WISCONSIN OPEN MEETINGS LAW
A COMPLIANCE GUIDE
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WISCONSIN OPEN MEETINGS LAW

I. POLICY OF THE OPEN MEETINGS LAW.

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. The state's open meetings law declares that: 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). In order to advance this policy, the open meetings law requires that "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." Wis. Stat. § 19.81(2). There is thus a presumption that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987). Although there are some exemptions allowing closed sessions in specified circumstances, they are to be invoked sparingly and only where necessary to protect the public interest. The policy of the open meetings law dictates that governmental bodies convene in closed session only where holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes. Wis. Stat. § 19.81(4); *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19, 278 Wis. 2d 388, 692 N.W.2d 304 ("The legislature has issued a clear mandate that we are to vigorously and liberally enforce the policy behind the open meetings law.") This rule of liberal construction applies in all situations, except enforcement actions in which forfeitures are sought. Wis. Stat. § 19.81(4). Public officials must be ever mindful of the policy of openness and the rule of liberal construction in order to ensure compliance with both the letter and spirit of the law. *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, ¶ 6, 300 Wis. 2d 649, 731 N.W.2d 640 ("The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored.")

II. WHEN DOES THE OPEN MEETINGS LAW APPLY?

The open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).

A. Definition of "Governmental Body."

1. Entities that are governmental bodies.

a. State or local agencies, boards, and commissions.

The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by

constitution, statute, ordinance, rule or order . . . .” Wis. Stat. § 19.82(1). This definition is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that a governmental body is defined primarily in terms of the manner in which it is created, rather than in terms of the type of authority it possesses. Purely advisory bodies are, therefore, subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979). The words “constitution,” “statute,” and “ordinance,” as used in the definition of “governmental body,” refer to the constitution and statutes of the State of Wisconsin and to ordinances promulgated by a political subdivision of the state. The definition thus includes state and local bodies created by Wisconsin’s constitution or statutes, including condemnation commissions created by Wis. Stat. § 32.08, as well as local bodies created by an ordinance of any Wisconsin municipality. It does not, however, include bodies created solely by federal law or by the law of some other sovereign. State and local bodies created by “rule or order” are also included in the definition. The term “rule or order” has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Atty. Gen. 67, 68-69 (1989). This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department or division. *See* 78 Op. Atty. Gen. 67. A group organized by its own members pursuant to its own charter, however, is not created by any governmental directive and thus is not a governmental body, even if it is subject to governmental regulation and receives public funding and support.

The Wisconsin Attorney General has concluded that the following entities are “governmental bodies” subject to the open meetings law: **State or local bodies created by constitution, statute, or ordinance:**

• A municipal public utility managing a city-owned public electrical utility. 65 Op. Atty. Gen. 243 (1976).
• A town board, but not an annual or special town meeting of town electors. 66 Op. Atty. Gen. 237 (1977).
• A county board of zoning adjustment authorized by Wis. Stat § 59.99(3) (1983) (now Wis. Stat. § 59.694(1)). Gaylord Correspondence, June 11, 1984.
• A citizen's advisory group appointed by the mayor. Funkhouser Correspondence, March 17, 1983.
• An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director or Property Manager of that department. 78 Op. Atty. Gen. 67.
• An already-existing numerically definable group of employees of a governmental entity assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, when the group's meetings include the subject of the chief administrative officer's directive. Tylka Correspondence, June 8, 2005.
• A Criminal Justice Study Commission created by the Wisconsin Department of Justice, the University of Wisconsin Law School, the State Bar of Wisconsin, and the Marquette University Law School. Lichstein Correspondence, September 20, 2005.
• Grant review panels created by a consortium which was established pursuant to an order of the Wisconsin Commissioner of Insurance. Katayama Correspondence, January 20, 2006.

• A joint advisory task force established by a resolution of a Wisconsin town board and a resolution of the legislature of a sovereign Indian tribe. 1-04-09, September 28, 2009.

Any entity that fits within the definition of "governmental body" must comply with the requirements of the open meetings law. In most cases, it is readily apparent whether a particular body fits within the definition. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements.

b. Subunits.
A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Atty. Gen. 38, 40 (1985). If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a "subunit" subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board. Even a committee with only two members is considered a "subunit," as is a committee that is only advisory and that has no power to make binding decisions. Dziki Correspondence, December 12, 2006.

Groups that include both members and non-members of a parent body are not "subunits" of the parent body. Such groups nonetheless frequently fit within the definition of a "governmental body"—*e.g.*, as advisory groups to the governmental bodies or government officials that created them.

c. Governmental or quasi-governmental corporations.
The definition of "governmental body" also includes a "governmental or quasi-governmental corporation," except for the Bradley sports center corporation. Wis. Stat. § 19.82(1). The term "governmental corporation" is not defined in either the statutes or the case law interpreting the statutes. It is clear, however, that a "governmental corporation" must at least include a corporation established for some public purpose and created directly by the state Legislature or by some other governmental body pursuant to specific statutory authorization or direction. *See* 66 Op. Atty. Gen. 113, 115 (1977).

The term "quasi-governmental corporation" also is not defined in the statutes, but its definition was recently discussed by the Wisconsin Supreme Court in *State v. Beaver Dam Area Dev. Corp. ("BDADC")*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a "quasi-governmental corporation" does not have to be *created* by the government or *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.*, ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.*, ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and,

if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation's records. *Id.*, ¶ 62. In adopting this case-specific, multi-factored "function, effect or status" standard, the Wisconsin Supreme Court followed a 1991 Attorney General opinion. *See* 80 Op. Atty. Gen. 129, 135 (1991) (Milwaukee Economic Development Corporation, a Wis. Stat. Ch. 181 corporation organized by two private citizens and one city employee, is a quasi-governmental corporation); *see also* Kowalczyk Correspondence, March 13, 2006 (non-stock, non-profit corporations established for the purpose of providing emergency medical or fire department services for participating municipalities are quasi-governmental corporations). Prior to 1991, however, Attorney General Opinions on this subject emphasized some of the more formal aspects of quasi-governmental corporations. Those opinions should now be read in light of the *BDADC* decision. *See* 66 Op. Atty. Gen. 113 (volunteer fire department organized under Wis. Stat. Ch. 181 is not a quasi-governmental corporation); 73 Op. Atty. Gen. 53 (1984) (Historic Sites Foundation organized under Wis. Stat. Ch. 181 is not a quasi-governmental corporation); 74 Op. Atty. Gen. 38 (corporation established to provide financial support to public broadcasting stations organized under Wis. Stat. Ch. 181 is not a quasi-governmental corporation). Geyer Correspondence, February 26, 1987 (Grant County Economic Development Corporation organized by private individuals under Wis. Stat. Ch. 181 is not a quasi-governmental corporation, even though it serves a public purpose and receives more than fifty percent of its funding from public sources).

In March 2009, the Attorney General issued an informal opinion which analyzed the *BDADC* decision in greater detail and expressed the view that, out of the numerous factors discussed in that decision, particular weight should be given to whether a corporation serves a public function and has any private functions. I-02-09, March 19, 2009. When a private corporation contracts to perform certain services for a governmental body, the key considerations in determining whether the corporation becomes quasi-governmental are whether the corporation is performing a portion of the governmental body's public functions or whether the services provided by the corporation play an integral part in any stage—including the purely deliberative stage—of the governmental body's decision-making process. *Id.*

2. Entities that are not governmental bodies.

a. Governmental offices held by a single individual.

The open meetings law does not apply to a governmental department with only a single member. *Plourde v. Habhegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130. Because the term "body" connotes a group of individuals, a governmental office held by a single individual likewise is not a "governmental body" within the meaning of the open meetings law. Thus, the open meetings law does not apply to the office of coroner or to inquests conducted by the coroner. 67 Op. Atty. Gen. 250 (1978). Similarly, the Attorney General has concluded that the open meetings law does not apply to an administrative hearing conducted by an individual hearing examiner. Clifford Correspondence, December 2, 1980.

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b. Bodies meeting for collective bargaining.

The definition of "governmental body" explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under Wis. Stat. Ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law. Wis. Stat. § 19.82(1). A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining. Wis. Stat. § 19.82(1). The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law, including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining. 66 Op. Atty. Gen. 93, 96-97 (1977). The collective bargaining exclusion does not permit anybody to consider the final ratification or approval of a collective bargaining agreement in closed session. Wis. Stat. § 19.85(3).

c. Ad hoc gatherings.

Although the definition of a governmental body is broad, some gatherings are too loosely constituted to fit the definition. Thus, *Conta* holds that the directive that creates the body must also "confer collective power and define when it exists." 71 Wis. 2d at 681. *Showers* adds the further requirement that a "meeting" of a governmental body takes place only if there are a sufficient number of members present to determine the governmental body's course of action. 135 Wis. 2d at 102. In order to determine whether a sufficient number of members are present to determine a governmental body's course of action, the membership of the body must be numerically definable. The Attorney General's Office thus has concluded that a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power. Godlewski Correspondence, September 24, 1998. The definition of a "governmental body" is only rarely satisfied when groups of a governmental unit's employees gather on a subject within the unit's jurisdiction. Thus, for example, the Attorney General concluded that the predecessor of the current open meetings law did not apply when a department head met with some or even all of his or her staff. 57 Op. Atty. Gen. 213, 216 (1968). Similarly, the Attorney General's Office has advised that the courts would be unlikely to conclude that meetings between the administrators of a governmental agency and the agency's employees, or between governmental employees and representatives of a governmental contractor were "governmental bodies" subject to the open meetings law. Peplnjak Correspondence, June 8, 1998. However, where an already-existing numerically definable group of employees of a governmental entity are assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, the group's meetings with respect to the subject of the directive are subject to the open meetings law. Tylka Correspondence, June 8, 2005.

B. Definition of "Meeting."

A "meeting" is defined as: "[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. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . ." Wis. Stat. § 19.82(2).

The statute then excepts the following: an inspection of a public works project or highway by a town board; or inspection of a public works project by a town sanitary district; or the supervision, observation, or collection of information about any drain or structure related to a drain by any drainage board. *Id*.

1. The *Showers* test.

The Wisconsin Supreme Court has held that the above statutory 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. *Showers*, 135 Wis. 2d at 102.

a. The purpose requirement.

The first part of the *Showers* test focuses on the purpose for which the members of the governmental body are gathered. They must be gathered to conduct governmental business. *Showers* stressed that "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. Thus, in *Badke*, 173 Wis. 2d at 572-74, the Wisconsin Supreme Court held that the village board conducted a "meeting," as defined in the open meetings law, when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a development plan that was subject to the board's approval. The Court stressed that 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. *Id.* at 573-74. The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business. *Id.* at 574-76. The Court also held that the gathering of town board members was not chance or social because a majority of town board members attended plan commission meetings with regularity. *Id.* at 576. In contrast, the Court of Appeals concluded in *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77, 415 N.W.2d 528 (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.

b. The numbers requirement.

The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. People often assume that this means that the open meetings law applies only to gatherings of a majority of the members of a governmental body. That is not the case because 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. Therefore, a gathering of one-half of the members of a body, or even fewer, may be enough to control a course of action if it is enough to block a proposal. This is called a "negative quorum." Typically, governmental bodies operate under a simple majority rule in which a margin of one vote is necessary for the body to pass a proposal. Under that approach, exactly one-half of the

members of the body constitute a "negative quorum" because that number against a proposal is enough to prevent the formation of a majority in its favor. Under simple majority rule, therefore, the open meetings law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body's realm of authority. The size of a "negative quorum" may be smaller, however, when a governmental body operates under a super majority rule. For example, if a two-thirds majority is required for a body to pass a measure, then any gathering of more than one-third of the body's members would be enough to control the body's course of action by blocking the formation of a two-thirds majority. *Showers* made it clear that the open meetings law applies to such gatherings, as long as the purpose requirement is also satisfied (*i.e.*, the gathering is for the purpose of conducting governmental business). *Showers*, 135 Wis. 2d at 101-02. If a three-fourths majority is required to pass a measure, then more than one-fourth of the members would constitute a "negative quorum," etc.

2. Convening of members.

When the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action, there is no meeting within the meaning of the open meetings law. Katayama Correspondence, January 20, 2006. Nevertheless, the phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together.

a. Written correspondence.

The circulation of a paper or hard copy memorandum among the members of a governmental body, for example, may involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Accordingly, the Attorney General has long taken the position that such written communications generally do not constitute a "convening of members" for purposes of the open meetings law. Merkel Correspondence, March 11, 1993. Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it is still unlikely that a Wisconsin court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

b. Telephone conference calls.

A telephone conference call, in contrast, is very similar to an in-person conversation and thus qualifies as a convening of members. 69 Op. Atty. Gen. 143 (1980). Under the *Showers* test, therefore, the open meetings law applies to any conference call that: (1) is for the purpose of conducting governmental business and (2) involves a sufficient number of members of the body to determine the body's course of action on the business under consideration. To comply with the law, a governmental body conducting a meeting by telephone conference call must provide the public with an effective means to monitor the conference. This may be accomplished by broadcasting the conference through speakers located at one or more sites open to the public. 69 Op. Atty. Gen. 143, 145.

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c. 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. Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion.

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies. Nevertheless, because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority. Krischan Correspondence, October 3, 2000; Benson Correspondence, March 12, 2004. Members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting. 1-01-10, January 25, 2010.

3. Walking quorums.
The requirements of the open meetings law also extend to 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, quoting *Conta*, 71 Wis. 2d at 687. In *Conta*, the Court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *Conta*, 71 Wis. 2d at 685-88. The Court commented that any attempt to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the open meetings law. *Conta*, 71 Wis. 2d at 687. The requirements of the open meetings law thus cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. Such circumvention "almost certainly" violates the open meetings law. Clifford Correspondence, April 28, 1986; *see also* Herbst Correspondence, July 16, 2008 (use of administrative staff to individually poll a quorum of members regarding how they would vote on a proposed motion at a future meeting is a prohibited walking quorum). 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. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. 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; *see also* 1-01-10, January 25, 2010 (use of email voting to decide matters fits the definition of a "walking quorum" violation of the open meetings law).

4. Multiple meetings.

When a quorum of the members of one governmental body attend a meeting of another governmental body under circumstances where their attendance is not chance or social, in order to gather information or otherwise engage in governmental business regarding a subject over which they have decision-making responsibility, two separate meetings occur, and notice must be given of both meetings. *Badke*, 173 Wis. 2d at 577. The Attorney General has advised that, despite the "separate public notice" requirement of Wis. Stat. § 19.84(4), a single notice can be used, provided that the notice clearly and plainly indicates that a joint meeting will be held and gives the names of each of the bodies involved, and provided that the notice is published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Friedman Correspondence, March 4, 2003. The kinds of multiple meetings presented in the *Badke* case, and the separate meeting notices required there, must be distinguished from circumstances where a subunit of a parent body meets during a recess from or immediately following the parent body's meeting, to discuss or act on a matter that was the subject of the parent body's meeting. In such circumstances, Wis. Stat. § 19 .84(6) allows the subunit to meet on that matter without prior public notice.

5. Burden of proof as to existence of a meeting.

The presence of members of a governmental body does not, in itself, establish the existence of a "meeting" subject to the open meetings law. The law provides, however, that if one-half or more of the members of a body are present, the gathering is presumed to be a "meeting." Wis. Stat. § 19.82(2). The law also exempts any "social or chance gathering" not intended to circumvent the requirements of the open meetings law. Wis. Stat. § 19.82(2). Thus, where one-half or more of the members of a governmental body rode to a meeting in the same vehicle, the law presumes that the members conducted a "meeting" which was subject to all of the requirements of the open meetings law. Karstens Correspondence, July 31, 2008. Similarly, where a majority of members of a common council gathered at a lounge immediately following a common council meeting, a violation of the open meetings law was presumed. Dieck Correspondence, September 12, 2007. The members of the governmental body may overcome the presumption by proving that they did not discuss any subject that was within the realm of the body's authority. *Id.* Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of proving that the gathering constituted a "meeting" subject to the law. *Showers*, 135 Wis. 2d at 102. That burden may be satisfied by proving: (1) that the members gathered to conduct governmental business and (2) that there were a sufficient number of members present to determine the body's course of action. Again, it is important to remember that the overriding policy of the open meetings law is to ensure public access to information about governmental affairs. Under the rule of liberally construing the law to ensure this purpose, any doubts as to whether a particular gathering constitutes a "meeting" subject to the open meetings law should be resolved in favor of complying with the provisions of the law.

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III. WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

The two most basic requirements of the open meetings law are that a governmental body: (1) give advance public notice of each of its meetings, and (2) conduct all of its business in open session, unless an exemption to the open session requirement applies. Wis. Stat. § 19.83.

A. Notice Requirements.

Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how, and to whom notice must be given, as well as what information a notice must contain.

1. To whom and how notice must be given.

The chief presiding officer of a governmental body, or the officer's designee, must give notice of each meeting of the body to: (1) the public; (2) any members of the news media who have submitted a written request for notice; and (3) the official newspaper designated pursuant to state statute or, if none exists, a news medium likely to give notice in the area. Wis. Stat. § 19.84(1). The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. 66 Op. Atty. Gen. 93, 95. 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. Atty. 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, April 17, 2006. Nothing in the open meetings law prevents a governmental body from determining that multiple notice methods are necessary to provide adequate public notice of the body's meetings. Skindrud Correspondence, March 12, 2009. If a meeting notice is posted on a governmental body's website, amendments to the notice should also be posted. Eckert Correspondence, July 25, 2007. The chief presiding officer must also give notice of each meeting to members of the news media who have submitted a written request for notice. *Lawton*, 278 Wis. 2d 388, ¶ 7. Although this notice may be given in writing or by telephone, 65 Op. Atty. Gen. Preface, v-vi (1976), it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. 65 Op. Atty. Gen. 250, 251 (1976). Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings. 77 Op. Atty. Gen. 312, 313 (1988). In addition, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. *Lawton*, 278 Wis. 2d 388, ¶ 7. The governmental body is not required to pay for and the newspaper is not required to publish such notice. 66 Op. Atty. Gen. 230, 231 (1977). Note, however, that the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published.

When a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a). However, violations of those other statutory requirements are not redressable under the open meetings law. For example, the open meetings

law is not implicated by a municipality's alleged failure to comply with the public notice requirements of Wis. Stat. Ch. 985 when providing published notice of public hearings on proposed tax incremental financing districts. *See* Boyle Correspondence, May 4, 2005. Where a class 1 notice under Wis. Stat. Ch. 985 has been published, however, the public notice requirement of the open meetings law is also thereby satisfied. Stalle Correspondence, April 10, 2008.

2. Contents of notice.

a. In general.

Every public notice of a meeting must give 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." Wis. Stat. § 19.84(2). The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Atty. Gen. 68, 70 (1977). The Attorney General's Office has advised that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2). Schuh Correspondence, October 17, 2001. A frequently recurring question is how specific a subject-matter description in a meeting notice must be. Prior to June 13, 2007, this question was governed by the "bright-line" rule articulated in *State ex rel. H.D. Ent. v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999). Under that standard, a meeting notice adequately described a subject if it identified "the general topic of items to be discussed" and the simple heading "licenses," without more, was found sufficient to apprise the public that a city council would reconsider a previous decision to deny a liquor license to a particular local grocery store. *Id.* at 486-87. On June 13, 2007, the Wisconsin Supreme Court overruled *H.D. Enterprises* and announced a new standard to be applied prospectively to all meeting notices issued after that date. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804. In *Buswell*, the Court determined that "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business." *Id.*, ¶ 3. This reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances." *Id.*, ¶ 22. In making that determination, the factors to be considered include: "[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate." *Id.*, ¶ 28 (bracketed references added).

The first factor "balances the policy of providing greater information with the requirement that providing such information be 'compatible with the conduct of governmental affairs.' Wis. Stat. § 19.81(1)." *Id.*, ¶ 29. The determination must be made on a case-by-case basis. *Id.* "[T]he demands of specificity should not thwart the efficient administration of governmental business." *Id.* The second factor takes into account "both the number of people interested and the intensity of that interest," though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis. *Id.*, ¶ 30.

The third factor considers "whether the subject of the meeting is routine or novel." *Id.*, ¶ 31. There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed. *Id.* "Novel issues may . . . require more specific notice." *Id.* Whether a meeting notice is reasonable, according to the Court, "cannot be determined from the standpoint of when the meeting actually takes place," but rather must be "based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know." *Id.*, ¶ 32. Once reasonable notice has been given, "meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it." *Id.*, ¶ 34. However, "a meeting cannot address topics unrelated to the information in the notice." *Id.* The Attorney General has similarly advised, in an informal opinion, that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. I-05-93, April 26, 1993. Whether a meeting notice reasonably apprises the public of the meeting's subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body. Linde Correspondence, May 4, 2007; Koss Correspondence, May 30, 2007; Musolf Correspondence, July 13, 2007; Martinson Correspondence, March 2, 2009. In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed.

b. Generic agenda items.

Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all. Becker Correspondence, November 30, 2004; Heupel Correspondence, August 29, 2006. Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss. Erickson Correspondence, April 22, 2009. If such a notice is meant to indicate an intention to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting. *Id.* Likewise, the Attorney General has advised that the practice of using such designations as "mayor comments," "alderman comments," or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful." Rude Correspondence, March 5, 2004. Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting process than the public has, they should be held to a higher standard of specificity regarding the subjects they intend to address. Thompson Correspondence, September 3, 2004.

c. Action agenda items.

The Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken." *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that "adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *Badke*, 173 Wis. 2d at 573-74 and 577-78—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Buswell*, 301 Wis. 2d 178, ¶ 26; *Olson*, 252 Wis. 2d 628, ¶ 15. The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting. Herbst Correspondence, July 16, 2008. Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given. Bukowski Correspondence, May 5, 1986.

d. Notice of closed sessions.

The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Atty. Gen. 93, 98. Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session. Weinschenk Correspondence, December 29, 2006; Anderson Correspondence, February 13, 2007. In *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985), the Court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "to conduct a hearing to consider the possible discipline of a public employee" was sufficient.

3. Time of notice.

The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least twenty-four hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting. Wis. Stat. § 19.84(3). No Wisconsin court decisions or Attorney General opinion discuss what constitutes "good

cause" to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1) and (4). If there is any doubt whether "good cause" exists, the governmental body should provide the full 24-hour notice. When calculating the 24-hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. Posting notice of a Monday meeting on the preceding Sunday is, therefore, inadequate, but posting such notice on the preceding Saturday would suffice, as long as the posting location is open to the public on Saturdays. Caylor Correspondence, December 6, 2007.

Wisconsin Stat. § 19.84(4) provides that separate notice for each meeting of a governmental body must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a governmental body plans to hold over a given week, month, or year does not comply with the notice requirements of the open meetings law. *See* 63 Op. Atty. Gen. 509, 513. Similarly, a meeting notice that states that a quorum of various town governmental bodies may participate at the same time in a multi-month, on-line discussion of town issues, fails to satisfy the "separate notice" requirement. Connors/Haag Correspondence, May 26, 2009.

4. Compliance with notice.

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *Buswell*, 301 Wis. 2d 178, ¶ 34. There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. Stencil Correspondence, March 6, 2008. Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence, April 22, 2009.

B. Open Session Requirements.

1. Accessibility.

In addition to requiring advance public notice of every meeting of a governmental body, the open meetings law also requires that "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." Wis. Stat. § 19.81(2). Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Every meeting of a governmental body must initially be convened in "open session." *See* Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83. The requirement that meeting locations be reasonably accessible to the public and open to all citizens at all times means that governmental bodies must hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings. *Badke*, 173 Wis. 2d at 580-81. Absolute access is not, however, required.

Id. In *Badke,* for instance, the Wisconsin Supreme Court concluded that a village board meeting that was held in a village hall capable of holding 55-75 people was reasonably accessible, although three members of the public were turned away due to overcrowding. *Id.* at 561, 563, 581.Whether a meeting place is reasonably accessible depends on the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility. The policy of openness and accessibility favors governmental bodies holding their meetings in public places, such as a municipal hall or school, rather than on private premises. *See* 67 Op. Atty. Gen. 125, 127 (1978). The law prohibits meetings on private premises that are not open and reasonably accessible to the public. Wis. Stat. § 19.82(3). Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered "reasonably accessible." A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public's right to information about governmental affairs.

The policy of openness and accessibility also requires that governmental bodies hold their meetings at locations near to the public they serve. Accordingly, the Attorney General has concluded that a school board meeting held forty miles from the district which the school board served was not "reasonably accessible" within the meaning of the open meetings law. Miller Correspondence, May 25, 1977. The Attorney General advises that, in order to comply with the "reasonably accessible" requirement, governmental bodies should conduct all their meetings at a location within the territory they serve, unless there are special circumstances that make it impossible or impractical to do so. I-29-91, October 17, 1991.

Occasionally, a governmental body may need to leave the place where the meeting began in order to accomplish its business—*e.g.*, inspection of a property or construction projects. The Attorney General's Office has advised that such off-site business may be conducted consistently with the requirements of the open meetings law, as long as certain precautions are taken. First the public notice of the meeting must list all of the locations to be visited in the order in which they will be visited. This makes it possible for a member of the public to follow the governmental body to each location or to join the governmental body at any particular location. Second, each location at which government business is to be conducted must itself be reasonably accessible to the public at all times when such business is taking place. Third, care must be taken to ensure that government business is discussed only during those times when the members of the body are convened at one of the particular locations for which notice has been given. The members of the governmental body may travel together or separately, but if half or more of them travel together, they may not discuss government business when their vehicle is in motion, because a moving vehicle is not accessible to the public. Rappert Correspondence, April 8, 1993; Musolf Correspondence, July 13, 2007.

2. Access for persons with disabilities.

The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities." 69 Op. Atty. Gen. 251, 252 (1980). In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional

limitations to enter, circulate, and leave the facility *without* assistance. *See* Wis. Stat. §§ 19.82(3) and 101.13(1); 69 Op. Atty. Gen. 251, 252. In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *with* assistance. 69 Op. Atty. Gen. 251, 253. In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible without assistance.

The Americans with Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities.

3. Tape recording and videotaping.

The open meetings law grants citizens the right to attend and observe meetings of governmental bodies that are held in open session. The open meetings law also grants citizens the right to tape record or videotape open session meetings, as long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, as long as the activity does not interfere with the meeting. Wis. Stat. § 19.90. In contrast, the open meetings law does not require a governmental body to permit recording of an authorized closed session. 66 Op. Atty. Gen. 318, 325 (1977); Maroney Correspondence, October 31, 2006. If a governmental body wishes to record its own closed meetings, it should arrange for the security of the records to prevent their improper disclosure. 66 Op. Atty. Gen. 318,325.

4. Citizen participation.

In general, the open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies, but does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting. Lundquist Correspondence, October 25, 2005. There are some other state statutes that require governmental bodies to hold public hearings on specified matters. *See* for example, Wis. Stat. § 65.90(4) (requiring public hearing before adoption of a municipal budget) and Wis. Stat. § 66.46(4)(a) (requiring public hearing before creation of a tax incremental finance district). Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. Zwieg Correspondence, July 13, 2006; Chiaverotti Correspondence, September 19, 2006. Although it is not required, the open meetings law does permit a governmental body to set aside a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2) and 19.84(2). Such a period must be included on the meeting notice. During such a period, the body may receive information from the public and may discuss any matter raised by the public. 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.

5. Ballots, votes, and records, including meeting minutes.
No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). For example, a body cannot vote by secret ballot to fill a vacancy on a city council. 65 Op. Atty. Gen. 131 (1976). If a member of a governmental body requests that the vote of each member on a particular matter be recorded, a voice vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who is present for the vote. 1-95-89, November 13, 1989. 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. 1-01-10, January 25, 2010.

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. De Moya Correspondence, June 17, 2009. Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording. 1-95-89, November 13, 1989. As long as the body creates and preserves a record of all motions and roll-call votes, it is not required by the open meetings law to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89, March 8, 1989. *See*, *e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review). Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be, the general legislative policy of the open meetings law is 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). In light of that policy, it seems clear that a governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted. De Moya Correspondence, June 17, 2009. Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a meaningful record of that decision. Huebscher Correspondence, May 23, 2008. "Consent agendas," whereby a body discusses individual items of business under separate agenda headings, but takes action on all discussed items by adopting a single motion to approve all the items previously discussed, are likely insufficient to satisfy the recordkeeping requirements of Wis. Stat. § 19.88(3). Perlick Correspondence, May 12, 2005. [The Wood County Corporation Counsel disagrees with this opinion.]

Wisconsin Stat. § 19.88(3) also provides that meeting records created under that statute—whether for an open or a closed session—must be open to public inspection to the extent prescribed in the state public records law. Because the records law contains no general exemption for records created during a closed session, a custodian must release such items

unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public. De Moya Correspondence, June 17, 2009. There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. But the custodian still must separate information that can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them. *See* 67 Op. Atty. Gen. 117, 119 (1978).

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IV. WHEN IS IT PERMISSIBLE TO CONVENE IN CLOSED SESSION?

Every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

A. Notice of Closed Session.

The notice provision in Wis. Stat. § 19.84(2) requires that, if the chief presiding officer of a governmental body is aware that a closed session is contemplated at the time he or she gives public notice of the meeting, the notice must contain the subject matter of the closed session. If the chief presiding officer was not aware of a contemplated closed session at the time he or she gave notice of the meeting, that does not foreclose a governmental body from going into closed session under Wis. Stat. § 19.85(1) to discuss an item contained in the notice for the open session. 66 Op. Atty. Gen. 106, 108 (1977). In both cases, a governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) before going into closed session.

B. Procedure for Convening In Closed Session.

Every meeting of a governmental body must initially be convened in open session. Wis. Stat. §§ 19.83 and 19.85(1). Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *Schaeve*, 125 Wis. 2d at 51. Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. 66 Op. Atty. Gen. 93, 97-98. Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure. For example, Wis. Stat. § 19.85(1)(c) allows governmental bodies to use closed sessions to interview candidates for positions of employment, to consider promotions of particular employees, to consider the compensation of particular employees, and to conduct employee evaluations—each of which is a different reason that should be identified in the meeting notice and in the motion to convene into closed session. Reynolds/Kreibich Correspondence, October 23, 2003. Similarly, merely identifying and quoting from a statutory exemption does not adequately announce what particular part of the governmental body's business is to be considered under that exemption. Weinschenk Correspondence, December 29, 2006; Anderson Correspondence, February 13, 2007. Enough

specificity is needed in describing the subject matter of the contemplated closed meeting to enable the members of the governmental body to intelligently vote on the motion to close the meeting. Heule Correspondence, June 29, 1977; *see also Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. If several exemptions are relied on to authorize a closed discussion of several subjects, the motion should make it clear which exemptions correspond to which subjects. Brisco Correspondence, December 13, 2005. The governmental body must limit its discussion in closed session to the business specified in the announcement. Wis. Stat. § 19.85(1).

C. Authorized Closed Sessions.

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. Atty. Gen. 70, 73 (1985).

The following are some of the most frequently cited exemptions.

1. Judicial or quasi-judicial hearings.

Wisconsin Stat. § 19.85(1)(a) authorizes a closed session for "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body." In order for this exemption to apply, there must be a "case" that is the subject of a quasi-judicial proceeding. *Hodge*, 180 Wis. 2d at 72; *cf. State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963) (allowing zoning appeal boards to deliberate in closed session after hearing, decided before the Legislature added the "case" requirement in 1977). The Wisconsin Supreme Court held that the term "case" contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit. *Hodge*, 180 Wis. 2d at 74. An example of a governmental body that considers "cases" and thus can convene in closed session under Wis. Stat. § 19.85(1)(a), where appropriate, is the Wisconsin Employment Relations Commission, 68 Op. Atty. Gen. 171 (1979). Bodies that consider zoning appeals, such as boards of zoning appeals and boards of adjustment, may not convene in closed session. Wis. Stat. §§ 59.694(3) (towns); 60.65(5) (counties); and 62.23(7)(e)3. (cities); White Correspondence, May 1, 2009. The meetings of town, village, and city boards of review regarding appeals of property tax assessments must also be conducted in open session. Wis. Stat. § 70.47(2m).

2. Employment and licensing matters.

a. Consideration of dismissal, demotion, discipline, licensing, and tenure.

Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for: "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 . . . ." If a closed session for

such a purpose will include an evidentiary hearing or final action, then the governmental body must give the public employee or licensee actual notice of that closed hearing and/or closed final action. Evidentiary hearings are characterized by the formal examination of charges and by taking testimony and receiving evidence in support or defense of specific charges that may have been made. 66 Op. Atty. Gen. 211, 214 (1977). Such hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the governmental body's action might impose substantial stigma or disability upon the person. *Id.* Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session. The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person's employment or license. *See State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998); Johnson Correspondence, February 27, 2009. Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal. *Schaeve*, 125 Wis. 2d at 40.

b. Consideration of employment, promotion, compensation, and performance evaluations.

The second exemption which relates to employment matters authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c). The Attorney General's Office has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ. Caturia Correspondence, September 20, 1982. The Attorney General's Office has also concluded that this exemption is sufficiently broad to authorize convening in closed session to interview and consider applicants for positions of employment. Caturia Correspondence, September 20, 1982. An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c). Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee. 76 Op. Atty. Gen. 276 (1987). Similarly, the exemption does not authorize a school board to convene in closed session to select a person to fill a vacancy on the school board. 74 Op. Atty. Gen. 70, 72. The exemption does not authorize a county board or a board committee to convene in closed session for the purposes of screening and interviewing applicants to fill a vacancy in the elected office of county clerk. Haro Correspondence, June 13, 2003. Nor does the exemption authorize a city council or one of its committees to consider a temporary appointment of a municipal judge. O'Connell Correspondence, December 21, 2004. The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities

discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. *See* 80 Op. Atty. Gen. 176, 177-78 (1992); *see also Buswell*, 301 Wis. 2d 178, ¶ 37 (noting that Wis. Stat. § 19.85(1)(c) "provides for closed sessions for considering matters related to *individual* employees"). Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. 80 Op. Atty. Gen. 176, 178-82. The section authorizes closure to determine increases in compensation for specific employees, 67 Op. Atty. Gen. 117, 118. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, *see* 66 Op. Atty. Gen. 211, 213, but not to determine whether to reduce or increase staffing, in general.

3. Consideration of financial, medical, social, or personal information.
The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for: 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.

An example is where a state employee was alleged to have violated a state law. *See Wis. State Journal v. U.W. Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990). This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation; however, the vote should be in open session. 74 Op. Atty. Gen. 70, 72. At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session. 74 Op. Atty. Gen. 70, 72. - 20 -

4. Conducting public business with competitive or bargaining implications.
A closed session is authorized for "[d]eliberating 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." Wis. Stat. § 19.85(l)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Atty. Gen. 93, 96. (The opinion advises that governmental bodies that are not formed exclusively for collective bargaining comply with the

open meetings law when meeting for the purpose of developing negotiating strategy). Governmental officials must keep in mind, however, that this exemption applies only when "competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(l)(e). The exemption is restrictive rather than expansive. *Citizens for Responsible Development,* 300 Wis. 2d 649, ~~ 6-S. When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. The use of the word "require" in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting. *Citizens for Responsible Development,* 300 Wis. 2d 649, ~ 14. On the facts as presented in *Citizens for Responsible Development,* the Court thus found that a desire or request for confidentiality by a private developer engaged in negotiations with a city was not sufficient to justify a closed session for competitive or bargaining reasons. *Id,* ~~ 13-14. Nor did the fear that public statements might attract the attention of potential private competitors for the developer justify closure under this exemption, because the Court found that such competition would be likely to benefit, rather than harm, the city's competitive or bargaining interests. *Id,* ~ 14 n.6. Similarly, holding closed meetings about ongoing negotiations between the city and private parties would not prevent those parties from seeking a better deal elsewhere. The possibility of such competition, therefore, also did not justify closure under Wis. Stat. § 19.85(l)(e). *Citizens for Responsible Development,* 300 Wis. 2d 649, ~~ 15-16. The exemption did, however, allow the city to close those *portions* of its meetings that would reveal its negotiation strategy or the price it planned to offer for a purchase of property, but it could not close other parts of the meetings. *Id,* ~ 19. The competitive or bargaining interests to be protected by a closed session under Wis. Stat. § 19 .85(1)(e) do not have to be shared by every member of the body or by every municipality participating in an intergovernmental body. *State ex reI. Herro* v. *Village of McFarland,* 2007 WI App 172, ~~ 16-19,303 Wis. 2d 749, 737 N.W.2d 55.

Consistent with the above emphasis on the word "require" in Wis. Stat. § 19.85(1)(e), the Attorney General has advised that mere inconvenience, delay, embarrassment, frustration, or even speculation as to the probability of success would be an insufficient basis to close a meeting. Gempeler Correspondence, February 12, 1979.

Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect negotiations with a third party, but not where the discussions might be one of several factors that indirectly influence the outcome of those negotiations. Henderson Correspondence, March 24, 1992. The meetings of a governmental body also may not be closed in a blanket manner merely because they may at times involve competitive or bargaining issues, but rather may only be closed on those occasions when the particular meeting is going to involve discussion which, if held in open session, would harm the competitive or bargaining interests at issue. 1-04-09, September 28, 2009. Once a governmental body's bargaining team has reached a tentative agreement, the discussion whether the body should ratify the agreement should be conducted in open session. WI Op.Atty.Gen.139, 141 (1994).

5. Conferring with legal counsel with respect to litigation.

The exemption in Wis. Stat. § 19.55(1)(g) authorizes a closed session for "[c]onferring 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."

The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

6. Remaining exemptions.

The remaining exemptions in Wis. Stat. § 19.85(1) authorize closure for:

1. Considering applications for probation or parole, or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).
2. 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).
3. Specified deliberations involving the location of a burial site. Wis. Stat. § 19.85(1)(em).
4. Consideration of requests for confidential written advice from an ethics board. Wis. Stat. § 19.85(1)(h).
5. Considering specified matters related to a business ceasing its operations or laying off employees. Wis. Stat. § 19.85(1)(i).
6. 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).5

D. Who May Attend A Closed Session?

A frequently asked question concerns who may attend the closed session meetings of a governmental body? In general, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. Schuh Correspondence, December 15, 1988. If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provide otherwise. Wis. Stat. § 19.89. 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 Wis. Stat. § 19.84 apply. *Badke*, 173 Wis. 2d at 579.

E. Voting In an Authorized Closed Session.

The Wisconsin Supreme Court has held that Wis. Stat. § 14.90 (1959), a predecessor to the current open meetings law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in closed session. *Cities S. O. Co.*, 21 Wis. 2d at 538. The Court reasoned that "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process." *Id.* at 539. In *Schaeve*, 125 Wis. 2d at 53, the Court of Appeals commented on the propriety of voting in closed session under the current open meetings law. The Court indicated that a governmental body must vote in open session unless an

exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session. *Id.* The Court's statement was not essential to its holding and it is unclear whether the Supreme Court would adopt a similar interpretation of the current open meetings law. Given this uncertainty, the Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session. *Accord*, *Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided).

None of the exemptions in Wis. Stat. § 19.85(1) authorize a governmental body to consider in closed session the ratification or final approval of a collective bargaining agreement negotiated by or for the body. Wis. Stat. § 19.85(3); 81 Op. Atty. Gen. 139.

F. Reconvening In Open Session.

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within twelve hours after completion of a closed session, unless public notice of the subsequent open session is given "at the same time and in the same manner" as the public notice of the prior open session. Wis. Stat. § 19.85(2). The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public present that the session is open. Claybaugh Correspondence, February 16, 2006.

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V. WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?

A. Enforcement.

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1). In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys' familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence. 65 Op. Atty. Gen. Preface, ii. Under certain circumstances, the Attorney General may elect to prosecute complaints involving a matter of statewide concern.

A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney. *See* Wis. Stat. § 19.97(1). Actions to enforce the open meetings law need not be preceded by a notice of claim. *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594-97, 547 N.W.2d 587 (1996). The verified complaint must be signed by the individual and notarized and should include available information that will be helpful to investigators, such as: identifying the governmental body and any members thereof alleged to have violated the law; describing the factual circumstance of the alleged violations; identifying witnesses with relevant evidence; and identifying any relevant documentary evidence. The district attorney has broad discretion to determine whether a verified

complaint should be prosecuted. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). An enforcement action brought by a district attorney or by the Attorney General must be commenced within 6 years after the cause of action accrues or be barred. *See* Wis. Stat. § 893.93(1)(a).

Proceedings to enforce the open meetings law are civil actions subject to the rules of civil procedure, rather than criminal procedure, and governed by the ordinary civil standard of proof, rather than a heightened standard of proof such as would apply in a criminal or quasi-criminal proceeding. Accordingly, enforcement of the open meetings law does not involve such practices as arrest, posting bond, entering criminal-type pleas, or any other aspects of criminal procedure. Rather, an open meetings law enforcement action is commenced like any civil action by filing and serving a summons and complaint. In addition, the open meetings law cannot be enforced by the issuance of a citation, in the way that other civil forfeitures are often enforced, because citation procedures are inconsistent with the statutorily-mandated verified complaint procedure. Zwieg Correspondence, March 10, 2005.

If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within twenty days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law. *Lawton*, 278 Wis. 2d 388, ¶ 15. Wis. Stat. § 19.97(4). *See also Fabyan v. Achtenhagen*, 2002 WI App 214, ¶¶ 10-13, 257 Wis. 2d 310, 652 N.W.2d 649 (complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; *i.e.*, the caption must bear the title "State ex rel. . . ," or the court lacks competency to proceed). Although an individual may not bring a private enforcement action prior to the expiration of the district attorney's twenty-day review period, the district attorney may still commence an action even though more than twenty days have passed. It is not uncommon for the review and investigation of open meetings complaints to take longer than twenty days. Court proceedings brought by private relators to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred. Wis. Stat. § 893.93(2)(a); *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6, 265 Wis. 2d 674, 666 N.W.2d 104. If a private relator brings an enforcement action and prevails, the court is authorized to grant broad relief, including a declaration that the law was violated, civil forfeitures where appropriate, and the award of the actual and necessary costs of prosecution, including reasonable attorney fees. Wis. Stat. § 19.97(4). Attorney fees will be awarded under this provision where such an award will provide an incentive to other private parties to similarly vindicate the public's rights to open government and will deter governmental bodies from skirting the open meetings law. *Buswell*, 301 Wis. 2d 178, ¶ 54.

B. Penalties.

Any member of a governmental body who "knowingly" attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between $25 and $300 for each violation. Wis. Stat. § 19.96. Any forfeiture obtained in an action brought by the district attorney is awarded to the county. Wis. Stat. § 19.97(1). Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state. Wis. Stat. § 19.97(1), (2), and (4).

The Wisconsin Supreme Court has defined "knowingly" as not only positive knowledge of the illegality of a meeting, but also awareness of the high probability of the meeting's illegality or conscious avoidance of awareness of the illegality. *Swanson*, 92 Wis. 2d at 319. The Court also held that knowledge is not required to impose forfeitures on an individual for violating the open meetings law by means other than attending a meeting held in violation of the law. Examples of "other violations" are failing to give the required public notice of a meeting or failing to follow the procedure for closing a session. *Id*. at 321.

A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member's votes on all relevant motions prior to the violation were inconsistent with the cause of the violation. Wis. Stat. § 19.96.

A member who is charged with a violation other than knowingly attending a meeting held in violation of the law may be permitted to raise the additional statutory defense that the member did not act in his or her official capacity. In addition, in *Swanson*, 92 Wis. 2d at 319, and *Hodge*, 180 Wis. 2d at 80, the Supreme Court intimated that a member of a governmental body can avoid liability if he or she can factually prove that he or she relied, in good faith and in an open and unconcealed manner, on the advice of counsel whose statutory duties include the rendering of legal opinions as to the actions of the body. *See State v. Tereschko*, 2001 WI App 146, ¶¶ 9-10, 246 Wis. 2d 671, 630 N.W.2d 277 (unpublished opinion declining to find a knowing violation where school board members relied on the advice of counsel in going into closed session); *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974) (interpreting Wis. Stat. § 946.13(1) (private interest in public contract)). *Cf. Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 452-55, 521 N.W.2d 165 (Ct. App. 1994) (school board may not avoid duty to provide public records by delegating the creation and custody of the record to its attorneys).

A governmental body may not reimburse a member for a forfeiture incurred as a result of a violation of the law, unless the enforcement action involved a real issue as to the constitutionality of the open meetings law. 66 Op. Atty. Gen. 226 (1977). Although it is not required to do so, a governmental body may reimburse a member for his or her reasonable attorney fees in defending against an enforcement action and for any plaintiff's attorney fees that the member is ordered to pay. The city attorney may represent city officials in open meetings law enforcement actions. 77 Op. Atty. Gen. 177, 180 (1988).

In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action. Thus, in *Hodge*, 180 Wis. 2d at 75-76, the Court voided the town board's denial of a permit, taken after an unauthorized closed session deliberation about whether to grant or deny the permit. *Cf. Epping*, 218 Wis. 2d at 524 n.4 (arguably unlawful closed session deliberation does not provide basis for voiding subsequent open session vote); *State ex rel. Ward v. Town of Nashville*, 2001 WI App 224, ¶ 30, 247 Wis. 2d 988, 635 N.W.2d 26 (unpublished opinion declining to void an agreement made in open session, where the agreement was the product of three years of unlawfully closed meetings).

A court may award any other appropriate legal or equitable relief, including declaratory and injunctive relief. Wis. Stat. § 19.97(2).

In enforcement actions seeking forfeitures, the provisions of the open meetings law must be narrowly construed due to the penal nature of forfeiture. In all other actions, the provisions of the law must be liberally construed to ensure the public's right 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) and (4). Thus, it is advisable to prosecute forfeiture actions separately from actions seeking other types of relief under the open meetings law.

C. Interpretation by Attorney General.

In addition to the methods of enforcement discussed above, the Attorney General also has express statutory authority to respond to requests for advice from any person as to the applicability of the open meetings and public records laws. Wis. Stat. §§ 19.39 and 19.98. This differs from other areas of law, in which the Attorney General is only authorized to give legal opinions or advice to specified governmental officials and agencies. Because the Legislature has expressly authorized the Attorney General to interpret the open meetings law, the Supreme Court has acknowledged that the Attorney General's opinions in this area should be given substantial weight. *BDADC*, 312 Wis. 2d 84, ¶¶ 37, 44-45.

Citizens with questions about matters outside the scope of the open meetings and public records laws should seek assistance from a private attorney. Citizens and public officials with questions about the open meetings law or the public records law are advised to first consult the applicable statutes, the corresponding discussions in this Compliance Guide and in the Department of Justice's Public Records Law Compliance Outline, court decisions, and prior Attorney General opinions and to confer with their own private or governmental attorneys. In the rare instances where a question cannot be resolved in this manner, a written request for advice may be made to the Wisconsin Department of Justice. In submitting such requests, it should be remembered that the Department of Justice cannot conduct factual investigations, resolve disputed issues of fact, or make definitive determinations on fact-specific issues. Any response will thus be based solely on the information provided.

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