

## OPEN MEETINGS LAW

### I. The Open Meeting Law.

The Open Meeting statute is found in Secs. 19.81 - 19.98 of Wisconsin Statutes and Sec. 3.71(1) of the Madison General Ordinances (MGO). Additional open meeting regulations are contained in Administrative Procedure Memorandum 3-1 and 3-2.

### II. What The Law Requires.

All meetings of all state and local governmental bodies must be held in a place reasonably accessible to the public, including persons with disabilities. In addition, all such meetings must be preceded by notice in the manner required by the statutes, and be open to all citizens, unless the law expressly allows for a closed meeting. Furthermore, City policy and federal law require the use of interpreters whenever necessary to assure that individuals with hearing impairments or limited English proficiency may participate fully in City government

Even a closed session must be preceded by public notice, and must be initially convened in open session.

### III. What Bodies Are “Governmental Bodies” And Covered by The Statutes?

A. A 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. This includes a resolution adopted by the Council and it also includes formal directives from the Mayor. A governmental or quasi-governmental corporation is a governmental body. The City of Madison has explicitly restricted the authority to create governmental bodies to the Mayor and the Common Council. Individual employees are not authorized to convene or create public bodies. See § 33.01(4) and 33.27(2), MGO.

A formally constituted subunit of any of the foregoing is also covered by the law. Thus, if a body creates a subcommittee or designates a specific task to a specific subset of its membership, that body will be subject to the Open Meetings Laws, See Sec. 19.82(1), Wis. Stats.

B. An opinion of the Attorney General explains the term “quasi-governmental corporation.” OAG 20-91, November 18, 1991. It includes private corporations created by governmental bodies such as the Madison Development Corporation. A more recent legal case expands upon the definition. Please consult with the Office of the City Attorney to determine whether the Open Meetings Laws apply to any particular corporation the City creates, supports, sponsors or maintains membership in.

C. In order for a group to be a “governmental body,” the constitution, statute, ordinance, rule or order must confer some collective power on the group, and must define when that power exists. Collective power must be a power which individual members of the body do not possess.

D. A subcommittee is a “governmental body” if it is “formally constituted” and if it meets the other criteria in paragraph A. For example, the Board of Estimates and the Common

Council Organizational Committee are “formally constituted subunits” of the Common Council. Sometimes it can be hard to determine when a subcommittee is a “formally constituted subunit.” If you have questions, you should contact the Office of the City Attorney.

- E. Even if the collective power is only the power to give advice, collect information or make recommendations, that still constitutes collective power and a body which has such power is a “governmental body,” if it meets the other criteria.

#### IV. What Meetings Are Covered by The Open Meeting Law?

- A. The statute defines a meeting as “the convening of members of a governmental body for the purpose of exercising the responsibility, authority, power or duties delegated to or vested in the body.”

- B. A meeting takes place when two things happen:

1. There must be a purpose to engage in governmental business. That includes discussion, information gathering, or decision-making. Note: This element does require the body take action on any agenda item.
2. The number of members present must be sufficient to determine the parent body’s course of action regarding the proposal being discussed. Usually that means a quorum ( one member more than half of the governmental body’s authorized membership). A gathering of less than half the members of a body could constitute a meeting, if the gathering includes enough members to defeat some action that the body might take. This is called a negative quorum.

*Negative Quorum Example:*

Assume a public body has seven members. A quorum of that body would consist of four members. Now, if a meeting were held with only four members present it would take the votes of three members to pass any motions or items before that body. Thus, if any two members voted to oppose a motion or an item the motion/item would fail. Under this example, these two members would constitute a negative quorum. If these two members had gotten together beforehand and coordinated their actions they would have violated the Open Meetings Laws. However, if we change the example so that five members show up at the meeting, then the coordinated actions of those two members would not have violated the Open Meetings Laws. This is true because the number of affirmative votes need to either pass or defeat an item is precisely the same – it is three. Thus, the coordinated actions of these two committee members would not constitute a negative quorum.

This example demonstrates the difficulties inherent in determining whether a meeting of less than a quorum of membership constitutes a negative quorum. One never knows precisely what the magic number is until the actual meeting where the motion or item comes under consideration. This problem is called the “floating negative quorum.” However, the most prudent recommendation is that members avoid meeting in numbers that would constitute a negative quorum assuming that only a bare quorum of members is present at the full body’s meeting. If members have consulted prior to a meeting such that a negative quorum may have been created, the matter should be referred to another meeting.

- C. A meeting does not occur when members gather together socially or by chance, as long as the gathering is not “intended to avoid requirements of the open meeting law.” When one-half or more of the members are present, the meeting is rebuttably presumed to be for the purpose of conducting a meeting.

Suppose, for example, that the Board of Public Works holds a 4th of July cookout at the home of a member, and more than half the members attend. If this gathering is not noticed as a “meeting,” and a challenger files suit, the Board has the burden to prove that the gathering was purely social. This can be done by showing that, for example, dress was informal, there were games, skits, music, fireworks, or other recreational activity and that Board business was not discussed.

“Chance” meetings can happen if the “governmental body” is very small. For example, if two members of the Board of Estimates are eating lunch, and two other members walk into the restaurant, catch their eye, and sit down at their table, a quorum of the Board is present. This is a “chance” gathering and not a “meeting.” If Board business is discussed, however, the defense of “chance” would be difficult to establish. Also, the same rebuttable presumption of a meeting will apply to these chance encounters.

- D. Telephone conference calls are meetings if they involve enough members of the governmental body to determine the outcome of a matter. Agendas must specifically state which members are participating by phone. A speaker phone must be provided of sufficient quality that the public can follow the meeting.
- E. Tours or site visits are meetings and must be noticed. The body does not have to provide transportation to press and public, but, if the body provides transportation to members, it should travel in groups of less than a quorum or refrain from discussing business until it arrives at the meeting site.
- F. Problems can arise when a majority of members of one body attend a meeting of another body. This is a meeting covered by the statute if the members attend in order to exercise their responsibilities, including simply listening to information which they may later act upon or rely upon.

For example, if a quorum of the Urban Design Commission (UDC) decided to attend a meeting of the Plan Commission, because the Plan Commission was reviewing a UDC decision, the UDC should notice its attendance as a meeting.

For example, if a quorum of the Early Childhood Care and Education Board decided to attend a meeting of the Community Services Commission to discuss a budget issue, the Early Childhood Care and Education Board should notice its attendance as a meeting.

V. What is an Open Session?

- A. An open session is a meeting which is held in a place reasonably accessible to members of the public and where all persons are permitted to attend. This does not mean that crowds must be allowed to enter when Fire Codes would be violated. The law is complied with when the body makes reasonable efforts to schedule its meeting in a place that will be accessible to the number of persons reasonably expected to attend. Controversial agenda items may require a body to hold its meeting in a larger facility

than it does its regular meetings. Be aware that access to the room must be open throughout the meeting. This can be an issue when external entry doors to a building are locked during the course of an otherwise open meeting.

- B. A telephone conference call is reasonably accessible to the public if there is a speaker phone at the meeting sites and room for members of the public and the press to have access to the speaker phone. The meeting's agenda must specifically identify the members who will be appearing via telephone.
- C. Open meetings can be held at "quasi-public" facilities, if public meetings are regularly held there, but proper notice must be given and the location must be accessible to members of the public during the meeting. If there is any doubt about public access or accessibility, don't use the facility. It is preferable to use public buildings designed for public use.

#### VI. Meeting Sessions Must Be Made Accessible to Persons With Disabilities.

Title 2 of the Americans With Disabilities Act requires local governments to "furnish appropriate auxiliary aids where necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." See 28 CFR Sec. 35.160(b). The explanatory portion of the regulations suggests that ". . . when . . . information being communicated is complex or exchanged for a lengthy period of time (e.g. a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language . . . a sign language interpreter may be appropriate." Executive Order 13166 may require language interpreters/translators if a significant number of limited English proficient persons are anticipated to attend. Check with the Department of Civil Rights and the Office of the City Attorney.

#### VII. What Are The Requirements of Public Notice?

##### A. Special Requirements.

Governmental bodies that are governed by specific statutes, such as the Board of Review, the Plan Commission and others, must comply with the notice requirements of those statutes.

##### B. Content Requirements.

The notice must specify the time, date, place, and subject matter of a meeting including subjects intended for consideration at any closed session you are planning. APM 3-2 requires that agendas be posted as official notice of meetings. The agenda should list specific items for discussion. The items must be identified with such specificity that a reasonable person interested in that topic will know that it will be a matter before that body. Don't use vague phrases like "new business", "old business", etc. If a closed session is planned, the notice should include the specific subject matter of the closed session. It should also cite the specific statutory exemption which permits the closed session. Consult with the Office of the City Attorney whenever you are contemplating a closed session.

C. Who Must be Notified.

The notice must be provided to the public, to the official newspaper, and to those news media which have filed a written request for such notice. Notice to the public is accomplished when an agenda is posted in a place that is reasonably accessible to the public. The City Clerk is responsible for posting notices to the City's official bulletin board. Meeting agendas should be e-mailed to the City Clerk at "CL Meetings" to be posted properly. Committee chairs and staff should see to it that records show that notice was given.

D. Timing.

Notice must be given 24 hours in advance of a meeting unless such notice is impossible or impracticable. That is almost never the case. In no case, ever, may a meeting be held without at least 2 hours notice. Two-hour notice is not advisable. Meeting the burden of proof to demonstrate that 24 hour notice was impossible or impracticable is invariably more work than postponing the meeting would be.

Each open session must have a separate notice. It is helpful to publish an annual meeting schedule, but this schedule does not take the place of separate meeting notices.

E. Can You Discuss Subjects Which Do Not Appear on The Published Agenda?

Some bodies use a catch-all agenda item such as "other matters authorized by law." This is illegal. Don't use a catch-all item. Late-breaking events may either be noticed by an amended notice with at least 2 hours notice or put off until the next meeting. They should be put off unless there is a compelling reason to act.

F. Can a Body Go Into Closed Session When The Meeting Notice Makes no Reference to a Closed Session?

This is permissible if the body has convened in open session on proper notice, taken a vote as required to close the session, and if the subject of the closed session is a permissible subject for a closed session. After such a closed session, the body may not reconvene in open session for 12 hours. This should be done only if the closed session was not contemplated at the time the notice for the open session was given. It should be avoided, if possible. If it is necessary to do this, the item calling for a closed session should be moved to the end of the agenda.

G. Subunit Exemption.

The statute provides one exception to the notice requirement for all meetings of subcommittees. A subunit of a parent body may meet during the meeting of the parent body, during a recess of the parent body's meeting, or directly after the parent body's meeting to discuss or act on matters that were the subject of the meeting of the parent body. This is only permissible when the presiding officer of the parent body announces the time, place and subject matter of a committee or subcommittee meeting in advance, at the meeting of the parent body. See Sec. 19.84(6), Wis. Stats.

## VIII. When Can Governmental Bodies Meet In Closed Session?

Doubts about whether a meeting should be open or closed must be resolved in favor of openness. You must consult with the Office of the City Attorney if you have any questions on the propriety of meeting in closed session.

### A. Judicial or Quasi-Judicial Deliberations.

A governmental body, after it has held a judicial or quasi-judicial trial or hearing, may deliberate in closed session. See Sec. 19.85(1)(a), Wis. Stats. Deliberating in closed session is not mandatory, and some committees and commissions prefer to deliberate in open session. The Board of Review is forbidden by statute to deliberate in closed session.

### B. Discipline and Licensing.

When a governmental body considers dismissal, demotion, discipline, or licensing of a public employee or officer, or a person licensed by the governing body, and when the body investigates charges against such person, the body may act in closed session. The public employee or officer or licensed person must be given actual notice of any evidentiary hearing which may be held prior to final action and must also be notified of any meeting at which final action may be taken. This notice must contain a statement informing the person that she/he may demand that the meeting be held in open session. See Sec. 19.85(1)(b).

Sometimes testimony at such a hearing or meeting is about more than one person and it could happen that only one person would request that the meeting be held in open session. In that case, the portion of the meeting affecting a person who does not request open session can be closed.

### C. Compensation and Evaluation.

It is permissible to close meetings when the employment, promotion, compensation or performance evaluation data of any specific public employee subject to the jurisdiction of the particular governmental body is being considered. See Sec. 19.85(1)(c), Wis. Stats. This section does not apply to considerations of more global employment topics such as the establishment of general work rules or general pay schedules.

### D. Crime Prevention.

When governmental bodies consider strategy for crime detection or prevention, the meeting may be closed. See Sec. 19.85(1)(d), Wis. Stats.

### E. Competitive or Bargaining Reasons.

A meeting may be closed when a governmental body deliberates about negotiations, or actually negotiates, for purchase of public property, investment of public funds, or conducts any other specific public business, whenever competitive or bargaining reasons require a closed session. See Sec. 19.85(1)(e), Wis. Stats.

F. Personnel Matters.

A meeting may not be closed just because the subject has something to do with personnel matters. The meeting may be closed if the body is 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 as provided in VIII.B. above), where the information, if discussed in public, would be likely to have a substantial adverse effect on the reputation of the person involved. See Sec. 19.85(1)(f), Wis. Stats.

G. Conferring With Legal Counsel.

The governmental body may close a meeting to confer with its legal counsel when counsel either orally or in writing advises the body on strategy with respect to current or likely litigation. See Sec. 19.85(1)(g), Wis. Stats.

IX. How Should You Conduct a Closed Session?

A. Procedure For Convening Into Closed Session.

Governmental bodies must convene in open session before going into closed session.

1. Motion.

There must be a motion, and a second, to convene in closed session. A vote must be taken and a vote must be recorded in minutes which are kept. The motion must be carried by a majority vote. See Sec. 19.85(1), Wis. Stats. Strict compliance with the recording requirement is not necessary if the vote to convene in closed session is unanimous and the presiding officer notes, and the minutes record, the unanimous vote.

2. Announcement.

Before a vote is taken on the motion to close the session, the presiding officer must publicly announce the nature of the business to be considered and the specific statutory exception under which the closed session is authorized. The minutes should record this announcement. See Sec. 19.85(1), Wis. Stats.

It's good practice for the staff to write or type the motion for the chair to use.

Example 1: I move that the Plan Commission go into closed session so that it can confer with the City Attorney about the case of XYZ v. Madison, under Sec. 19.85(1)(f), Wis. Stats.

Example 2: I move that the Library Board go into closed session, under Sec. 19.85(1)(e), Wis. Stats., to confer with the Director of Labor Relations about bargaining with library employees.

Example 3: I move that the ABC Commission go into closed session, under Sec. 19.85(1)(f), Wis. Stats. to discuss allegations of embezzlement by an employee.

B. Who May Attend a Closed Session?

Attendance at a closed session is limited to members of the body, necessary staff and other officers, such as the clerk and the attorney, and other persons whose presence is necessary to conduct the business. If the closed meeting is a meeting of a subcommittee,

members of the parent committee must be allowed to attend the closed session, unless the parent committee has rules which provide otherwise.

C. What Goes on at Closed Sessions?

Once the governmental body has convened in closed session, it may discuss or consider only those subject matters specifically included in the announced reason for the closed session.

A body should vote in open session unless doing so would be contrary to the reasons for going into closed session.

If voting is an integral part of the closed deliberations, the body may vote in closed session.

D. Records of the Proceedings of Closed Sessions.

While the open meeting statute does not require that bodies keep minutes of their meetings, Sec. 33.01, M.G.O., requires minutes. Specific statutes concerning certain bodies also require that records be kept. See, for example, Sec. 62.13(1), Wis. Stats., which requires the Board of Police and Fire Commissioners to keep a record of its proceedings, and Sec. 62.14(5), Wis. Stats, which requires the Board of Public Works to do the same. All motions and roll call votes, whether in closed or open session, must be recorded and preserved, and open to public inspection to the extent required by the public records law.

If a record is kept of discussion and debate during the closed session, the record does not have to be disclosed under the public records statute, as long as the reason for convening in closed session continues to apply. The record of the motion or motions and the roll call vote has to be made public.

Once the underlying purpose for the closed session ceases, the records of the meeting must be provided to any person requesting access. For example, if the sale of public property was discussed in closed session, for the purpose of obtaining a competitive price, the need for confidentiality ceases when the purchase is complete.

The Office of the City Attorney advises against taping closed sessions.

X. Secret Ballots, Votes and Records.

A secret ballot may not be used except for the election of a body's own officers. Unless the statute requires voting by written ballot or by a roll call vote, voting may be by voice vote or by a show of hands unless a member demands a written ballot or a roll call vote.

XI. Use of Recording Equipment.

A government body must make a reasonable effort to accommodate any person desiring to record, film or photograph a meeting. Such recording or filming is not to be allowed to interfere with the conduct of the meeting.

XII. How is the Open Meeting Law Enforced?

A. Prosecution.

Violations may be prosecuted by the Attorney General, the District Attorney, or an individual citizen.

B. What is the Penalty.

Members of a governmental body who knowingly attend a meeting in violation of the open meeting law or otherwise violate the open meeting law by some act or omission are subject to paying a forfeiture of between \$25 and \$300 plus court costs. This is a personal liability and the municipality is not permitted to reimburse the member.

C. Actions May be Voided.

Any action taken at a meeting held in violation of the open meeting law is voidable if the public interest in enforcing the provisions of the law is greater than the public interest in upholding the action. Only a court has the authority to void the action of a body.

XIII. Suggestions For Avoiding Liability.

A. A member of a body who believes that the purpose stated for the motion to close a meeting is not legally sufficient, should vote against the motion.

B. At the beginning of the meeting, the presiding officer could ask the staff whether or not proper notice has been given for the meeting. If it is not clear that proper notice has been given, the meeting can then be rescheduled.

C. If you have a question about substantive reasons for closing meetings, procedures, or notice requirements, call the Office of the City Attorney and ask for advice.

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Michael P. May, City Attorney  
Roger A. Allen, Assistant City Attorney