Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2020-18

THE OPEN MEETINGS LAW

In Wisconsin, meetings of state and local governmental bodies generally are required to be preceded by a public notice, held in places reasonably accessible to members of the public, and open to all citizens at all times. These openness requirements, and the processes for ensuring compliance with them, are commonly referred to as the state's "Open Meetings Law."

This information memorandum provides an overview of the statutory framework of the Open Meetings Law, as set forth in subch. V, ch. 19, Stats. Several references to court precedents or opinions of the Attorney General's (AG) interpretations of the law are included; however, additional research beyond the scope of the information memorandum may be required in order to assess how a court or the AG might apply the law in specific situations. The purpose of this information memorandum is to assist readers in understanding the Open Meetings Law's basic statutory requirements.

PURPOSES OF THE OPEN MEETINGS LAW

The Open Meetings Law was created in 1959 and revised substantially in 1976. The purposes of the law are set forth in a statutory declaration of policy, stating that:

- In recognition of the fact 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 the affairs of government 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.
- In conformance with Wis. Const. art. IV, s. 10, which states that the doors of each house shall remain open, the Legislature will comply to the fullest extent with this policy except when the public welfare requires secrecy.

[s. 19.81 (1)-(3), Stats.]

The declaration of policy directs that the Open Meetings Law must be liberally construed to achieve the purposes set forth above. [s. 19.81 (4), Stats.]

DEFINITIONS

The application of the Open Meetings Law to a group of people gathering depends in part on whether the group is considered a "governmental body," whether the gathering is a "meeting," and whether the meeting is in "open session." The Open Meetings Law provides specific definitions for these three terms. [s. 19.82, Stats.]

Governmental Body

The Open Meetings Law defines a "governmental body" as 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. A "governmental body" also includes a formally constituted subunit of any of these bodies. However, the statutes exclude from this definition a committee or subunit formed for public employee collective bargaining. [s. 19.82 (1), Stats.] In addition, courts have held the Open Meetings Law does not apply to offices held by a single individual, or bodies created by the Wisconsin Supreme Court. [*Plourde v. Habhegger*, 2006 WI App 147; *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287 (1976).]

Meeting

A "meeting" is defined in the Open Meetings Law 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. This definition includes a rebuttable presumption that if one-half or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the 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 has a limited exception for gatherings of local governmental bodies in certain cases, such as an inspection of a public works project or highway by a town board. [s. 19.82 (2), Stats.]

Negative Quorum

While the statutes provide a rebuttable presumption that a gathering is presumed to be a "meeting" if one-half or more of the members of a governmental body are present, the Open Meetings Law may also apply to gatherings of one-half or fewer of the members of a body when the gathering constitutes what is known as a "negative quorum." A negative quorum occurs when a group of members gathers in numbers that would be sufficient to block an action of the full body. This is because even though they may not affirmatively control the outcome of an issue, this number of members may control the body's course of action.

The concept of a negative quorum was applied in the *Showers* case, in 1987, in which the Wisconsin Supreme Court articulated a test for determining when the statutory definition of a "meeting" applies. Under the *Showers* test, a meeting occurs whenever a convening of members of a governmental body satisfies two requirements: (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 body's course of action on the subject under discussion.

[*State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987).]

Walking Quorum

The applicability of the Open Meetings Law to a series of informal discussions between small numbers of members of a body has been addressed by courts and the AG in numerous cases. This is commonly referred to as a "walking quorum." The identified concern with a walking quorum is that, unless it is properly noticed and made accessible to the public, it may produce a predetermined outcome and render the public meeting a mere formality. The AG has also determined, for example, that the use of administrative staff to individually poll members

regarding how they would vote on a proposed motion is a prohibited walking quorum. [*State ex. rel. Lynch v. Conta*, 71 Wis. 2d. 662 (1976); Clifford Correspondence (Apr. 28, 1986) and Herbst Correspondence (July, 16, 2008).]

However, the essential element of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. If there is no such express or tacit agreement, exchanges among separate groups of members may occur without violating the Open Meetings Law. [*State ex rel. Zecchino v. Dane County*, 2018 WI App 19; Kay Correspondence (Apr. 25, 2007); Kittleson Correspondence (June 13, 2007).]

Open Session

The Open Meetings Law defines an "open session" as a meeting 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 building and room thereof that enables access by persons with functional limitations, as specified in the statutes. [s. 19.82 (3), Stats.]

REQUIREMENTS OF THE LAW

Notice Requirements

Public notice of a meeting must be provided in accordance with the procedures set forth in the Open Meetings Law, in addition to any other notice requirements that are legally applicable to the type of meeting being held by a governmental body. Under the Open Meetings Law, public notice of a meeting must be communicated by the governmental body's chief presiding officer, or their designee, to the public, to news media that have filed a written request for notice, and to the official newspaper that applies to meetings of the body, as specified in the statutes. If no official newspaper exists, notice must be communicated to a news medium likely to give notice in the area. [s. 19.84 (1), Stats.]

2019 Wisconsin Act 140 amended the Open Meetings Law to specify the methods that may be used to give notice to the public. Under Act 140, any one of the following methods may be used to provide notice to the public:

- Posting a notice in at least three public places likely to give notice to persons affected.
- Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body's Internet site.
- By paid publication in a news medium likely to give notice to persons affected.

[s. 19.84 (1) (b), Stats.; 2019 Wisconsin Act 140, SECS. 5g and 5r.]

Every public notice of a meeting of a governmental body must specify the time, date, place, and subject matter of the meeting, in such form as is reasonably likely to apprise members of the public and the news media thereof. The notice must be given at least 24 hours prior to the commencement of the meeting, unless, for good cause, this is impossible or impractical, in which case a shorter notice may be given. However, in no case may the notice be provided less than two hours in advance of the meeting. [s. 19.84 (2) and (3), Stats.]

The specific information included in the description of the subject matter of a meeting must be determined on a case-by-case basis. Whether it is sufficiently specific depends upon what is reasonable under the circumstances. Factors to consider when making this determination include the burden of providing more detailed notice, whether the subject is of particular public

interest, and whether it involves nonroutine action that the public would be unlikely to anticipate. [*State ex re. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71.]

Open Session Requirements

The Open Meetings Law generally requires every meeting of a governmental body to be held in open session. 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. [s. 19.83, Stats.]

No duly elected or appointed member of a governmental body may be excluded from any meeting of that body. Likewise, no member of a governmental body may be excluded from any meeting of a subunit of that body, unless the body's rules provide otherwise. [s. 19.89, Stats.]

The statutes require a governmental body meeting in open session to 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. The AG has interpreted this requirement as providing the public with a right to record an open meeting in a nondisruptive fashion. Thus, based on the AG's opinion, the governmental body generally cannot prohibit recording of a meeting unless it is in an authorized closed session. [s. 19.90, Stats.; OAG-66-318 (Nov. 25, 1977); Maroney Correspondence (Oct. 31, 2006).]

Voting Requirements

Under the Open Meetings Law, unless otherwise specifically provided by statute, no secret ballot may be used to determine any election or other decision of a governmental body except the election of officers of the body. For example, the members of a city council may not vote by secret ballot to fill a vacancy on the body. Additionally, any 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. In such instances, the vote must generally be taken by a roll-call vote; the AG has advised that a voice vote or a show of hands is only permissible if the vote is unanimous and the minutes reflect who is present for the vote. [s. 19.88 (1) and (2), Stats.; OAG-65-131 (July 30, 1976); OAG-I-95-89 (Nov. 13, 1989).]

The Open Meetings Law also states that the motions and roll call votes of a governmental body meeting must be recorded, preserved, and open to public inspection to the extent required by the Open Records Law. The AG has determined that this requirement applies to both open and closed sessions. [s. 19.88 (3), Stats.; De Moya Correspondence (June 17, 2009).]

Specific Exceptions to Open Meetings Requirements

Limited Notice Authorizations

Departments and subunits of the University of Wisconsin System are statutorily exempt from general public notice requirements under the Open Meetings Law. However, these entities must still provide notice that is reasonably likely to apprise interested persons of meetings of such bodies, as well as news media that have filed written requests for notice. [s. 19.84 (5), Stats.]

The Open Meetings Law authorizes a governmental body that is a formally constituted subunit of a parent governmental body to conduct a meeting for the purpose of discussing or acting on a matter that was the subject of a lawful meeting of the parent body, without a separate public notice. The subunit's meeting must occur during the meeting at which the subject was taken up by the parent body, or during a recess in such meeting, or immediately after such meeting; and

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 Authorization

The Open Meetings Law authorizes a meeting of a governmental body to be convened in closed session only for specific enumerated purposes. [s. 19.85, Stats.] The statutes state that a closed session may be held for any of the following purposes:

- Deliberating about a case that was the subject of any judicial or quasi-judicial trial or hearing before that 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 the taking of formal action on any such matter. 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.
- 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 be likely to 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 by the body 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 a local governmental ethics board.

In addition, the law requires that both the Ethics Commission and the Elections Commission must meet in closed session for the purpose of deliberating about an investigation of any violation of the law under its jurisdiction. [s. 19.851, Stats.]

Closed Session Procedures

The Open Meetings Law establishes procedures that must be followed when a meeting of a governmental body goes into closed session. 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.

[s. 19.85, 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." In conformance with this constitutional provision, as stated above, the statutes provide that it is the intent of the Legislature to comply to the fullest extent with the Open Meetings Law except when the public welfare requires secrecy. Accordingly, the Open Meetings Law applies to all meetings of the Senate, the Assembly, and the committees or subcommittees thereof, except in certain circumstances, as specified in the statutes. [s. 19.87, Stats.]

Under the statutes, if a provision of the Open Meetings Law conflicts with a Senate or Assembly rule or a joint rule of the Legislature, and a legislative meeting is conducted in compliance with that rule, the conflicting provision of the open meetings law does not apply to the meeting. [s. 19.87 (2), Stats.] In relation to this issue, the Wisconsin Supreme Court held that the Legislature may interpret its own rules of proceedings, and the Court will decline to review the validity of procedures followed by the Legislature in the absence of constitutional directives to the contrary. [*State ex. rel. Ozanne v. Fitzgerald*, 2011 WI 43 (citing *State ex. rel. La Follette v. Stitt*, 114 Wis. 2d 358 (1983)).]

The statutes provide that legislative meetings called solely for the purpose of scheduling business are exempt from public notice requirements under the Open Meetings Law; and no provision of the Open Meetings Law applies to any partisan caucus of the Senate or Assembly, except as provided by legislative rule. [s. 19.87 (1) and (3), Stats.]

PENALTIES AND ENFORCEMENT

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 such violation. However, a member is not liable for their attendance at a meeting held in violation of the Open Meetings Law if they make or vote in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, their votes on all relevant motions were inconsistent with all those circumstances that cause the violation. [s. 19.96, Stats.]

Enforcement

The Open Meetings Law is enforced by the AG on behalf of the state. Also, upon the verified complaint of any person, it may be enforced by the district attorney of any county in which a violation occurs. Any forfeitures recovered, together with reasonable costs, are awarded to the state in actions by the AG, and to the county in actions by a district attorney. Enforcement may include legal or equitable relief, including mandamus, injunction, or declaratory judgment, as may be appropriate under the circumstances. Actions taken at a meeting of a governmental body held in violation of the Open Meetings Law may be voided by the court, in certain cases, as specified in the statutes. [s. 19.97 (1)-(3), Stats.]

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 on behalf of the state. If the person prevails in a lawsuit on behalf of the state, they may be awarded actual and necessary costs of prosecution, including reasonable attorney fees, in addition to other remedies that may be imposed by the court. In such cases, any forfeiture recovered must be paid to the state. [s. 19.97 (4), Stats.]

Interpretations by Attorney General

The statutes specify that any person may request advice from the AG as to the applicability of the Open Meetings Law under any circumstances. [s. 19.98, Stats.]

ADDITIONAL REFERENCES

Wisconsin Open Meetings Law Compliance Guide, Wisconsin Department of Justice (May 2019).

This information memorandum was prepared by Dan Schmidt, Deputy Director, and Brian Larson, and Melissa Schmidt, Senior Staff Attorneys, on November 17, 2020.