law

Wis. Stat. §§ 19.81–19.98

(3) "Matching program" means the computerized comparison of information in one records series to information in another records series for use by an authority or a federal agency to establish or verify an individual's eligibility for any right, privilege or benefit or to recoup payments or delinquent debts under programs of an authority or federal agency.

(5) "Personally identifiable information" means information that can be associated with a particular individual through one or more identifiers or other information or circumstances.

(6) "Record" has the meaning specified in s. 19.32 (2).

(7) "Records series" means records that are arranged under a manual or automated filing system, or are kept together as a unit, because they relate to a particular subject, result from the same activity or have a particular form.

(8) "State authority" means an authority that is a state elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, rule or order; a state governmental or quasi–governmental corporation; the supreme court or court of appeals; or the assembly or senate.

History: 1991 a. 39; 1993 a. 215; 1995 a. 27; 1997 a. 79; 2001 a. 16; 2007 a. 20.

19.65 Rules of conduct; employee training; and security. An authority shall do all of the following:

(1) Develop rules of conduct for its employees who are involved in collecting, maintaining, using, providing access to, sharing or archiving personally identifiable information.

(2) Ensure that the persons identified in sub. (1) know their duties and responsibilities relating to protecting personal privacy, including applicable state and federal laws.

History: 1991 a. 39.

19.67 Data collection. (1) COLLECTION FROM DATA SUBJECT OR VERIFICATION. An authority that maintains personally identifiable information that may result in an adverse determination about any individual's rights, benefits or privileges shall, to the greatest extent practicable, do at least one of the following:

(a) Collect the information directly from the individual.

(b) Verify the information, if collected from another person.

History: 1991 a. 39.

19.68 Collection of personally identifiable information from Internet users. No state authority that maintains an Internet site may use that site to obtain personally identifiable information from any person who visits that site without the consent of the person from whom the information is obtained. This section does not apply to acquisition of Internet protocol addresses.

History: 2001 a. 16.

19.69 Computer matching. (1) MATCHING SPECIFICATION. A state authority may not use or allow the use of personally identifiable information maintained by the state authority in a match under a matching program, or provide personally identifiable information for use in a match under a matching program, unless the state authority has specified in writing all of the following for the matching program:

(a) The purpose and legal authority for the matching program.

(b) The justification for the program and the anticipated results, including an estimate of any savings.

(c) A description of the information that will be matched.

(2) COPY TO PUBLIC RECORDS BOARD. A state authority that prepares a written specification of a matching program under sub. (1) shall provide to the public records board a copy of the specification and any subsequent revision of the specification within 30 days after the state authority prepares the specification or the revision.

(3) NOTICE OF ADVERSE ACTION. (a) Except as provided under par. (b), a state authority may not take an adverse action against an individual as a result of information produced by a matching program until after the state authority has notified the individual, in writing, of the proposed action.

(b) A state authority may grant an exception to par. (a) if it finds that the information in the records series is sufficiently reliable.

(4) NONAPPLICABILITY. This section does not apply to any matching program established between the secretary of transportation and the commissioner of the federal social security administration pursuant to an agreement specified under s. 85.61 (2).

History: 1991 a. 39, 269; 1995 a. 27; 2003 a. 265.

19.70 Rights of data subject to challenge; authority corrections. (1) Except as provided under sub. (2), an individual or person authorized by the individual may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if the individual is authorized to inspect the record under s. 19.35 (1) (a) or (am) and the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

History: 1991 a. 269 ss. 27d, 27e, 35am, 37am, 39am; 2013 a. 171 s. 16; Stats. 2013 s. 19.70.

19.71 Sale of names or addresses. An authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. The collection of fees under s. 19.35 (3) is not a sale or rental under this section.

History: 1991 a. 39.

19.77 Summary of case law and attorney general opinions. Annually, the attorney general shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The attorney general shall provide the summary, at no charge, to interested persons.

History: 1991 a. 39.

19.80 Penalties. (2) EMPLOYEE DISCIPLINE. Any person employed by an authority who violates this subchapter may be discharged or suspended without pay.

(3) PENALTIES. (a) Any person who willfully collects, discloses or maintains personally identifiable information in violation of federal or state law may be required to forfeit not more than $500 for each violation.

(b) Any person who willfully requests or obtains personally identifiable information from an authority under false pretenses may be required to forfeit not more than $500 for each violation.

History: 1991 a. 39, 269.

SUBCHAPTER V

OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy. (1) In recognition of the fact that a representative government of the American type is depen-

dent 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.

(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 members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

History: 1975 c. 426; 1983 a. 192.

NOTE: The following annotations relate to s. 66.77, repealed by Chapter 426, laws of 1975.

Subsequent to the presentation of evidence by the taxpayer, a board of review's consideration of testimony by the village assessor at an executive session was contrary to the open meeting law. Although it was permissible for the board to convene a closed session for the purpose of deliberating after a quasi–judicial hearing, the proceedings did not constitute mere deliberations but were a continuation of the quasi–judicial hearing without the presence of or notice to the objecting taxpayer. Dolphin v. Butler Board of Review, 70 Wis. 2d 403, 234 N.W.2d 277 (1975).

The open meeting law is not applicable to the judicial commission. State ex rel. Lynch v. Dancey, 71 Wis. 2d 287, 238 N.W.2d 81 (1976).

A regular open meeting, held subsequent to a closed meeting on another subject, does not constitute a reconvened open meeting when there was no prior open meeting on that day. 58 Atty. Gen. 41.

Consideration of a resolution is a formal action of an administrative or minor governing body and when taken in proper closed session, the resolution and result of the vote must be made available for public inspection, pursuant to s. 19.21, absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Joint apprenticeship committees, appointed pursuant to Wis. Adm. Code provisions, are governmental bodies and subject to the requirements of the open meeting law. 63 Atty. Gen. 363.

Voting procedures employed by worker's compensation and unemployment advisory councils that utilized adjournment of public meeting for purposes of having members representing employers and members representing employees or workers to separately meet in closed caucuses and to vote as a block on reconvening was contrary to the open records law. 63 Atty. Gen. 414.

A governmental body can call closed sessions for proper purposes without giving notice to members of the news media who have filed written requests. 63 Atty. Gen. 470.

The meaning of "communication" is discussed with reference to giving the public and news media members adequate notice. 63 Atty. Gen. 509.

The posting in the governor's office of agenda of future investment board meetings is not sufficient communication to the public or the news media who have filed a written request for notice. 63 Atty. Gen. 549.

A county board may not utilize an unidentified paper ballot in voting to appoint a county highway commissioner, but may vote by ayes and nays or show of hands at an open session if some member does not require the vote to be taken in such manner that the vote of each member may be ascertained and recorded. 63 Atty. Gen. 569.

NOTE: The following annotations refer to ss. 19.81 to 19.98.

When the city of Milwaukee and a private non–profit festival organization incorporated the open meetings law into a contract, the contract allowed public enforcement of the contractual provisions concerning open meetings. Journal/Sentinel, Inc. v. Pleva, 155 Wis. 2d 704, 456 N.W.2d 359 (1990).

Sub. (2) requires that a meeting be held in a facility that gives reasonable public access, not total access. No person may be systematically excluded or arbitrarily refused admittance. State ex rel. Badke v. Greendale Village Bd. 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

This subchapter is discussed. 65 Atty. Gen. preface.

Public notice requirements for meetings of a city district school board under this subchapter and s. 120.48, 1983 stats., are discussed. 66 Atty. Gen. 93.

A volunteer fire department organized as a nonprofit corporation under s. 213.05 is not subject to the open meeting law. 66 Atty. Gen. 113.

Anyone has the right to tape–record an open meeting of a governmental body provided the meeting is not thereby physically disrupted. 66 Atty. Gen. 318.

The open meeting law does not apply to a coroner's inquest. 67 Atty. Gen. 250.

The open meeting law does not apply if the common council hears a grievance under a collective bargaining agreement. 67 Atty. Gen. 276.

The application of the open meeting law to the duties of WERC is discussed. 68 Atty. Gen. 171.

A senate committee meeting was probably held in violation of the open meetings law although there was never any intention prior to the gathering to attempt to debate any matter of policy, to reach agreement on differences, to make any decisions on any bill or part thereof, to take any votes, or to resolve substantive differences. Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and control by vote a formal meeting of a governmental body. 71 Atty. Gen. 63.

Nonstock corporations created by statute as bodies politic clearly fall within the term "governmental body" as defined in the open meetings law and are subject to the provisions of the open meetings law. Nonstock corporations that were not created by the legislature or by rule, but were created by private citizens are not bodies politic and not governmental bodies. 73 Atty. Gen. 53.

Understanding Wisconsin's open meeting law. Harvey, WBB September 1980.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

An Intro to Understanding Wisconsin's Open Meetings Law. Block. Wis. Law. Dec. 2015.

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi–governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long–term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, or V of ch. 111.

(2) "Meeting" means the 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. If one–half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).

(3) "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. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

History: 1975 c. 426; 1977 c. 364, 447; 1985 a. 26, 29, 332; 1987 a. 305; 1993 a. 215, 263, 456, 491; 1995 a. 27, 185; 1997 a. 79; 1999 a. 9; 2007 a. 20, 96; 2009 a. 28; 2011 a. 10.

A "meeting" under sub. (2) was found although the governmental body was not empowered to exercise the final powers of its parent body. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

A "meeting" under sub. (2) was found when members met with a purpose to engage in government business and the number of members present was sufficient to determine the parent body's course of action regarding the proposal discussed. State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

The open meetings law is not meant to apply to single–member governmental bodies. Sub. (2) speaks of a meeting of the members, plural, implying there must be at least two members of a governmental body. Plourde v. Berends, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130, 05–2106.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

A corporation is quasi–governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case–by–case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city Web site, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. State v. Beaver Dam Area Development Corporation, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, 06–0662.

A particular group of members of the government compose a governmental body if there is a constitution, statute, ordinance, rule, or order conferring collective power and defining when it exists. To cause a body to exist, the relevant directive must confer upon it the collective responsibilities, authority, power, or duties necessary to a governmental body's existence under the open meetings law. The creation of a governmental body is not triggered merely by any deliberate meetings involving governmental business between 2 or more officials. Loosely organized, ad hoc gatherings of government employees, without more, do not constitute governmental bodies. Rather, an entity must exist that has the power to take collective action that the members could not take individually. Krueger v. Appleton Area School District Board of Education, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35, 15–0231.

When a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are created by rule under sub. (1) and the open meetings law applies to them. Here, a school board provided that the review of educational materials should be done according to the board–approved handbook. The handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for board approval. Because the committee in question was formed as one of these committees, pursuant to the authority delegated from the board by rule and the handbook, it was created by rule and therefore was a "governmental body" under sub. (1). Krueger v. Appleton Area School District Board of Education, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35, 15–0231.

Under *Showers*, 135 Wis. 2d 77, the open meetings law may apply to a walking quorum. A walking quorum is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. To establish a walking quorum, a plaintiff must prove that members of a governmental body purposefully engaged in discussions of governmental business and that the discussions were held between a sufficient number of members so as to affect the vote. Zecchino v. Dane County, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203, 17–0002.

A municipal public utility commission managing a city owned public electric utility is a governmental body under sub. (1). 65 Atty. Gen. 243.

A "private conference" under s. 118.22 (3), on nonrenewal of a teacher's contract is a "meeting" within s. 19.82 (2). 66 Atty. Gen. 211.

A private home may qualify as a meeting place under sub. (3). 67 Atty. Gen. 125.

A telephone conference call involving members of governmental body is a "meeting" that must be reasonably accessible to the public and public notice must be given. 69 Atty. Gen. 143.

A "quasi–governmental corporation" in sub. (1) includes private corporations that closely resemble governmental corporations in function, effect, or status. 80 Atty. Gen. 129.

Election canvassing boards operating under ss. 7.51, 7.53, and 7.60 are governmental bodies subject to the open meetings law — including the public notice, open session, and reasonable public access requirements — when they convene for the purpose of carrying out their statutory canvassing activities, but not when they are gathered only as individual inspectors fulfilling administrative duties. OAG 5–14.

19.83 Meetings of governmental bodies. (1) Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

(2) During a period of public comment under s. 19.84 (2), a governmental body may discuss any matter raised by the public.

History: 1975 c. 426; 1997 a. 123.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

19.84 Public notice. (1) Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area.

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

(3) Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of the meeting.

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1997 a. 123; 2007 a. 20.

There is no requirement in this section that the notice provided be exactly correct in every detail. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01–0201.

Sub. (2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. The notice must alert the public of the importance of the meeting. Although a failure to expressly state whether action will be taken could be a violation, the importance of knowing whether a vote would be taken is diminished when no input from the audience is allowed or required. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01–0201.

Sub. (2) sets forth a reasonableness standard for determining whether notice of a meeting is sufficient that strikes the proper balance between the public's right to information and the government's need to efficiently conduct its business. The standard requires taking into account the circumstances of the case, which includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non–routine action that the public would be unlikely to anticipate. Buswell v. Tomah Area School District, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, 05–2998.

The supreme court declined to review the validity of the procedure used to give notice of a joint legislative committee on conference alleged to violate the sub. (3) 24–hour notice requirement. The court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments and will not intermeddle in what it views, in the absence of constitutional directives to the contrary, to be purely legislative concerns. Ozanne v. Fitzgerald, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, 11–0613.

Under sub. (1) (b), a written request for notice of meetings of a governmental body should be filed with the chief presiding officer or designee and a separate written request should be filed with each specific governmental body. 65 Atty. Gen. 166.

The method of giving notice pursuant to sub. (1) is discussed. 65 Atty. Gen. 250.

The specificity of notice required by a governmental body is discussed. 66 Atty. Gen. 143, 195.

The requirements of notice given to newspapers under this section is discussed. 66 Atty. Gen. 230.

A town board, but not an annual town meeting, is a "governmental body" within the meaning of the open meetings law. 66 Atty. Gen. 237.

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for communication of the notices. 77 Atty. Gen. 312.

A newspaper is not obligated to print a notice received under sub. (1) (b), nor is governmental body obligated to pay for publication. Martin v. Wray, 473 F. Supp. 1131 (1979).

19.85 Exemptions. (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

(a) Deliberating concerning a case which was the subject of any judicial or quasi–judicial trial or hearing before that governmental body.

(b) Considering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employee or person licensed is

given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employee or person licensed requests that an open session be held.

(c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

(d) Except as provided in s. 304.06 (1) (eg) and by rule promulgated under s. 304.06 (1) (em), considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.

(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

(ee) Deliberating by the council on unemployment insurance in a meeting at which all employer members of the council or all employee members of the council are excluded.

(eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.

(em) Deliberating under s. 157.70 if the location of a burial site, as defined in s. 157.70 (1) (b), is a subject of the deliberation and if discussing the location in public would be likely to result in disturbance of the burial site.

(f) 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 par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

(h) Consideration of requests for confidential written advice from the elections commission under s. 5.05 (6a) or the ethics commission under s. 19.46 (2), or from any county or municipal ethics board under s. 19.59 (5).

(2) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.

(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV, or V of ch. 111 which has been negotiated by such body or on its behalf.

History: 1975 c. 426; 1977 c. 260; 1983 a. 84; 1985 a. 316; 1987 a. 38, 305; 1989 a. 64; 1991 a. 39; 1993 a. 97, 215; 1995 a. 27; 1997 a. 39, 237, 283; 1999 a. 32; 2007 a. 1, 20; 2009 a. 28; 2011 a. 10, 32; 2015 a. 118.

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by s. 19.35 (1) (a) to state specific and sufficient public policy reasons why the public interest in nondisclosure outweighed the public's right of inspection. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

The balance between protection of reputation under sub. (1) (f) and the public interest in openness is discussed. Wis. State Journal v. UW–Platteville, 160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990). See also Pangman v. Stigler, 161 Wis. 2d 828, 468 N.W.2d 784 (Ct. App. 1991).

A "case" under sub. (1) (a) contemplates an adversarial proceeding. It does not connote the mere application for and granting of a permit. Hodge v. Turtle Lake, 180 Wis. 2d 62, 508 N.W.2d 603 (1993).

A closed session to discuss an employee's dismissal was properly held under sub. (1) (b) and did not require notice to the employee under sub. (1) (b) when no evidentiary hearing or final action took place in the closed session. State ex rel. Epping v. City of Neillsville, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998), 97–0403.

The exception under sub. (1) (e) must be strictly construed. A private entity's desire for confidentiality does not permit a closed meeting. A governing body's belief that secret meetings will produce cost savings does not justify closing the door to public scrutiny. Providing contingencies allowing for future public input was insufficient. Because legitimate concerns were present for portions of some of the meetings does not mean the entirety of the meetings fell within the narrow exception under sub. (1) (e). Citizens for Responsible Development v. City of Milton, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640, 06–0427.

Section 19.35 (1) (a) does not mandate that, when a meeting is closed under this section, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeyer,* 2002 WI 84, 254 Wis. 2d 306. Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06–1143.

Nothing in sub. (1) (e) suggests that a reason for going into closed session must be shared by each municipality participating in an intergovernmental body. It is not inconsistent with the open meetings law for a body to move into closed session under sub. (1) (e) when the bargaining position to be protected is not shared by every member of the body. Once a vote passes to go into closed session, the reason for requesting the vote becomes the reason of the entire body. Herro v. Village of McFarland, 2007 WI App 172, 303 Wis. 2d 749, 737 N.W.2d 55, 06–1929.

In allowing governmental bodies to conduct closed sessions in limited circumstances, this section does not create a blanket privilege shielding closed session contents from discovery. There is no implicit or explicit confidentiality mandate. A closed meeting is not synonymous with a meeting that, by definition, entails a privilege exempting its contents from discovery. Sands v. The Whitnall School District, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439, 05–1026.

Boards of review cannot rely on the exemptions in sub. (1) to close any meeting in view of the explicit requirements in s. 70.47 (2m). 65 Atty. Gen. 162.

A university subunit may discuss promotions not relating to tenure, merit increases, and property purchase recommendations in closed session. 66 Atty. Gen. 60.

Neither sub. (1) (c) nor (f) authorizes a school board to make actual appointments of a new member in closed session. 74 Atty. Gen. 70.

A county board chairperson and committee are not authorized by sub. (1) (c) to meet in closed session to discuss appointments to county board committees. In appropriate circumstances, sub. (1) (f) would authorize closed sessions. 76 Atty. Gen. 276.

Sub. (1) (c) does not permit closed sessions to consider employment, compensation, promotion, or performance evaluation policies to be applied to a position of employment in general. 80 Atty. Gen. 176.

A governmental body may convene in closed session to formulate collective bargaining strategy, but sub. (3) requires that deliberations leading to ratification of a tentative agreement with a bargaining unit, as well as the ratification vote, must be held in open session. 81 Atty. Gen. 139.

"Evidentiary hearing" as used in sub. (1) (b), means a formal examination of accusations by receiving testimony or other forms of evidence that may be relevant to the dismissal, demotion, licensing, or discipline of any public employee or person covered by that section. A council that considered a mayor's accusations against an employee in closed session without giving the employee prior notice violated the requirement of actual notice to the employee. Campana v. City of Greenfield, 38 F. Supp. 2d 1043 (1999).

Closed Session, Open Book: Sifting the *Sands* Case. Bach. Wis. Law. Oct. 2009.

19.851 Closed sessions by ethics or elections commission. (1) Prior to convening under this section or under s. 19.85 (1), the ethics commission and the elections commission shall vote to convene in closed session in the manner provided in s. 19.85 (1). The ethics commission shall identify the specific reason or reasons under sub. (2) and s. 19.85 (1) (a) to (h) for convening in closed session. The elections commission shall identify the specific reason or reasons under s. 19.85 (1) (a) to (h) for convening in closed session. No business may be conducted by the ethics commission or the elections commission at any closed session under this section except that which relates to the purposes of the session as authorized in this section or as authorized in s. 19.85 (1).

(2) The commission shall hold each meeting of the commission for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the commission in closed session under this section.

History: 2007 a. 1; 2015 a. 118.

19.86 Notice of collective bargaining negotiations. Notwithstanding s. 19.82 (1), where notice has been given by either party to a collective bargaining agreement under subch. I, IV, or V of ch. 111 to reopen such agreement at its expiration date, the employer shall give notice of such contract reopening as provided in s. 19.84 (1) (b). If the employer is not a governmental

body, notice shall be given by the employer's chief officer or such person's designee.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1995 a. 27; 2007 a. 20; 2009 a. 28; 2011 a. 10.

19.87 Legislative meetings. This subchapter shall apply to all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof, except that:

(1) Section 19.84 shall not apply to any meeting of the legislature or a subunit thereof called solely for the purpose of scheduling business before the legislative body; or adopting resolutions of which the sole purpose is scheduling business before the senate or the assembly.

(2) No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

(3) No provision of this subchapter shall apply to any partisan caucus of the senate or any partisan caucus of the assembly, except as provided by legislative rule.

(4) Meetings of the senate or assembly committee on organization under s. 71.78 (4) (c) or 77.61 (5) (b) 3. shall be closed to the public.

History: 1975 c. 426; 1977 c. 418; 1987 a. 312 s. 17.

Former open meetings law, s. 66.74 (4) (g), 1973 stats., that excepted "partisan caucuses of the members" of the state legislature from coverage of the law applied to a closed meeting of the members of one political party on a legislative committee to discuss a bill. The contention that this exception was only intended to apply to the partisan caucuses of the whole houses would have been supportable if the exception were simply for "partisan caucuses of the state legislature" rather than partisan caucuses of members of the state legislature. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

In contrast to former s. 66.74 (4) (g), 1973 stats., sub. (3) applies to partisan caucuses of the houses, rather than to caucuses of members of the houses. State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

19.88 Ballots, votes and records. (1) Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting.

(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19.

History: 1975 c. 426; 1981 c. 335 s. 26.

The plaintiff newspaper argued that sub. (3), which requires "the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection," in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records law for the commission's alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under s. 19.37 (2) for an alleged violation of the open meetings law. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13–1715.

Under sub. (1), a common council may not vote to fill a vacancy on the common council by secret ballot. 65 Atty. Gen. 131.

19.89 Exclusion of members. No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body.

History: 1975 c. 426.

19.90 Use of equipment in open session. Whenever a governmental body holds a meeting in open session, the body shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting. This section does not permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants.

History: 1977 c. 322.

19.96 Penalty. Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than $25 nor more than $300 for each such violation. No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.

History: 1975 c. 426.

The state need not prove specific intent to violate the Open Meetings Law. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

19.97 Enforcement. (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

(2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

(3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

(4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in the name, and on behalf, of the state. In such actions, the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

History: 1975 c. 426; 1981 c. 289; 1995 a. 158.

Judicial Council Note, 1981: Reference in sub. (2) to a "writ" of mandamus has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613–A]

Awards of attorney fees are to be at a rate applicable to private attorneys. A court may review the reasonableness of the hours and hourly rate charged, including the rates for similar services in the area, and may in addition consider the peculiar facts of the case and the responsible party's ability to pay. Hodge v. Town of Turtle Lake, 190 Wis. 2d 181, 526 N.W.2d 784 (Ct. App. 1994).

Actions brought under the open meetings and open records laws are exempt form the notice provisions of s. 893.80. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94–2809.

Failure to bring an action under this section on behalf of the state is fatal and deprives the court of competency to proceed. Fabyan v. Achtenhagen, 2002 WI App 214, 257 Wis. 2d. 310, 652 N.W.2d 649, 01–3298.

Complaints under the open meetings law are not brought in the individual capacity of the plaintiff but on behalf of the state, subject to the 2–year statute of limitations under s. 893.93 (2). Leung v. City of Lake Geneva, 2003 WI App 129, 265 Wis. 2d 674, 666 N.W.2d 104, 02–2747.

When a town board's action was voided by the court due to lack of statutory authority, an action for enforcement under sub. (4) by an individual as a private attorney general on behalf of the state against individual board members for a violation of the open meetings law that would subject the individual board members to civil forfeitures was not rendered moot. Lawton v. Town of Barton, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304, 04–0659

19.98 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances.

History: 1975 c. 426.

Appendix B

Open Meetings Law Complaint Form–SAMPLE

VERIFIED OPEN MEETINGS LAW COMPLAINT

Now comes the complainant _____ and as and for a verified complaint pursuant to Wis. Stat. §§ 19.96 and 19.97, alleges and complains as follows:

1. That s/he is a resident of the _____ [town, village, city] of _____, Wisconsin, and that his or her Post Office Address is _____[street, avenue, etc.], _____ [city], Wisconsin _____ [zip].

2. That _____[name of member or chief presiding officer] whose Post Office Address is _____ [street, avenue, etc.], _____ [city], Wisconsin _____ [zip] was on the ____ day of _____ 20_____, a _____[member or chief presiding officer] of _____ [designate official title of governmental body] and that such _____ [board, council, commission or committee] is a governmental body within the meaning of Wis. Stat. § 19.82(1).

3. That _____ [name of member or chief presiding officer] on the ___ day of _____, 20_____, at _____ County of _____, Wisconsin, knowingly attended a meeting of said governmental body held in violation of Wis. Stat. § 19.96 and _____ [cite other applicable section(s)], or otherwise violated those sections in that [set out every act or omission constituting the offense charged]:

4. That _____ [name of member or chief presiding officer] is thereby subject to the penalties prescribed in Wis. Stat. § 19.96.

5. That the following witnesses can testify to said acts or omissions:

Name	Address	Telephone
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. That the following documentary evidence of said acts or omissions is available: _____.

7. That this complaint is made to the District Attorney for _____ County under the provisions of Wis. Stat. § 19.97, and that the district attorney may bring an action to recover the forfeiture provided in Wis. Stat § 19.96.

WHEREFORE, complainant prays that the District Attorney for _____ County, Wisconsin, timely institute an action against_____[name of member or chief presiding officer] to recover the forfeiture provided in Wis. Stat. § 19.96, together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN)
) ss.
COUNTY OF _____)

_____ being first duly sworn on oath deposes and says that s/he is the above-named complainant, that s/he has read the foregoing complaint and that, based on his or her knowledge, the contents of the complaint are true.

_____
COMPLAINANT

Subscribed and sworn to before me
this ____ day of _____, 20___.

_____
Notary Public, State of Wisconsin
My Commission: _____

City of Stoughton
Social Media Policy
Adopted June 25, 2019

BACKGROUND

The City of Stoughton authorizes the Mayor, Common Council, and City departments to communicate, collaborate, and exchange information to support the City's mission, using social media technologies. Interactive social media platforms offer opportunities to City residents to interact directly with their City government. Using these tools, constituents may request services, report problems in their neighborhoods, or express opinions to elected officials and policymakers. Moreover, by opening more direct channels of communication with residents, the City will enhance its ability to respond more quickly to their needs.

The use of social media platforms, however, gives rise to administrative legal responsibilities. The City has established this Social Media Policy to facilitate the use of social media and address related challenges and responsibilities.

DEFINITIONS

"Authorized User" – City Employees authorized by the Mayor, the Common Council or their Department Head, pursuant to this Policy, to establish, create, edit or maintain any City-supported Social Media Site.

"City Employee" – any individual employed by the City of Stoughton, as well as any contractor, vendor or agent working for or representing the City but no in City employ.

"City Official"- any individual holding an elected City office.

"City-related Content"- social media content related to City activities; determined on the substance of the information or materials posted, rather than the identity of the poster, the equipment used, or the Social Media Site on which it is posted.

"City-supported Social Media Site"- a Social Media Account created or Social Media Site approved for use by City Officials or Authorized Users pursuant to this Policy.

"City Website"- https://www.ci.stoughton.wi.us

"Department Head"- the head of any City Department, or their designee.

"Inappropriate Content"- as defined in the User Responsibilities section of this Policy.

"Social Media Account"-any registration, login credential, tool, forum, website, or network that is created or maintained by a department to establish or perpetuate a social media presence.

"Social Media Sites"- interactive online pages or web applications that allow for multiple postings or interactions and whose information is constantly altered by its readers and producers. Examples of these sites include, but are not limited to, blogs, wikis, RSS feeds, and web sites and applications such as Facebook, Twitter, GovLoop, YouTube, LinkedIn and Flickr.

"Social Media Content"- any information or materials posted to Social Media Sites.

AUTHORIZATION AND ACCESS

No City-Supported Social Media Site may be created or used without the approval of the Mayor, the Common Council or a Department Head.

Any Social Media Account or Social Media Site in use by any City Official or City Employee for City-related Content (excepting personal accounts or sites) on the date this Policy is adopted shall be discontinued unless use of the account or site is approved by the Mayor, Common Council or a Department Head within 45 days after the date this Policy is approved by the Common Council.

Department Heads who authorize the creation or use of social media must designate an Authorized User (who may be the Department Head) who shall be responsible for monitoring and administering the Social Media Site, and who shall serve as the legal custodian of the Social Media Content on the Social Media Site. Before approving the creation or use of a Social Account or Social Media Site, the Department Head must: (1) determine that their Department can effectively administer the Social Media Site in accordance with the Policy and comply with Wisconsin laws governing the retention of and access to public records; (2) determine how often the Authorized User should monitor the Social Media Site; and, (3) notify the City Director of Information Technology of the social media site. City Employees must have prior authorization from their Department Head before creating City-related Content on a City-supported Social Media Site.

Department Heads should routinely review access privileges for City Employees to determine if continued access to City-supported Social Media Sites remains appropriate. Decisions on allowing continued access should be based on the need of the department and the City Employee's job responsibilities. The City of Stoughton reserves the right to deny access to post information of City-sponsored Social Media Sites to any City Employee who violates this Social Media Policy.

If the Mayor authorizes the creation or use of a Social Media Account or Social Media Site, the Mayor must designate an Authorized User (who may be the Mayor) who shall be responsible for monitoring and administering the Social Media Site, and who shall serve as the legal custodian of the Social Media Content on the Social Media Site. Before approving the creation or use of a Social Media Account or a Social Media Site, the Mayor must determine that the Authorized User can effectively administer the Social Media Site in accordance with this Policy and comply with Wisconsin laws governing the retention of and access to public records.

If the Common Council authorizes the creation or use of a Social Media Account or Social Media Site, the Common Council must designate an Authorized User who shall be responsible for monitoring and administering the Social Media Site, and who shall serve as the legal custodian of the Social Media Content on the Social Media Site. Before approving the creation or use of a Social Media Account or Social Media Site, the Common Council must determine that the Authorized User can effectively administer the Social Media Site in accordance with this policy and comply with Wisconsin laws governing the retention of access to public records.

The City Clerk is an Authorized User of the City Website, is responsible for monitoring and administering the City Website, and is the legal custodian of public records on the City Website. City Employees other that the City Clerk must be approved by the Mayor as additional Authorized Users of the City Website before they may post to or otherwise modify the City Website.

OFFICIAL AND ACCEPTABLE EMPLOYEE USE

Once granted access, City Employees may post to City-supported Social Media Sites in an official capacity only information that pertains to City of Stoughton business or operations. City Employees, in their role as designated representatives of the City, must never post personal information to a City-sponsored Social Media Site.

City employees must use strong passwords for all City-supported Social Media Sites. City employees are encouraged to use 2 factor authentication for all City-supported Social Media Sites, if allowed by the platform.

The same principles and polices that govern interactions with the public generally apply to City-sponsored social media. City Employees representing the City of Stoughton on Social Media Sites must, at all times, conduct themselves in accordance with all state and local laws and all existing City policies. The City requires all employees who participate in social media on behalf of their departments to adhere to and follow all existing work rules and the City's Code of Ethics.

City Employees posting official information to City-supported Social Media Sites generally do so only for the department they represent. They may post information or links to information already published on existing City web pages or Social Media Sites, but may not post any new or original materials relating to the activities or operations of other City departments, governments, organizations, or individuals without prior approval from the group or person discussed. City Employees should refer any questions, comments, or discussion outside of their department's responsibility or their personal expertise to an appropriate responder within their own or another City department.

City Employees posting on City-supported Social Media Sites should act as they would if interacting with citizens or other employees in person. City Employees must respond honestly to appropriate questions, and should not become hostile or argumentative. City Employees should

always exercise good judgement regarding how to maintain confidentiality (omitting addresses, phone numbers, and other personal data) of posted information.

City Employees and Elected Officials must refrain from using social media tools to express personal opinions or concerns. They may never use their access to City-sponsored Social Media sites for personal gain, or to promote private endeavors of others. City Employees and Elected Officials also may not post information on City-sponsored Social Media Sites that constitutes defamation, obscenity, publication of private facts, or speech that violates copyright or trademark laws.

Notwithstanding other provisions of this policy, this policy does not restrict the ability of City Employees or City Officials to speak as private citizens on matters relating to City business. City Employees and City Officials may post comments, questions, or opinions on social media sites, including City-sponsored Sites, so long as they make clear that they are acting as private citizens and that their statements in no way represent the official position of the City.

When appropriate, Social Media Content should direct users to relevant information and resources on the City Website.

Authorized Users assigned responsibility for monitoring City-Supported Social Media Sites must periodically monitor material posted to Social Media Sites as directed by the authorizing Department Head to:

- Respond promptly to questions or replies;
- Replace stale, outdated, and/or incorrect information; and
- Remove Inappropriate Content.

USER RESPONSIBILITIES

The City of Stoughton participates in and provides information through City-supported Social Media Sites as a public service. The City anticipates that users will use such sites to convey useful information to and engage in productive discourse with Elected Officials and City Employees.

The City expects that all participants on City-sponsored Social Media Sites will display respect and civility when posting comments or information. The City of Stoughton reserves the right to remove Inappropriate Content at its sole discretion. For purposes of this Policy, Inappropriate Content is defined as comments or materials that:

- Are profane, advocate violence, or are pornographic;
- Promote, foster, or perpetuate discrimination on the basis of gender, race, creed, color, national origin or ancestry, age, disability, lawful source of income, marital status, sexual orientation, gender identity, past or present membership in military service, or familial status;

- Unlawfully defame or attack an individual or group;
- Make direct or indirect threats against any person or organization;
- Advertise or solicit business for a personal or private business or endeavor;
- Promote or endorse a specific financial or commercial entity;
- Defraud or defame any financial, commercial, or non-governmental agency;
- Violate any federal, state or local law or encourage any illegal activity;
- Violate any existing copyrights, trade secrets, or legal ownerships;
- Compromise the safety and/or security of the public or public systems

LEGAL REQUIREMENTS

Under Wisconsin law, Social Media Content that is created by City Employees or City Officials, or that is kept on a City-supported Social Media Site, constitutes a public record subject to record retention and public access requirements. Designated legal custodians of public records on City-Supported Social Media Sites will be responsible for compliance with record retention requirements and requests for access to public records.

Communication among members of governmental bodies using social media may constitute a "meeting" under the Wisconsin Open Meetings Law. Such "meetings" would trigger a host of legal requirements and expenses for the City. For this reason, members of the Common Council and City Committees, Boards and Commissions should avoid interactions among one another on topics related to City business.

Various social media sites adhere to their own policies regarding the privacy of site users. The City of Stoughton makes no claim to protect or preserve the privacy of social media users. Further, the City of Stoughton retains the right to review all information or materials written or contributed by City Employees on City-supported Social Media Sites; therefore, City Employees should have no expectation of privacy when posting to City-supported Social Media Sites.

The content of all communications posted by City Employees on City-sponsored Social Media Sites is the sole property of the City of Stoughton. Subject to the terms of service enforced by social media sites that the City uses, posting made by other user may also be considered City property.

Violation of this policy by a City Employee may result in discipline up to and including discharge. Violation of this policy by a citizen posting on City-supported Social Media Sites may result in the removal of that citizen's comment from a City-supported Social Media Site. Subsequent violation by a citizen may result in the banning of that citizen from all City-supported Social Media Sites.

Users should be aware that the information made available by the City of Stoughton Social Media Sites may not be timely, accurate or complete. Any communication from or to the City through these sites will not be considered legal or official notice for any purpose.

The City of Stoughton reserves the right to revise or modify this policy at any time, without prior notice.