Open Meetings & Public Records Training

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Open Meetings

- Public Policy Behind Open Meetings . . . Wis. Stat. s. 19.81
  - All meetings shall be publicly held, § 19.81(2), *Wis. Stats*: "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."
  - Liberal construction, § 19.81(4), *Wis. Stats.* ***State ex rel. Lawton v. Town of Barton***, 2005 WI App 16, ¶ 19.
- The purpose of the Open Meeting Law is to give the public the fullest and most complete information concerning the affairs of government. ***Martin v Wray***, 473 F. Supp. 1131 (E.D. Wis. 1979).

Open Meetings – Scope of the Law

Scope of the Law

- Applies to Governmental Bodies, which are defined as:
  - "[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 sub ch. II of ch. 229; a family care district under s. 46.2895; a nonprofit corporation operating the Olympic ice training center under §42.11(3); 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."

Open Meetings – Scope of the Law

- The key test is the source of authority from which the body obtains its power.
- Coverage is determined by the method of its creation.
- Governmental bodies are created by "constitution, statute, ordinance, rule or order" where collective power is conferred and defined. This includes formally constituted sub – units. See ***State ex rel. Lynch v Conta***, 71 Wis. 2d 622, 681, 239 N.W. 2d 313 (1976):
- Even bodies that are purely advisory are subject to the law if they are created by constitution, statute, ordinance, rule or order. ***State v. Swanson***, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Open Meetings – What types of meetings are covered?

Definition of meeting:

- "[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." § 19.82(2), *Wis. Stats*.

Open Meetings – What types of meetings are covered?

- Judicial and Attorney General interpretation.
- The *Showers* Test – The above 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. ***State ex rel. Newspapers v. Showers***, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

Open Meetings – What types of meetings are covered?

Purpose to Engage in Governmental Business:

- "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. *Showers,* 135 Wis. 2d at 102-03.
- 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. ***State ex rel. Badke v. Greendale Village Board***, 173 Wis. 2d 553, 573-74 (1993).
- Nonetheless, the Court of Appeals concluded in ***Paulton v. Volkmann***, 141 Wis. 2d 370, 375-77 (Ct. App. 1987), 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.

Open Meetings – What types of meetings are covered?

Number of Members Present Requirement.

- It is critical to remember that 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, *i.e.,* a "negative quorum." The size of a negative quorum is smaller than a majority in situations where a super-majority (2/3 or 3/4) vote is required for a body to pass a measure.

Open Meetings – Quorums

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. *Showers*, 135 Wis. 2d at 92.
- The critical element of a walking quorum is an agreement to act uniformly.
- If there is no tacit or express agreement, exchanges among separate groups of members may take place without violating the Open Meetings law.

Open Meetings – Quorums

Problems with Walking Quorums:

- The danger is that walking quorums produce a predetermined outcome and may render publicly-held meetings a mere formality. See ***State ex rel. Lynch v Conta***, 71 Wis. 2d 622, 239 N.W. 2d 313 (1976).
- Proxies or surrogates cannot be used to circumvent the open meetings law. Clifford Correspondence, April 28, 1986.

“Petitions” and Walking Quorums

- The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting does not constitute a “walking quorum.” Kay Correspondence, April 25, 2007; Kittleson Correspondence, June 13, 2007.
- 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. Huff Correspondence, January 15, 2008.

Open Meetings – What types of meetings are covered?

Technological Advances have changed what constitutes a meeting:

- Telephone Conferences - In 1980, the Attorney General opined that a telephone conference involving a governmental body constituted a meeting and was subject to the provisions of the Open Meetings Law. 69 Op. Att'y Gen. 143 (1980).

Open Meetings – What types of meetings are covered?

Video Conferences

- In order to comply with the Open Meetings Law, the video conference must be “reasonably accessible” to the public.
- A video conference may be “reasonably accessible” if it is broadcast at a location open to the public.
- Therefore, at a minimum, it would seem prudent that an accessible room be reserved for the public viewing of the meeting.

Open Meetings – What types of meetings are covered?

Electronic Mail

- Communications *via* electronic mail may constitute a "meeting" and be subject to the Open Meetings Law.
- The underlying principle is pretty simple: e-mail is a valuable, time saving device for quick and incidental communication, but it should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny. *Benson Correspondence* (March 2004).

Open Meetings – What types of meetings are covered?

Electronic Mail

- A violation may occur if elected officials are instant messaging or emailing each other within a close time frame if: 1) enough of them are involved in the messaging to determine the body's course of action, and 2) there is a purpose to engage in governmental business. Benson Correspondence, March 2004.

- A violation could also occur if a single official were to e-mail other officials in succession, asking for their support of a particular matter or position. If the sender (or others forwarding the sender's e-mail) were to reach enough officials to constitute a quorum necessary to take or block the action contemplated in the e-mail, then a "walking quorum" or "negative quorum" violation may occur. Benson Correspondence, March 2004.

Open Meetings – What types of meetings are covered?

Electronic Mail

- Electronic mail features such as "reply all" and "forward" make it possible for a message to be instantaneously transmitted to a sufficient number of members of the governmental body to determine the body's course of action on the matter, thus satisfying the definition of a meeting. *DOJ Correspondence*, October 3, 2000.
- While there is no applicable precedent that addresses the use of electronic mail in the context of the Open Meetings Law, members of governmental bodies are strongly discouraged from communicating via electronic mail on matters within the realm of their authority.

War Stories

Madison "City Council emails, texts present challenges for laws governing open meetings, records" Wisconsin State Journal (May 7, 2012).

http://host.madison.com/wsj/news/local/govt-and-politics/city-council-emails-texts-present-challenges-for-laws-governing-open/article_89466178-96e1-11e1-a11d-0019bb2963f4.html

Open Meetings – Recording

- The Open Meetings law explicitly provides that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film or photograph an open session meeting, provided the activity does not interfere with the conduct of the meeting. § 19.90, *Wis. Stats.*
- The same right does not extend to closed session meetings.

Open Meetings – Meeting Notices

- Meeting notices must be reasonably specific with regard to agenda items so as to reasonably apprise the public of what will occur at the upcoming meeting. Linde Correspondence, 2007.
- As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves. Id.
- 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. 63 Op. Att'y Gen. 509, 510-11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published.
- 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. Peck Correspondence, 2006.

Open Meetings – Who Can Close?

- Only the board may exercise the right to convene into executive session; the public does not have the right or power to close a meeting.
- Even under § 19.85(1)(b), *Wis. Stats.*, an employee cannot close a meeting.

Open Meetings – When May They Be Closed?

- Wisconsin Stat. § 19.85(1) contains thirteen exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. 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. State ex rel. Hodge v. Turtle Lake, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); Citizens for Responsible Development, 300 Wis. 2d 649, ¶ 8.
- 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. See 74 Op. Att'y Gen. 70, 73 (1985).

Statutory Exemptions Allowing for Closed Session

- Judicial or quasi-judicial hearings. Wis. Stat. § 19.85(1)(a).
- Employment and licensing matters. Wis. Stat. § 19.85(1)(b).
- Consideration of employment, promotion, compensation, and performance evaluations. Wis. Stat. § 19.85(1)(c).
- Considering applications for probation or parole, or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).
- Conducting public business with competitive or bargaining implications. Wis. Stat. § 19.85(1)(e).
- Specified deliberations by the state council on unemployment insurance and the state council on worker's compensation. Wis. Stat. § 19.85(1)(ee) and (eg).
- Specified deliberations involving the location of a burial site. Wis. Stat. § 19.85(1)(em).
- Consideration of financial, medical, social, or personal information. Wis. Stat. § 19.85(1)(f).
- Conferring with legal counsel with respect to litigation. Wis. Stat. § 19.85(1)(g).
- Consideration of requests for confidential written advice from an ethics board. Wis. Stat. § 19.85(1)(h).
- Considering specified matters related to a business ceasing its operations or laying off employees. Wis. Stat. § 19.85(1)(i).
- Considering specified financial information relating to the support of a nonprofit corporation operating an ice rink owned by the state. Wis. Stat. § 19.85(1)(j).

Open Meetings – Who May Attend Closed Session

- In general, the open meetings law gives wide discretion to a governmental body to admit to a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. *DOJ Correspondence*, December 15, 1988.
- Cannot exclude any elected or appointed member of the governmental body.
- However, it is important to remember that 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 § 19.84, *Wis. Stats.*, apply. *Badke*, 173 Wis. 2d at 579.

PUBLIC RECORDS

What is a Record Subject to Disclosure?

- Statement of Policy. Section 19.31, Wis. Stat. states:

[I]t 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 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 exceptional cases may access by denied.

What is a Record Subject to Disclosure?

- "Except as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a).
- The requester gets to see the records unless disclosure is barred by:
  - Statute;
  - Common law; or
  - Public Policy Balancing Test. Whether the public's strong interest in disclosure is overcome by the public's greater interest in nondisclosure. Wisconsin's Supreme Court has held that in every case, the public's interest in disclosing the record weighs heavily. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

What is a Record Subject to Disclosure?

- Definition of Record. Section 19.32(2) defines "Record" broadly!
- "Any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2).
- Must be created or kept in connection with official purpose or function of the agency. 72 Op. Att'y Gen. 99, 101 (1983); State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 679 (1965).

What is NOT a Record Subject to Disclosure?

- Drafts, notes, preliminary documents, and similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working. Wis. Stat. § 19.32(2).

The record request

- Requests do not have to be in writing. Wis. Stat. § 19.35(1)(h).
- The requester generally does not have to identify himself or herself. Wis. Stat. § 19.35(1)(i).
- The requester does not need to state the purpose of the request. Wis. Stat. § 19.35(1)(h) and (i).

The Request: Specificity

- The request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h).
- A request without a reasonable limitation as to subject matter or length of time does not constitute a sufficient request. *Id*.
- The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request. *Gehl, supra*, ¶ 17.

The Request: Specificity

- However, a records custodian may not deny a request solely because the records custodian believes that the request could be narrowed. *Gehl, supra*, ¶ 20.
- The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited. *Id.*, ¶ 23.
- A records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request.
- These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed.

The Response to the Request: Timing

- Response must be provided "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). The public records law does not require response within any specific time, such as "two weeks" or "48 hours."
- An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a $1,000.00 forfeiture. Wis. Stat. § 19.37.
- DOJ policy is that ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records.
- For requests that are broader in scope, or that require location, review or redaction of many documents, a reasonable time for responding may be longer.
- To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.

Denying a Request

- If the request is in writing, a denial or partial denial of access also must be in writing. Wis. Stat. § 19.35(4)(b).
- Reasons for denial must be specific and sufficient. *Hempel*, 2005 WI 120, ¶ 25-26.
- Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
- If the custodian fails to state sufficient reasons for denying the request, the court will issue a writ of mandamus compelling disclosure of the requested records. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16.

Denying a Request

- If no responsive records exist, the authority should say so in its response.
- An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test.
- Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as "social security numbers."
- Denial of a written request must inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General. Wis. Stat. § 19.35(4)(b).

Redaction

- If part of the record is disclosable, that part must be disclosed. Wis. Stat. § 19.36(6).
- An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome. *Osborn*, 2002 WI 83, ¶ 46.
- However, an authority does not have to extract information from existing records and compile it in a new format. Wis. Stat. § 19.35(1)(L); *WIREdata I*, 2007 WI App 22, ¶ 36.
- Authorities cannot charge a fee for redaction costs. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65.

Limited duty to notify record subject

- In response to *Woznicki*, the legislature enacted Wis. Stat. § 19.356 to clarify pre-release notice requirements and judicial review procedures.
- First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.
- The duty to notify the record subject only applies to three categories of records:
  - Records containing information relating to an employee created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer.
  - Records obtained by the authority through a subpoena or search warrant.
  - Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access.

Limited duty to notify record subject

- When notification is required, follow the procedure in Wis. Stat. § 19.356.
- Must serve written notice personally or by certified mail. Wis. Stat. § 19.356(2)(a).
- Notice must be served before permitting access to the record and within three business days after making the decision to permit access. Wis. Stat. §§ 19.345 and 19.356(2)(a).

The Broad Definition of "Record" and Electronic Communications on Personal Devices and Accounts

- The Wisconsin Attorney General has opined that it is the content that determines whether a document is a "record," not medium, format, or location. 72 Op. Att'y Gen. 99 (1983).
- This means that documents which relate to official governmental business on personal devices and accounts likely constitute a "record" under Wisconsin's Public Records Law.
- Although a Wisconsin appellate court has not decided this question, other courts from around the country have, and their holdings support the aforementioned conclusion.

The Broad Definition of "Record" and Electronic Communications on Personal Devices and Accounts

City of San Jose v. Smith, 2 Cal. 5th 608 (Cal. 2017):

- The Court held a requester had a right to access voicemails, e-mails, and text messages relating to City of San Jose business contained on the private cell phones of the Mayor and ten council members. The Court reached its holding for the following reasons:
  - The City's argument that, under the CPRA, a "public record" is limited to records contained on public electronic devices would allow evasion of the CPRA by use of a personal account. Such a result is counter to the legislative intent behind the CPRA.
  - Privacy interests of public employees and officials would be protected by the law's various safeguards, such as the ability to redact purely personal information, the ability to withhold preliminary drafts, notes, and memoranda, and the ability to withhold records under the "balancing test."
  - Searches of personal devices and accounts can be done in a fashion that limits the invasiveness of the search.

The Broad Definition of "Record" and Electronic Communications on Personal Devices and Accounts

Comstock Residents Ass'n v. Lyon County Bd. of Commissioners, 414 P. 3d 318 (Nev. 2018):

- The Court ruled that Lyon County Board of Commissioners must disclose communications located on their personal phones relating to an industrial development in the County.
- The Court rejected the County's argument that the Nevada Public Records Act only applied to records physically located in government offices, noting that the NPRA applies to private entities rendering public services.
- The Court also stated that, because each individual commissioner is a "public entity" under the NPRA, the County has custody over each record despite their location.
- The Court concluded that whenever a communication pertains to the provision of public services, the communication is a record subject to public disclosure under the NPRA, regardless of where the communication is created or stored.

The Broad Definition of "Record" and Electronic Communications on Personal Devices and Accounts

Nissen v. Pierce County, 183 Wash.2d 863 (Wash. 2015):

- A prosecutor received a request for all text messages sent and received on his personal cell phone on a particular date. A detailed call log and text message log were produced in response to the request. No physical text messages were produced.
- The Court held that the Washington Public Records Act captures work product on a public employee's private cell phone, because the WPRA is explicit that information qualifies as a public record "regardless of its physical form if it is: (1) owned, used, or retained by a state or local agency; and (2) related to the conduct or performance of government."
- Because the call log and text message log produced by the County were obtained from Verizon Wireless after the County's receipt of the public records request, the logs did not constitute public records.
- The prosecutor's physical text messages, which were not produced by the County, were public records subject to disclosure under the WPRA. This is because the text messages related to the prosecutor's job duties.

So, what do we do?

- To the extent you can avoid using personal electronic devices and accounts for official governmental business, DO IT!
- To the extent you cannot avoid using personal electronic devices and accounts for official governmental business, ensure all records on such devices and accounts are backed up on official governmental servers/accounts.

A Step-by-Step Analysis for Handling Records Requests

- Does the request have an unreasonable limitation as to subject matter or length of time?
- Is there a record responsive to the request?
- Does a statutory or common law exception apply?
- Balancing Test. Does the public's interest in not disclosing the record outweigh the public's interest in disclosure?
- Is notice required under Wis. Stat. s. 19.356 prior to release of the record?

Additional Resources

- Attorney General's Open Meetings Compliance Guide - http://www.doj.state.wi.us//dls/open-government
- The UW-Extension Local Government Center has many resources on the topics covered in this presentation and contributed content to this presentation.

Additional Resources

- Wisconsin Counties Association
  - www.wicounties.org
  - (866) 404-2700

- von Briesen & Roper, s.c.
  - www.vonbriesen.com
  - (414) 287-1461