

WISCONSIN OPEN MEETINGS & PUBLIC RECORDS LAWS

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OPEN MEETINGS LAW

Wis. Stat. § 19.81, et seq.

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PUBLIC POLICY

“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.”

— Wis. Stat. § 19.81(1)

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(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.

(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.

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THE BASICS OF OPEN MEETINGS

“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.”

Wis. Stat § 19.83(1)

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WHAT IS A GOVERNMENTAL BODY?

- 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 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.

Wis. Stat. § 19.82(1)

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An entity is a quasi-governmental organization “if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. Such a determination requires a case-by-case analysis.” State v. Beaver Dam Area Development Corp., 2008 WI 90, ¶ 9, 312 Wis. 2d 84, 752 N.W.2d 295.

A key factor nearly always is state funding of the entity. Additional factors include whether it serves a public function, whether it appears to the public to be a government entity, whether the entity is subject to government control, and the degree of access that government bodies have to the entity's records.

Id., at ¶ 62 (citing Burt A. Braverman and Wesley R. Heppler, A Practical Review of State Open Records Laws, 49 Geo. Wash. L. Rev. 720, 731 (1981)).

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WHAT CONSTITUTES A MEETING?

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.

Wis. Stat. § 19.82(2)

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WHAT CONSTITUTES A MEETING?

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.

Wis. Stat. § 19.82(2)

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### NEGATIVE QUORUMS

Negative Quorum is the number of members necessary to block action by the body.

- “The fact is that there is always the potential, no matter how divergent the forces, to join together. The Open Meeting Law is concerned with the potential to determine the outcome, not with the likelihood that an alliance may or may not be formed. The legislature knew, as do these Commissioners, that politics makes strange bedfellows. Today’s enemy may become tomorrow’s ally. Shifting agendas and shifting alliances can and often do lead to unpredictable results and unlikely alliances.”  
Showers at 103.
- Wisconsin ex rel. Zecchino v. Dane County, 2018 WI App 19
- Calculation is based upon the number actual present and voting
- Discusses One-way Communications

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### WALKING QUORUMS

- Walking quorum is “separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum.” Showers, 135 Wis. 2d at 92
- 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.

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### A NOTE ON ELECTRONIC COMMUNICATIONS:

Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a “convening of members,” depending on how the communication medium is used. 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:

- The number of participants involved in the communications
- The number of communications regarding the subject
- The time frame within which the electronic communications occurred
- The extent of the conversation-like interactions reflected in the communications.

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ATTENDING OTHER MEETINGS

However, because no notice was given of their attendance, the public may not have been aware of the perceived importance of these meetings to the Village Board and therefore failed to attend. Thus, the public was not made aware that information was being presented that could form the rationale behind the Village Board's action. The open meeting law is intended to allow the public access to the fullest information possible concerning the workings of government and the decisionmaking process. The public can hardly have access to this information if not made aware of its existence.

State ex rel. Badke v. Village Bd. of Village of Greendale, 173 Wis. 2d 553, 573, 494 N.W.2d 408 (1993).

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NOTICE REQUIREMENTS

- 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.

Wis. Stat. § 19.84(2)

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State ex rel. Buswell v. Tomah Area School Dist., 2007 WI 71, ¶¶ 27-28, 301 Wis. 2d 178, 732 N.W.2d 804.

"Thus, the language of § 19.84(2) and the policies underlying the open meetings law do not abide a brightline rule where the general topic of a meeting constitutes sufficient subject matter notice as a matter of law. Rather, they demand a reasonableness standard according to which notice must be reasonably specific under the circumstances of the case.

The reasonableness standard requires taking into account the circumstances of the case in determining whether notice is sufficient. This 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."

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BEST PRACTICES FOR NOTICE

**DO: Return to Grade School!**

- Who, Where, When, What & Why

Which Body Is Meeting?  
Location of the Meeting?  
Date and Time of the Meeting?  
What will be discussed?  
Why??

**DON'T: Skimp on Details**

- Need more than "Rezoning of Property" or "Approve Contract"

**DON'T: Get too Cute**

- "Approval," "Consideration of," and similar additional verbiage may not be needed

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CLOSED SESSIONS – WIS. STAT. § 19.85(1)

- A meeting may, upon motion duly made and carried, 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 presiding officer announces to those present the nature of the business to be considered at such closed session, and the specific exemption(s) 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.

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- 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.

Wis. Stat. § 19.85(2)

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STATUTORY REASONS FOR CLOSED SESSIONS UNDER 19.85(1)

(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.

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

(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.

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(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).

(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.

- *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, ¶¶ 14-17, 300 Wis. 2d 649, 731 N.W.2d 640
  - Cannot avoid negative public debate
  - Cannot eliminate possible competition

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BEST PRACTICES FOR CLOSED SESSIONS

**DON'T: Skimp on Details**

- Citizen should be able to tell what is being discussed

**DO: Separate Votes**

- Closed sessions are disfavored, Give members the option to vote No

**DO: Include Statutory Requirements on Agenda**

- What is being discussed?
- Statutory Exemption and Language
- Notice of Returning to Open Session if applicable

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**DO: Consider Optics**

- “Closed Sessions” agenda section vs. “New Business”

- L. Resolution 67-2018, Approving an Intergovernmental Agreement With Washington County Related to the Briggs and Stratton Corporation Development With Germantown TID No. 8.
- M. Resolution 68-2018, Waiver and Agreement related to Certain Village Rights for Properties within Willow Creek Business Park (TID # 6).
- N. September 2018 Meeting Schedule.
- O. Acquisition of Easement for Sanitary Sewer Main to Serve Holy Hill Road Service Area. The Village Board May Enter into Closed Session per Wis. Stat. § 19.85(1)(e) for the purpose of 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 and then may reconvene into open session to take such action as it deems appropriate.

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OPEN RECORDS LAW

Wis. Stat. § 19.21, et seq.

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PUBLIC POLICY

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

—Wis. Stat. § 19.31

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THE BASICS OF OPEN RECORDS

"Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made."

-Wis. Stat § 19.35(1)(a)

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LEGAL CUSTODIANS

- An elective official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.
- The chairperson of a committee of elective officials, or the designee of the chairperson, is the legal custodian of the records of the committee.
- Every other authority shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employees of the authority entrusted with records subject to the legal custodian's supervision.

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### THE RESPONSE PROCESS IN 4 STEPS

- Step One: Does the Record Exist?
- Step Two: Is the requester entitled to access the record by law?
- Step Three: Is the requester prohibited from accessing the record by law?
- Step Four: Conduct a Balancing Test to determine if the record should be released

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### WHAT IS A RECORD?

- Any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority.
- Includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved.
- Does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

- Wis. Stat. § 19.32(2)

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### NOTES AND DRAFTS

- "Whether the document is in 'preliminary' form and therefore not in final form is not determinative of whether it is a record." Fox v. Bock, 149 Wis. 2d 403, 412, 438 N.W.2d 589 (1989).
- "Upon a demand for inspection, the custodian of the document bears the burden of proof of facts demonstrating that it is a draft. The decision that a document is a draft under sec. 19.32(2), Stats., is a legal conclusion. However, if there exists a factual dispute, the custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true. The custodian must satisfy the finder of fact by the greater weight of the credible evidence that the document is a draft. Merely labeling each page of the document 'draft' does not make the document a draft as that term is defined in sec. 19.32(2), Stats. Similarly, corporation counsel cannot keep the document classified as a draft by not having the final corrections made on it. It was not prepared for the personal use of the corporation counsel. It was a report completed, paid for and relied upon by the county and therefore it does not comport with the exclusions set forth in the public access statute." Id. at 417 (internal citation omitted).

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A WARNING ABOUT PERSONAL DEVICES

- Schill v. Wisconsin Rapids School Dist., 2010 WI 86, ¶ 22, 327 Wis.2d 572, 786 N.W.2d 177.
- Personal emails/documents on Government computer are probably records.
- Government emails/documents on Personal Devices are records.
- “In determining whether a document is a record under Wis. Stat. § 19.32(2), the focus is on the content of the document. To be a record under § 19.32(2), the content of the document must have a connection to a government function.”

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ELECTRONIC AND SOCIAL MEDIA

- Twitter, Facebook, Text Messages and the like are all records
- Preservation is the concern

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CONFIDENTIALITY AGREEMENTS

- Generally a bad idea as you may end up having to decide whether to break the agreement or the open records law.

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### CORRESPONDENCE WITH ELECTED OFFICIALS

- Names and email addresses of citizens cannot be redacted from correspondence sent to public officials expressing their opinions regarding public policy.
- There is a strong public interest in knowing “who” is emailing elected officials to attempt to influence public policy and from “where” such individuals are communicating.
- Citizens have no expectation of privacy regarding the emails they send to elected officials in an attempt to influence public policy.

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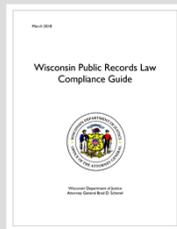
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### MORE GUIDANCE?

- Check the Attorney General's Webpage: <https://www.doj.state.wi.us/office-open-government/office-open-government>



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