



Open Meetings and Public Records Law

September 30, 2020

Open Meetings Law

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Wisconsin's Open Meetings Law (OML)

- “[T]he public is entitled to **the fullest and most complete information regarding the affairs of government.**”
- All **meetings of governmental bodies must:**
 - Be preceded by **public notice.**
 - AND**
 - Held in a place that is **open and reasonably accessible** to all members of the public

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What is a Governmental Body?

- A **group of people** empowered to **act collectively** with regard to **governmental business**.
 - Not a single individual official
 - Includes advisory bodies and subcommittees
- Ultimately, what matters is the manner in which the body was created, rather than the nature of its authority

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What constitutes a meeting?

- Two requirements:
 - **Purpose** – to exercise “responsibilities, authority, power, or duties” of the body
 - **Numbers** – a “convening of members” to exercise those responsibilities or duties

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The “Purpose” Requirement

- “Conducting governmental business” is read liberally
 - Not limited to formal or final decision making.
 - Includes preliminary decisions, discussion, and information gathering.

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The "Numbers" Requirement

- A sufficient number of member to determine the body's course of action is either:
 - The affirmative power to pass an action – a **quorum**
 - OR
 - The negative power to defeat an action – a **negative quorum**
 - ♦ If a simple majority to act – one half of body
 - ♦ If a supermajority (e.g., 2/3 of body) to act – 1/3 of the body plus one

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"Convening" of Members

- Not limited to face-to face interactions
- Includes situations where members can effectively communicate with each other contemporaneously and exercise authority
- A telephone or video conference – **likely a "convening of members"**
- Written correspondence – **probably not a "convening of members"**

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Walking quorums

- Likely a meeting when:
 - A **series of gatherings** among members of a body;
 - Each **smaller in size than a quorum**;
 - An **agreement is reached to act** a certain way; and
 - In **sufficient number to control the body**.
- Walking quorums prohibited to prevent circumventing OML through collective agreements or an agent in what would otherwise not be a meeting.

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Electronic Communications

- More likely meetings subject to OML
- Courts will consider:
 - Number of participants
 - Number of communications
 - Time frame/contemporaneity of communications
- Electronic communications pose unique risk of constituting a walking quorum
- **USE CAUTION:** limit electronic communications to one-way transmissions, minimize content and distribution

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Social or chance gatherings

- Not a "meeting" unless the gathering is intended to avoid compliance with the law.
- **But** if one-half or more of the members are present, it's **presumed to be a meeting** and the body has the burden of proving that they weren't conducting governmental business

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Notice

- Every meeting must be preceded by **at least 24 hours notice** to the public.
 - Shorter notice permitted **in an emergency** if 24 hours notice is impossible or impractical, but **in no case may less than 2 hours notice be given**
- Notice must contain:
 - Time
 - Date
 - Place
 - Subject matter – generic designations not enough

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Open session

- OML gives citizen the right to **attend and observe**
- OML permits public comments
 - If public comment will be received, it **must be included in the meeting's agenda.**

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Closed sessions

- Closed sessions are permitted only in 11 specific circumstances ("exemptions") contained in Wis. Stat. § 19.85(1).
- Because of time, I will not discuss those exemptions in detail
- **Presumption is that meeting should be held in open session, and exemptions are limited/narrowly read.**

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Bottom line

The purpose of OML is to **ensure openness, with only a few exceptions permitting confidential meetings.**

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Public Records Law

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Wisconsin's Public Records Law (PRL)

- **“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.”**
- **Bottom line:** There's a presumption that everything created or maintained by a governmental entity is a public record.

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The Records Request

- The records request doesn't have to be made in writing
 - “Magic words” are not required – but request must be reasonably specific to subject matter/length of time.
 - But if a request is made in writing, response must be as well.
- Responses are mandatory: as soon as practicable and without delay
- If no record exists, inform the requestor

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Is There a Record?

- **Content, not format controls** – any type of written, drawn, printed, spoken, visual or electronic information recorded and maintained can be a record.

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Exceptions – Not a “record”

- By statute, “record” does not include, for example:
 - Notes – kept for personal use and used to refresh recollection at a later time.
 - ♦ E.g., your personal notes from this meeting
 - Drafts
 - ♦ Not a draft if used for the purpose for which it was commissioned.
 - ♦ Cannot indefinitely qualify a document as a “draft” to avoid disclosure
- All exceptions are **narrowly construed**

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Statutorily required or exempt

- A few types of records where access expressly required by statute or court decision
 - Traffic accident reports, daily arrest logs
- Some records exempt from disclosure by state or federal statutes
 - Patient health care records, SSNs, Medicaid records
- Some records exempt from disclosure by court decisions:
 - Attorney-client privilege, “purely personal emails that evince no violation of law or policy”
- Exemptions are also **narrowly construed**

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The Balancing Test

- When faced with a request for records where access isn't expressly required or exempt, custodian must **balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure**
 - No blanket exceptions permitted – must state specific policy reasons.
- A fact-intensive inquiry performed on a case-by-case basis.

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Closing thoughts

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Closing thoughts

- The appearance of impropriety can be as damaging as actual misconduct – always err on the side of caution and **consult OLC with specific inquiries**
- If contacted by a member of the public about your subcommittee, encourage them to attend public hearing for more information

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