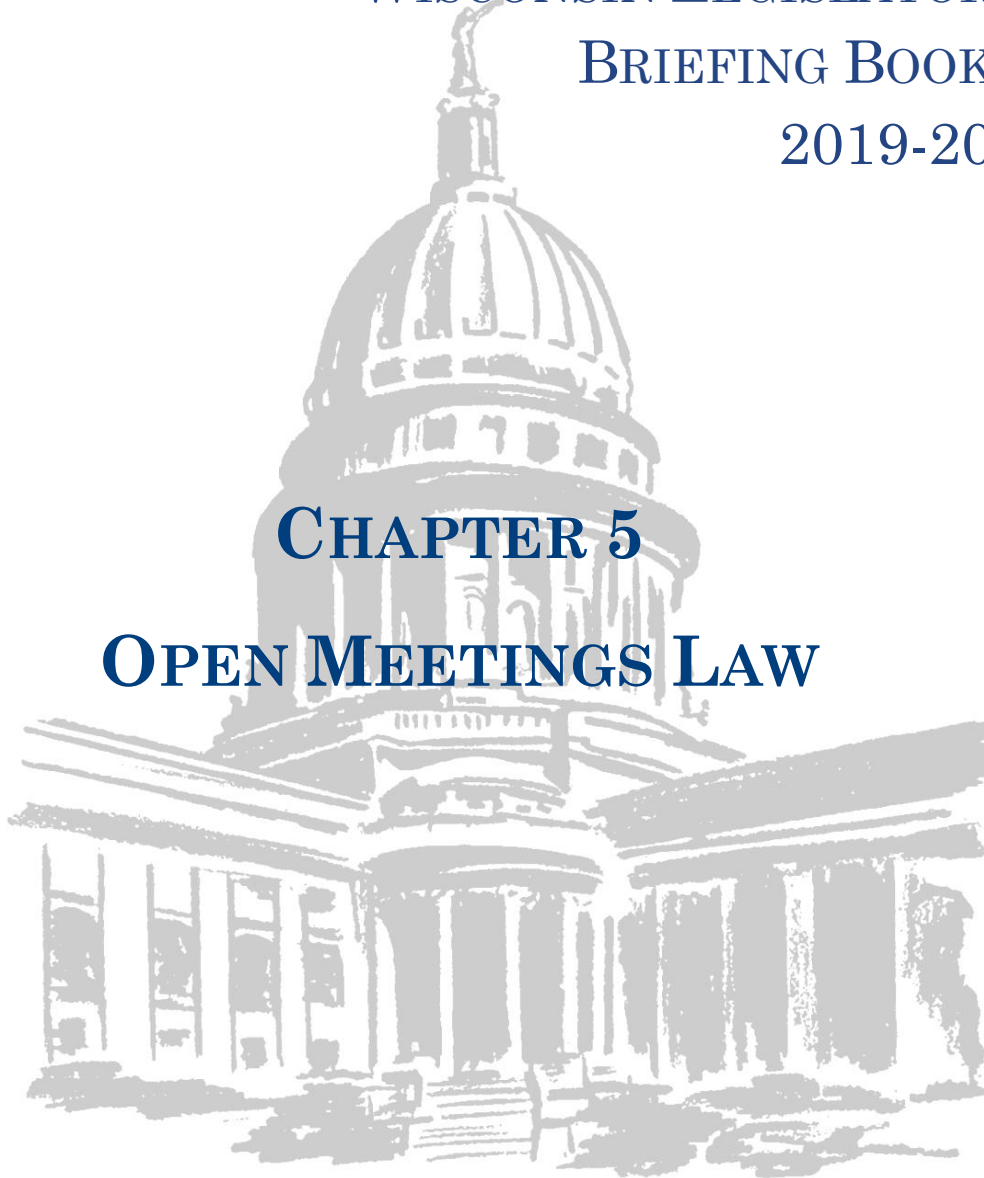


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CHAPTER 5
OPEN MEETINGS LAW



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INTRODUCTION

The Open Meetings Law, originally created in 1959 and revised substantially in 1976, governs meetings of governmental bodies in Wisconsin. The law generally requires that meetings of governmental bodies be conducted in open session, with specified exceptions, and be preceded by public notice. The law is set forth in ss. 19.81 to 19.98, Stats.

PURPOSE

The Open Meetings Law contains a declaration of policy, stating that:

- A representative government of the American type is dependent upon an informed electorate.
- The public is entitled to the fullest and most complete information regarding governmental affairs as is compatible with the conduct of governmental business.
- To implement and ensure this policy, all meetings of state and local governmental bodies must be publicly held in places reasonably accessible to the public and must be open to all citizens at all times, unless otherwise expressly provided by law.

The declaration of policy further prescribes that the Open Meetings Law is to be liberally construed in order to achieve its purposes. [s. 19.81, Stats.]

DEFINITIONS

The Open Meetings Law provides specific definitions for the terms “governmental body,” “meeting,” and “open session.” [s. 19.82, Stats.]

Governmental Body

A governmental body is any 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; or a long-term care district.

The term includes a formally constituted subunit of any of these bodies. The term excludes a committee or subunit that is formed for or meeting for the purpose of public employee collective bargaining.

Meeting

A “meeting” is defined as 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.

The definition creates a rebuttable presumption that if half or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the powers vested in that governmental body.

The definition excludes any social or chance gathering or conference that is not intended to avoid the Open Meetings Law. In addition, the definition excludes gatherings of members of a town board, town sanitary district, or drainage board, for inspecting, observing, or supervising at the site of a public works project, although limited notice and reporting may be required.

Open Session

An “open session” is defined as a meeting that is held in a place that is reasonably accessible to members of the public and is open to all citizens at all times. In the case of a state governmental body, it means a meeting that is held in a room, and a building, that enables access by persons with physical disabilities.

REQUIREMENTS OF THE LAW

Open Session

The Open Meetings Law generally requires every meeting of a governmental body to be held in open session. [s. 19.83, Stats.] Consequently, all discussions of a governmental body, and any action, whether formal or informal, must be initiated, deliberated upon, and acted upon only in open session, except as specifically exempted by statute.

A duly elected or appointed member of a governmental body may not be excluded from any meeting of that body. Likewise, a member of the full governmental body may not be excluded from any meeting of a subunit of that body, unless the body’s rules provide otherwise.

The law presumes that if one-half or more of the members are present, the gathering is a meeting to exercise the authority and duties vested in the body.

Negative Quorum

The applicability of the Open Meetings Law to a gathering of less than one-half of the members of a governmental body has been addressed by the Wisconsin Supreme Court. The case involved an unannounced, private meeting of four members of the 11-member Milwaukee Metropolitan Sewerage Commission. The subject of the meeting was the commission’s proposed operating and capital budgets. Adoption of these budgets required a two-thirds vote of the commission (i.e., eight votes), and four members was a sufficient number to block adoption. Such a gathering of enough members that could be sufficient to block an action of the full body was labeled as a “negative quorum.” [*State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987).]

The court provided a two-part test to determine when a gathering constitutes a negative quorum and triggers the Open Meetings Law. Under the test, such a meeting is subject to the law if: (1) the members have convened for the purpose of engaging in governmental business, whether discussion, decision-making, or information gathering; and (2) the number of members present is sufficient to determine the governmental body's course of action on the subject under discussion.

Walking Quorum

The applicability of the Open Meetings Law to a series of informal discussions between small numbers of the body's members has been addressed by the Wisconsin courts and the state Attorney General. This is commonly referred to as a "walking quorum," and such series of small-group meetings that occur with the implied or express agreement to act uniformly in a sufficient number to reach a quorum may only be held with proper notice and accessibility.

Generally, notice must be given at least 24 hours in advance of a meeting. Shorter advance notice may be given in some circumstances, if given at least two hours before a meeting.

The essential danger identified by the courts with a walking quorum is that it may produce a predetermined outcome and render the public meeting a mere formality. According to an informal opinion by the Attorney General, use of administrative staff to individually poll members regarding how they would vote on a proposed motion is a prohibited walking quorum.

If, however, there is no implied or express agreement to act uniformly in sufficient number to reach a quorum, a series of informal exchanges among separate groups of members may occur without violating the Open Meetings Law.

Notice

Public notice of meetings must be given by the governmental body's chief presiding officer, or a designee, to news media that have filed a written request for notice and to the governmental body's official newspaper. If no official newspaper exists, notice must be communicated to a news medium likely to give notice in the area.

The meeting notice must specify each meeting's time, date, place, and subject matter. Notice must be given at least 24 hours before the commencement of the meeting. If there is good cause why a 24-hour notice is impossible or impractical, a shorter notice may be given. However, in no case may notice be provided less than two hours before the meeting. [s. 19.84, Stats.]

Voting

Unless otherwise specifically provided by statute, a secret ballot may not be used to determine elections or the decisions of a governmental body, except for the election of officers. A member of a governmental body may require that each member's vote on any

question be ascertained and recorded, other than a vote for election of officers. Motions and roll call votes of each governmental body meeting must be recorded, preserved, and open to public inspection to the extent required by the Open Records Law. [s. 19.88, Stats.]

Recording Devices

A governmental body holding a meeting in open session must make a reasonable effort to accommodate anyone who wishes to record, film, or photograph the meeting, unless these activities interfere with the conduct of the meeting or the rights of the participants. [s. 19.90, Stats.]

REQUIREMENTS FOR LEGISLATIVE MEETINGS

The Wisconsin Constitution, Article IV, Section 10, provides that for legislative proceedings the “doors of each house shall be kept open except when the public welfare shall require secrecy.” The statutes declare that in conformance with this constitutional provision it is the intent of the Legislature to comply to the fullest extent with the Open Meetings Law. Accordingly, the statutes provide that meetings of the Senate, the Assembly, committees, and subcommittees are subject to the Open Meetings Law, except in certain circumstances. [s. 19.87, Stats.]

Meetings called solely to schedule business before a legislative body do not have to comply with the public notice requirements of the law.

The statutes specifically provide that if a provision of the Open Meetings Law conflicts with a Senate or Assembly rule or a joint rule of the Legislature, and the legislative meeting is conducted in compliance with that rule, the conflicting provision of the Open Meetings Law does not apply. On this issue, the Wisconsin Supreme Court has held that the Legislature may interpret its own rules of proceedings, and the Court will generally decline to review the validity of the procedures used by the Legislature. [*State ex. rel. Ozanne v. Fitzgerald*, 2011 WI 43 (citing *State ex. rel. La Follette v. Stitt*, 114 Wis. 2d 358 (1983)).]

Meetings called solely for the purpose of scheduling business are not subject to the notice requirements. In addition, the Open Meetings Law does not apply to a partisan caucus of the Senate or Assembly, except as provided by legislative rule. The Wisconsin Supreme Court has interpreted this to mean that the Open Meetings Law also does not apply to a partisan caucus of a legislative committee, except as may be provided by legislative rule. [*State ex. rel. Lynch v. Conta*, 71 Wis. 2d 662 (1976).]

SPECIFIC EXCEPTIONS TO OPEN MEETINGS REQUIREMENTS

Limited Notice Allowed

Departments and subunits of the University of Wisconsin System are exempt from the specific public notice requirements set forth above. These entities must, however, provide

notice reasonably likely to inform interested persons, as well as news media that have filed written requests for notice. [s. 19.84 (5), Stats.]

A subunit of a governmental body (such as a subcommittee) may conduct a meeting during a lawful meeting of its parent body, during the meeting's recess, or immediately after the parent body meets, for the purpose of discussing or acting on a subject that is also the subject of the meeting of the parent body, without a separate public notice. The parent body's presiding officer must publicly announce the time, place, and subject matter of the subunit's meeting in advance at the parent body's meeting. [s. 19.84 (6), Stats.]

Closed Session Allowed

A meeting of a governmental body may be convened in closed session only for specific, enumerated purposes. [s. 19.85, Stats.]

These purposes are:

- Deliberating about a case that was the subject of any judicial or quasi-judicial trial or hearing before the particular governmental body.
- Considering dismissal, demotion, licensing, or discipline of a public employee or a person licensed by a board or commission, the investigation of charges against such a person, or considering the grant or denial of tenure for a university faculty member, and taking formal action on any such matter. Under the law, the affected person must receive actual notice of any evidentiary hearing and of any meeting at which final action may be taken. The notice must state that the person has a right to demand that the evidentiary hearing or meeting be held in open session.
- Considering employment, promotion, compensation, or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
- Considering specific probation, extended supervision, or parole applications, or considering strategy for crime detection or prevention.
- Deliberating or negotiating the purchasing of public properties, investing public funds, or conducting other specified public business, if competitive or bargaining reasons require a closed session.
- Deliberating in a meeting by the Unemployment Compensation Advisory Council or the Worker's Compensation Advisory Council at which all employer members of the Council or all employee members of the Council have been excluded.

A governmental body meeting for the purpose of negotiating or formulating strategy for collective bargaining may meet in closed session. However, a governmental body may not consider the final ratification or approval of a public employee collective bargaining agreement at a closed meeting.

- Deliberating the preservation of burial sites if the location of a burial site is a subject of the meeting and if discussing the location in public would be likely to result in disturbance of the burial site.
- 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, in which public discussion would likely have a substantial adverse effect on the reputation of any person referred to in the histories or data or involved in the problems or investigations.
- Conferring with the governmental body’s legal counsel who is rendering oral or written advice concerning strategy to be adopted regarding litigation in which the body is or is likely to become involved.
- Considering a request for confidential written advice from the Elections Commission, the Ethics Commission, or from a local governmental ethics board.

In addition, the law requires the Ethics Commission to meet in closed session for the purpose of deliberation concerning an investigation of any violation of the law under its jurisdiction after a proper vote to convene in closed session.

Closed Session Procedure

The Department of Justice’s *Open Meetings Law Compliance Guide* is available at:

<https://www.doj.state.wi.us>

The Open Meetings Law establishes a procedure that must be followed when a meeting of a governmental body goes into closed session. [s. 19.85, Stats.] The requirements are as follows:

- The chief presiding officer of the governmental body must announce to those present at an open meeting the nature of the business to be considered in a closed session and the specific exemption under which the closed session is authorized. The announcement must be made part of the record of the meeting.
- A motion to convene in closed session must be made and adopted by majority vote. The vote must be conducted in such a manner that each member’s vote is ascertained and recorded in the meeting’s minutes.
- The business to be taken up at the closed session is limited to the matters contained in the presiding officer’s announcement of the closed session.
- A governmental body may not commence an open meeting, then convene in closed session, and thereafter reconvene in open session within 12 hours after completing the closed session, unless public notice of the subsequent open session was given at the same time and in the same manner as the public notice of the meeting held prior to the closed session.

ENFORCEMENT AND PENALTIES

Enforcement

The Open Meetings Law is enforced by the Attorney General or by a district attorney on the complaint of any person that a violation may have occurred. [s. 19.97, Stats.] Any person may request advice from the Attorney General as to how the Open Meetings Law applies under any circumstance.

The Attorney General or district attorney may commence an action, separately or in conjunction with a forfeiture action, to obtain appropriate legal or equitable relief, including mandamus, injunction, or declaratory judgment. A court may hold an action void only if it finds that, under the facts of the particular case, the public interest in enforcing the Open Meetings Law outweighs any public interest in sustaining the validity of the action taken at the meeting.

If a district attorney refuses or fails to begin a lawsuit to enforce the Open Meetings Law within 20 days after receiving a verified complaint, the person making the complaint may commence a lawsuit in the name and on behalf of the state. The court may award actual and necessary costs of prosecution, including reasonable attorney fees, to the person who commenced the lawsuit if the person prevails. Any forfeiture imposed is paid to the state.

Penalties

A member of a governmental body who knowingly attends a meeting of the body held in violation of the Open Meetings Law, or who violates the law by some other act or omission, is subject to a nonreimbursable forfeiture of not less than \$25 nor more than \$300 for each violation. [s. 19.96, Stats.]

A member of a governmental body is not liable for attendance at a meeting held in violation of the law if the person makes or votes in favor of a motion to prevent the violation from occurring, or if, on any relevant motions prior to the violation, the person's votes are inconsistent with the circumstances causing the violation.

Any forfeitures recovered, together with reasonable costs, are awarded to the state in actions brought by the Attorney General and to the county in actions brought by a district attorney.

GLOSSARY

Governmental business: Formal or informal action, including discussions, decision-making, and information-gathering on matters within a governmental body's realm of authority.

Negative quorum: A gathering of a number of members sufficient to affirmatively or negatively affect a governmental body's course of action, if the gathering is for the purpose of engaging in governmental business.

Open Meetings Law: Sections 19.81 to 19.98 of the Wisconsin statutes, which require a governmental body to open its meetings to public access.

Quorum: Usually, a majority of the current membership of a governmental body that constitutes a sufficient number for the transaction of business, unless a higher number is specifically required for certain business.

Walking quorum: A series of discussions between small numbers of a governmental body's members, with the implied or express agreement to act uniformly in a sufficient number to reach a quorum.

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