

## Creating a legal record of the board's actions



Ben Richter  
WASB Staff Counsel  
brichter@wasb.org  
608-257-2622

## Public Policy of Open Government

- ▶ 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. § 19.81 (1).
- ▶ Therefore, “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 . . . .” § 19.81 (2).



## Advance Notice of Meetings

- ▶ Every meeting of a governmental body shall be preceded by public notice and shall be held in open session. § 19.83 (1).
- ▶ Public notice shall be given by communication from the chief presiding officer of a governmental body or such person's designee. § 19.84 (1).



## What entities are subject to the Open Meeting Law?

- ▶ What is a “governmental body”?
  - “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*; a governmental or quasi-governmental corporation . . . or a formally constituted *subunit* of any of the foregoing.
  - “Created by . . . rule or order” has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. This includes directives from governmental bodies, or certain government officials.

## Collective Bargaining Meetings

- ▶ What is a “governmental body”?
  - “Governmental body” does *not* include any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining, including grievance processing. § 19.82 (1); 67 Op. Att’y 276 (1983).
  - Exceptions:
    - s. 19.86: Notwithstanding s. 19.82 (1), where notice has been given by either party to a collective bargaining agreement under subch. IV of ch. 111 to reopen such agreement at its expiration date, the employer shall give notice of such contract reopening.



## Collective Bargaining Meetings

- ▶ Exceptions:
  - s. 111.70 (4) (cm) 2: The meetings between parties to a collective bargaining agreement or proposed collective bargaining agreement under this subchapter that involve a collective bargaining unit containing a general municipal employee and that are held for the purpose of *presenting initial bargaining proposals*, along with supporting rationale, shall be open to the public.
  - Districts must also notice meetings at which they will consider ratification of a tentative agreement, and such consideration or ratification may *not* take place in a closed session. § 19.85 (3).

## Collective Bargaining Meetings

- ▶ Limits on collective bargaining under Act 10:
  - Unions and employees may try to talk about prohibited subjects of bargaining at negotiations sessions.
  - While school boards are not prohibited from engaging in those discussions, notice must be given to the public that the board and union may talk about wages, hours and working condition matters that are beyond the scope of bargaining under Act 10.
  - There is no provision for going into closed session to discuss policies and rules that are prohibited subjects of bargaining under Act 10.
    - 19.85(1)(c) Wis. Stat. applies only to discussion of individual employee employment, promotion, compensation or performance evaluation data – it does not cover policies covering groups of employees.

## What entities are subject to the Open Meetings Law?

- ▶ What is a “subunit” of a governmental body?
  - A “formally constituted subunit” of a governmental body is itself a “governmental body” that must comply with the requirements of the open meetings law.
  - A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att’y Gen 38, 40 (1985).
  - A group that contains both members and non-members of the parent body are not “subunits” of the parent body, but if created by rule or order of the parent body, the group will nevertheless be subject to the requirements of the open meetings law.

## Meetings

- ▶ What is a “meeting” of a governmental body?
  - “Meeting” means 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. § 19.82 (2).
  - “Meeting” does not include any social or chance gathering or conference which is not intended to avoid the open meetings law requirements. § 19.82 (2).
  - 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).



## Meetings

- ▶ What is a “meeting” of a governmental body?
  - *Showers test*: The Wisconsin Supreme Court has held that the statutory definition of “meeting” applies when:
    1. The number of members present are sufficient to determine the parent body’s course of action regarding the proposal discussed at the meeting; and,
    2. The members are meeting to engage in governmental business, be it discussion, decision or information gathering. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).



## Meetings – Number of Members

- ▶ What is a “meeting” of a governmental body?
  - Because one-half of the members of the board, or even fewer members if a super-majority vote is required, can be sufficient to block a proposal and control the body’s course of action, the open meetings law, and its notice requirements, apply to more than just meetings of the board in which a quorum is present. *Showers*, 135 Wis. 2d at 157.
  - This is commonly referred to as a “negative quorum.”



## Meetings – Number of Members

- ▶ What is a “meeting” of a governmental body?
  - 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. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).
  - Consider phone calls, emails, text messages, internet forums, chat rooms, blogs, etc.



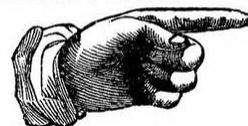
## Notice

- ▶ To whom must districts provide notice?
  - The public:
    - The attorney general recommends posting the notice in *at least* three different places within a district. 66 Op. Att’y Gen. 93 (1977).
    - If the district chooses to provide public notice via paid publication likely to give notice within the district, it must ensure that the news media actually publishes the notice. - *Why is this a bad idea?*
    - The attorney general has also opined that, although a district may choose to supplement its other public notices by placing a notice on its website, such a web posting should not replace its other public notices. Peck Correspondence, April 17, 2006.

## Notice

- ▶ To whom must districts provide notice?
  - The public:
    - [2015 Wisconsin Act 79](#):
    - As an alternative to posting in 3 public places, this new law permits the governing body to direct that the notice shall be placed electronically on an internet site maintained by the municipality and posted in at least one public place likely to give notice to persons affected.
      - Requirements related to the timing of the posting are the same regardless of which method of posting is used in lieu of newspaper publication.

Please Notice This



## Notice

- ▶ To whom must districts provide notice?
  - Those news media who have filed a request for such notice; and,
  - The official newspaper, or if none exists, to a news medium likely to give notice in the area. § 19.84 (1) (b).
  - Governmental bodies may not charge the newspaper or other medium for providing statutorily required notices of public meetings 77 Op. Att’y Gen. 312 (1988); conversely, the newspaper or news media is not required to publish the notice, and may not charge a governmental body for doing so. 66 Op. Att’y Gen. 230 (1977).

## Notice

- ▶ When must notice be provided?
  - Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of the meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given.
  - However, under no circumstance may a governmental body provide less than 2 hours notice. § 19.84 (3).
  - Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting. § 19.84 (4).

## Notice

- ▶ What must the notice include?
  - Time;
  - Date;
  - Place;
  - 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 news media thereof. § 19.84 (2).



## Notice

- ▶ So what's reasonable?
  - *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71.
    - When determining whether notice is sufficiently specific or reasonable, a reviewing court will consider the following factors:
      - The burden of providing a more detailed notice – would providing a more specific notice have thwarted the “efficient administration of governmental business”?



## Notice

- ▶ So what's reasonable?
  - Whether the subject is of particular public interest – the greater the interest in a topic, the more detailed the notice should be.
  - Whether the subject matter involves non-routine action that the public would be unlikely to anticipate – unique or uncommon issues may require more specific or detailed notice.



## Notice

- ▶ So what's reasonable?
  - Given these factors, boards must avoid placing generic agenda items such as “old business,” “new business,” “such other matters as are authorized by law,” “superintendent’s report,” “committee updates,” etc., on the notice because those headings do not describe any particular subject matter whatsoever.
  - What about a “action,” “discussion,” or “informational” items?
  - What about “consent” agendas?

## Notice

### ▶ Closed session notice:

- Notice of closed session items should be no less specific than notice of open session items. In other words, the notice of a closed session item must be reasonably likely to apprise members of the public as to the subject matter to be considered in closed session.
- The notice must reference the specific statutory exemption that authorizes the district to go into closed session.
- Merely citing the statute number and quoting the language of the entire exemption may not be adequate, however; the notice should instead include the specific subject matter within the language of the statutory exemption to be discussed.

## Notice

### ▶ Closed session notice:

- Caveat: If the governmental body did not contemplate convening in closed session at the time notice of the meeting was posted, the governmental body may still go into closed session under one of the statutory exemptions to discuss an item contained in the notice for open session. 66 Op. Att’y Gen 106 (1977).
- Why might this be problematic?



## Notice



### ▶ Closed session notice:

- Why might this be problematic?
  - Employee notice under § 19.85 (1) (b);
  - s. 19.85 (2): 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.

## Open Session



### ▶ Accessibility:

- “Open session” means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.
- A room will likely be “accessible” if it can accommodate all citizens who wish to attend and if those with functional limitations are able to enter, move about, and exit without functional limitations. 69 Op. Att’y Gen. 251 (1980).

## Open Session



- ▶ Recording the meeting:
  - Boards must make a reasonable effort to accommodate any person desiring to record, film or photograph a meeting.
  - However, a board may limit such activity if the recording, filming or photographing interferes with the conduct of the meeting or the rights of the participants. § 19.90.

## Open Session



- ▶ Citizen Participation:
  - The open meetings law gives members of the public the right to attend open session meetings, but it does not grant them the right to be heard or to actively participate in the meetings.
  - A school board may allow citizen participation, but it is not required to by the open meetings law.
  - Public participation may, however, be mandated by other laws at meetings requiring a public hearing.

## Open Session



### ► Citizen Participation:

- The open meetings law allows the board to hold a period for public comment, provided the period of public comment was properly noticed. § 19.84 (2).
- During a period of public comment, a governmental body may receive information and discuss any matter raised by the public. §§ 19.83 (2), 19.84 (2).
- The board must refrain from taking action on any matter raised during the public comment period, however, until the matter is properly noticed at a future meeting.

## Open Session



### ► Citizen Participation:

- *If a member of the public raises a subject that does not appear on the meeting notice, however, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. In addition, the body may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice.*
- Wisconsin Open Meetings Law Compliance Guide 2015, Wisconsin Department of Justice, Attorney General Brad D. Schimel, p. 21.



## Closed Session



- ▶ Procedure for conducting a closed session:
  - Meeting convenes in open session;
  - Motion to convene to closed session (seconded);
  - No motion to convene into closed session may be adopted unless the chief presiding officer announces to those present at the meeting:
    - (1) The nature of the business to be considered at such closed session; and,
    - (2) The specific exemption or exemptions by which such closed session is claimed to be authorized.

## Closed Session



- ▶ Procedure for conducting a closed session:
  - Board president's announcement becomes a part of the record of the meeting;
  - Board members vote on the motion;
  - To pass, the motion must be carried by a majority vote, and the vote of each member must be ascertained and recorded in the minutes.
  - 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. § 19.85 (1).

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before the governmental body;
  - A “case” under this section contemplates an adversarial proceeding. *Hodge v. Turtle Lake*, 180 Wis.2d 62, 508 N.W.2d 603 (1993).

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (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 . . . , 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.

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (b) (*continued*) 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. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employee or person licensed requests that an open session be held.

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
    - This exemption was designed to allow governmental bodies to have frank discussions about an employee/applicant's actions, abilities and qualifications without concern for potential lawsuits that could arise out of the open discussion of such sensitive information. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis.2d 480, 373 N.W.2d 459 (Ct. App. 1985).

## Closed Session Exemptions



- ▶ § 19.85 (1) (c) *continued*:
  - This exemption applies to employees, including local public officers such as superintendents or principals, and allows boards to meet in closed session to discuss the qualifications of, and/or salary for, a *specific employee or applicant*. It does not allow a board to go into closed session to discuss the qualifications or salary range for a position in general. *See Caturia Correspondence, September 20, 1982.*
  - An elected official is not considered an employee; therefore, a board cannot convene in closed session to select a person to fill a vacancy on the school board. *74 Op. Att’y Gen. 70.*

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (d) Considering strategy for crime detection or prevention.
  - (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* (i.e., leave the board no other option but to have) a closed session. *See State ex rel. Citizens for Responsible Dev. v. City of Milton, 2007 WI App. 114.*

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (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.
    - Must have actual knowledge of information that will have a substantial adverse effect on the person involved.

## Closed Session Exemptions



- ▶ § 19.85 (1):
  - (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.
  - (h) Consideration of requests for confidential written advice from the government accountability board under s. 5.05 (6a), or from any county or municipal ethics board under s. 19.59 (5).

## Closed Session



- ▶ Who may attend?
  - A governmental body may admit anyone it deems necessary to conduct the business that is the reason for the closed session. Schuh Correspondence, December 15, 1988.
  - No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. § 19.89.
  - Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body. § 19.89.

## Board Member Voting



- ▶ Open session:
  - A governmental body must have a quorum, or majority number of members, present to conduct its business.
  - What about participating via telephone or some other electronic means?
    - A governmental body may not use email ballots to decide matters, even if the result of the vote is later ratified at a properly noticed meeting. I-01-10, January 25, 2010. - ***Beware informal polling.***
  - If a quorum of the board is present, a plurality vote of those members is generally sufficient to pass or block a proposal. A tie vote will also block a proposal.

## Board Member Voting



- ▶ Open session:
  - A majority vote of the full membership of the board is needed to legally vote to employ or dismiss a teacher or administrator. §§ 118.22 (2), 118.24 (6).
  - A two-thirds super-majority vote of the entire membership of the board is necessary to approve the transfer of budgeted appropriations to alternative purposes. § 65.90 (5).

## Board Member Voting



- ▶ Secret ballot:
  - s. 19.88 (1): “. . . no secret ballot may be utilized to determine any election or other decision of a governmental body *except* the election of the officers of such body in any meeting.
  - Therefore, a board may not use a secret ballot vote to appoint an applicant to a vacancy on the board or to elect members for committee positions.

## Board Member Voting



- ▶ Closed session:
  - The attorney general has advised that a governmental body should conduct all votes in open session “unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session.”
  - In other words, “a governmental body should vote in open session, unless doing so would compromise the need for the closed session.” *See* J.B. Van Hollen, Attorney General, Wisconsin Dept. of Justice, Wisconsin Open Meetings Law, A Compliance Guide 23 (2010).

## Minutes

- ▶ The school district clerk shall enter in the record book provided by the board the minutes of its meetings, orders, resolutions and other proceedings. §§ 120.11(1), 120.17 (3).
- ▶ The school board president shall act as chairperson of school board meetings and see that minutes of the meetings are properly recorded, approved and signed. § 120.15 (5).
- ▶ The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection. § 19.88 (3).
- ▶ Except in the case of electing board officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded. § 19.88 (2).

## Publishing the Proceedings

- ▶ In addition to recording the minutes, the board is also required to publish the proceedings of a school board meeting within 45 days after the meeting as a class 1 notice in a newspaper published in the school district, if any, *or* publicize them via school district-wide distribution prepared and directed by the school board and paid out of school funds. If there is no newspaper published in the school district, the proceedings shall be posted or published as the school board directs. § 120.11 (4).



## Publishing the Proceedings

- ▶ The proceedings shall include the substance of every official action taken by the school board at the meeting and a statement of receipts and expenditures in the aggregate. § 120.11 (4).
- ▶ Wisconsin law defines “substance” as “an intelligible abstract or synopsis of the essential elements of the official action taken by a local governing body, including the subject matter of a motion, the persons making and seconding the motion and the roll call vote on the motion.” § 985.01 (6).
- ▶ The school board must also make a detailed record of all receipts and expenditures available to the public for inspection *at each school board meeting and upon request*. § 120.11 (4).

## Closed Session Minutes

- ▶ Closed session minutes must be kept in the same manner as open session minutes, and they are subject to a public records request unless there is a continuing need to keep the content of the closed session confidential.
- ▶ Furthermore, although discussion in closed session is protected initially by the open meetings law, the open meetings law may not prevent private, closed session discussions from being subject to discovery during civil litigation. In other words, if sued, board members may properly be questioned about, and forced to disclose, the content of discussions that occurred during a closed session. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89.

## Penalties for Violations

- ▶ Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than \$25 nor more than \$300 for each such violation.
- ▶ No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.
- ▶ Actions taken at meetings held in violation are voidable, and the district may be liable for fees, costs and other forfeitures. § 19.97.

## Additional Resources

- ▶ WASB, *Legal Comments*:
  - Compliance with Wisconsin's Open Meetings Law, Parts I & II
  - Minutes of School Board Meetings
  - Board Member Voting
  - What is a 'Governmental Body' Subject to Open Meetings Law?
  - Wisconsin's Open Meetings Law and Communicating with Technology
- ▶ Wisconsin Attorney General's Open Meetings Law Compliance Guide, *available at: [www.doj.state.wi.us](http://www.doj.state.wi.us)*

## Questions?

- ▶ Ben Richter  
WASB Staff Counsel  
[brichter@wasb.org](mailto:brichter@wasb.org)  
877-705-4422

