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Closed Sessions



UNDER
WISCONSIN'S
OPEN MEETINGS
LAW

Closed Sessions Under

By Claire Silverman, Legal Counsel

Although local officials are at their most visible when in meetings open to the general public, it may seem like no one is watching. Many weighty issues are discussed in front of an empty gallery. But, hold a closed session, and you're likely to pique interest in the subject matter. Given Wisconsin's long and proud tradition of open government, and the importance of maintaining the public's trust in local government, and in light of the increased scrutiny given to matters discussed behind closed doors, it's important for local officials to understand the law governing closed sessions.

This month's legal comment focuses specifically on closed sessions under Wisconsin's open meeting law. In particular, it addresses the procedure for going into closed session, when a closed session is authorized, who can attend or be excluded from a closed session, what records must be kept relating to closed sessions, the legality of voting in closed session, and other questions that arise with regard to closed sessions.

I. PROCEDURE FOR GOING INTO CLOSED SESSION

A governmental body must always begin a meeting in open session, even if the only item on the agenda will be discussed in closed session. It is important to follow the correct procedure when going into a closed session. This procedure requires notice whenever a closed session is contemplated, and a closed session always requires an announcement by the presiding officer, and a vote by members on whether or not to go into closed session.

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A. Notice: The open meeting law requires that the notice of a meeting specify the subject matter of any closed session contemplated.¹ Thus, if a presiding officer knows that a member at an upcoming meeting will likely move to convene the body into closed session for a permitted purpose, the officer must include this information in the notice. The notice should cite the particular statutory exemption that justifies the closed session, even though Wis. Stat. sec. 19.84(2) does not specifically require such details, and must be detailed enough to reasonably apprise the public and news media of the subject matter.

When can a closed session be held without advance notice? A governmental body which has convened in open session on proper notice can convene into an unanticipated closed session for proper purposes to discuss the subject matter for which the meeting was called if a proper public announcement is made by the presiding officer at the meeting and the closed session was truly not contemplated at the time notice for the open session was given.²

If a governmental body needs to convene into closed session and the notice did not specify that there would be a closed session, it is advisable for the body to postpone moving into

1. Wis. Stat. sec. 19.84(2).

2. 66 Op. Att'y Gen. 106 (1977); Governing Bodies 325.

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closed session until all other items on the agenda have been dealt with. This is because the open meeting law prohibits a governmental body from reconvening in open session within twelve hours after completing a closed session unless the original notice of the meeting specified that the body would reconvene in open session.³

B. Announcement: Before any vote is taken on whether to convene in closed session, the presiding officer must publicly announce the nature of the business to be considered and the specific statutory exception which authorizes the closed session. This announcement must become part of the record of the meeting.⁴

C. Motion: A motion to convene in closed session, properly seconded, must be carried by a majority vote. The vote of each member must be recorded and preserved in the minutes.⁵ Members of a governmental body can protect themselves from potential liability for open meeting law violations by voting against going into an unlawful or unauthorized closed session.⁶

II. WHEN ARE CLOSED SESSIONS PERMISSIBLE?

The open meeting law does not require that a governmental body discuss certain subject matters in closed session.

Instead, it authorizes a governmental body, when discussing specific subject matters, to meet in closed session if the governmental body deems it appropriate. The decision regarding whether a closed session is warranted belongs to the governmental body. The law does not authorize a person who is the subject of a closed session to demand that the matter be discussed in closed session.

There are various exemptions which authorize a governmental body to meet in closed session.⁷ A closed session may be held for any of the following purposes:

Judicial or Quasi-Judicial Matters.

A governmental body may deliberate in closed session concerning a case which was the subject of a judicial or quasi-judicial trial or hearing.⁸

This exemption does not authorize the holding of a closed session to consider whether to grant an application for a permit. "Case" contemplates a controversy between or among adverse parties and a proceeding designed to redress wrongs or enforce rights. *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 508 N.W.2d 603 (1993).

Discipline and Licensing. A governmental body may meet in closed ses-

sion to consider dismissal, demotion, licensing or discipline of any public employee or officer or any person licensed by the body or to investigate charges against such person, and to take formal action on any such matter, provided the public employee, officer or licensed person is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice must contain a statement that the person may demand that any evidentiary hearing or meeting be held in open session.⁹

An evidentiary hearing involves the taking of testimony and the receipt of evidence, and is more than mere discussion. Evidentiary hearings are usually held when employees are entitled to due process before termination. Most municipal employees are "employees at will" unless something (e.g., contract, personnel manual, understanding, etc.) has modified that status. At-will employees are not entitled to due process before they are terminated. If there is no evidentiary hearing or if final action is taken in open session rather than in closed session, an employee is not entitled to the above notice. *State ex rel. Epping*

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3. Wis. Stat. sec. 19.85(2).
4. Wis. Stat. sec. 19.85(1).
5. Wis. Stat. sec. 19.85(1).
6. Wis. Stat. sec. 19.96.

7. See Wis. Stat. sec. 19.85(1).
8. Wis. Stat. sec. 19.85(1)(a).
9. Wis. Stat. sec. 19.85(1)(b).

v. City of Neillsville Common Council, 218 Wis.2d 516, 581 N.W.2d 548 (Ct. App. 1998).

Compensation and Evaluation. A governmental body can meet in closed session to consider employment, promotion, compensation or performance evaluation data of any public employee subject to the governing body's jurisdiction or authority.¹⁰

This exemption only authorizes a governmental body to meet in closed session to consider the employment, compensation, promotion or performance evaluation of *specific* public employees. It does not provide an exemption for discussing general policies relating to employment or compensation. The purpose of the exemption is to protect the public employee who is being considered and not to protect the governmental body.¹¹

Crime Prevention. A governmental body may meet in closed session to consider strategies for detecting and preventing crime.¹²

Competitive or Bargaining Reasons. A governmental body may meet in closed session to deliberate or negotiate the purchase of public properties, investment of public funds, or conduct other specific public business whenever competitive or bargaining reasons require a closed session.¹³

Under this exemption, while a private entity's request for confidentiality might provide a reason for a government to desire holding closed meet-

ings, that request does not *require* the government to hold closed meetings to preserve the government's competitive or bargaining interests as demanded by Wis. Stat. 19.85(1)(e). *State of Wisconsin ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 300 Wis.2d 649, 731 N.W.2d. 640. In *Milton*, the court held that a City's fear of losing a proposed ethanol plant to competition from another municipality did not justify a closed session under 19.85(1)(e) where there was no indication that holding closed meetings can deter the plant developers from seeking a better financial package from some other municipality. A closed session for purposes of suppressing interest from other potential purchasers in land desired by a municipality for development does not justify a closed session under sec. 19.85(1)(e) since the seller is not required to keep the negotiations confidential and the seller is reasonably motivated by a desire to receive the best price for it. *Id.* Developing a negotiation strategy or deciding on a price to offer for a piece of land is an example of what is contemplated by the 19.85(1)(e) closed meeting exception. *Id.*

Personnel Matters. A governmental body may meet in closed session to consider financial, medical, social or personal histories or disciplinary data of specific persons, preliminarily consider specific personnel problems or investigate charges against specific

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GOVERNMENTAL
body MAY MEET
in closed session
to consider
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detecting and
preventing crime.



10. Wis. Stat. sec. 19.85(1)(c).

11. Op. Att'y Gen 5-92 (Feb. 25, 1992).

12. Wis. Stat. sec. 19.85(1)(d).

13. Wis. Stat. sec. 19.85(1)(e).

“ A MEMBER OF A GOVERNMENTAL body also HAS THE RIGHT TO ATTEND A CLOSED MEETING OF A SUBUNIT OF THAT GOVERNMENTAL body UNLESS THE RULES OF THE PARENT body provide OTHERWISE ”

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persons that, if discussed in public, would be likely to have a substantial adverse effect on the reputation of any person mentioned in such histories or data, or involved in such problems or investigations.¹⁴

If the “past history” data to be reviewed is already in the public domain, this exemption would not apply since discussion of the matter in an open meeting would not unduly damage the person’s reputation.

Conferring with Counsel. A governmental body can meet in closed session when conferring with legal counsel who, either orally or in writing, will advise the governmental body on a strategy to be adopted with respect to current or likely litigation.¹⁵

Ethics Advice. A governmental body may meet in closed session to consider requests for confidential written advice from the state, county or municipal ethics board.¹⁶

III. WHO CAN ATTEND OR BE EXCLUDED FROM CLOSED SESSIONS?

Attendance at a closed session is limited to the members of the governmental body and necessary staff and other officers, such as the clerk and attorney, and other persons whose presence is necessary for conducting the business

at hand. We are often asked whether a member of a governmental body can be excluded from a closed session of that body. The answer is no. One example of a situation where this question arises is when a governing body member or that official’s family member or close personal friend has a claim or has filed a lawsuit against the municipality and the municipality is holding a closed session to confer with legal counsel regarding the strategy to be adopted with regard to that issue. Another example would be where a member of the official’s family is a municipal employee and is the subject of a closed session under one of the exemptions pertaining to personnel issues.

Although it sometimes results in difficult situations, the open meeting law gives that member a right to attend the closed session.¹⁷ Specifically, Wis. Stat. sec. 19.89 provides that “no duly elected or appointed member of a governmental body may be excluded from any meeting of such body.” Similarly, a member of a governmental body also has the right to attend a closed meeting of a subunit of that governmental body unless the rules of the parent body provide otherwise.¹⁸

What is a subunit? Subunit is not defined statutorily, so a court would likely look to the common dictionary definition to determine what constitutes a subunit. The prefix “sub” generally means “under, beneath, below”

14. Wis. Stat. sec. 19.85(1)(f).

15. Wis. Stat. sec. 19.85(1)(g).

16. Wis. Stat. sec. 19.85(1)(h).

17. Although the member has a right to attend the closed session, the state ethics code may preclude the member from taking official action. That subject is beyond the scope of this comment.

18. Wis. Stat. sec. 19.89.

or “next lower than or inferior to.”¹⁹ Statutory boards or commissions, such as library boards, plan commissions, utility commissions and police and fire commissions, are probably not subunits of a common council or village board, although committees (e.g., a finance committee, a public safety committee) are.²⁰ Thus, for example, members of a common council or village board would not have the right to attend a closed session of the police and fire commission, but would have the right to attend a closed session of the personnel committee unless the common council or village board’s rules limit that right.

Another question we often receive is whether the clerk can be excluded from a closed session. The League has opined that despite the statutes which provide that the clerk shall attend village board or common council meetings and keep a full record of the proceedings, the governing body may exclude the clerk from a closed session where the clerk is the subject of discussion provided the presiding officer or governing body appoints someone to take minutes in the clerk’s absence.²¹ Section 19.89 only prohibits members of a governmental body from being excluded. Although the clerk is a city or village officer, the clerk is not a member of the common council or village board.

In addition to understanding who cannot or should not be excluded from a closed session, a governmental body should also give thought as to who is properly included in a closed session. This is particularly important in the quasi-judicial context. In one case, the Wisconsin Court of Appeals voided a police and fire commission’s (PFC) decision because it concluded that the presence of a mayorally appointed council liaison in the closed deliberations of the PFC impermissibly tainted the process.²² The court noted that the PFC is designed and intended to be “an impartial body that operates independently of the city itself.” It further observed that the liaison, as the representative of the mayor who also is superior to the police chief who brought the charges against the officer in question, was effectively a representative of one of the parties. The court thus reasoned that the liaison’s sitting with the PFC “unquestionably and materially diminish[ed] the appearance of the board’s independence.” The court emphasized that active participation is not the benchmark, and that the liaison’s “mere presence, sitting as a non-voting panel member, gave a sufficient appearance of impropriety to taint the entire proceedings.”

IV. PROCEEDINGS OF CLOSED SESSIONS

Once a governmental body has convened in closed session, it may discuss or consider only those subject matters

authorized by the various statutory exemptions. Additionally, discussions in closed session must be limited to the specific matters that the presiding officer announced would be the subject(s) of the closed meeting.²³

Motions and roll call votes of each closed session must be recorded and preserved and are open to public inspection to the extent prescribed by the public records law. The record on all votes taken by the body must show all motions made, who initiated and seconded the motion, and, if a roll call vote, how each member voted.²⁴ Although the open meeting law does not require that a governmental body keep minutes of all proceedings, other statutes do impose this requirement on city councils and village boards.²⁵

Officials often ask whether a governmental body should make an audio recording of a closed session. Although the decision is ultimately the governmental body’s, making an audio record is not advisable. The exemptions are designed to allow a governmental body to have a confidential discussion. This is undermined when an audio recording is made. Records of closed sessions are open to public inspection to the extent prescribed in the public records law. Because there is no specific exemption for records created during a closed session, the

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19. Merriam Webster, Abridged Collegiate Dictionary.

20. Governing Bodies 310.

21. Governing Bodies 359.

22. *State ex rel. Heil v. Green Bay Police and Fire Commission*, 2002 WI App 228 (July 2, 2002).

23. Wis. Stat. sec. 19.85(1).

24. Wis. Stat. sec. 19.88(3).

25. See Wis. Stat. secs. 62.11(4) and 62.09(11)(b) for cities and sec. 61.32 for villages.

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custodian must release the record unless he or she concludes that the harm to the public from release of the record outweighs the benefit to the public from release of the record. There's a strong presumption under the open records law that release of records is in the public interest. As long as the reasons for convening in closed session continue, the custodian can justify not disclosing the information which requires confidentiality. However, the custodian must separate information

which can be made public from that which cannot be. Typically the record of the roll call vote would not be confidential. If there is no audio recording, there is no need to determine whether it can or should be released.

Once the underlying purpose for a closed session ceases, the records of the meeting must be provided to any person requesting access.²⁶

V. VOTING IN CLOSED SESSION

Many officials say they have been told that a governmental body cannot vote in closed session. For the most part, this simply is not true.²⁷ However, a governmental body should not vote in closed session unless there is a good reason for doing so. Most often, it is the discussion itself, rather than the end result, which warrants confidentiality. If the outcome of the meeting is not confidential, then the vote should be taken when the body goes back into open session. The League has opined

26. Governing Bodies 293; 67 Op. Att'y Gen. 117 (1978); Public Records 63.

27. Wis. Stat. sec. 70.47(2m) precludes the Board of Review from introducing, deliberating upon or adopting any formal action of any kind at a closed session.

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that governmental bodies can take final action and vote in closed session as long as the voting is an integral part of the deliberation process.²⁸

Section 19.83, Stats., provides: “Every meeting of a governmental body shall be . . . held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session, except as provided in s. 19.85.” Section 19.85(1)(b) allows a closed session to be held for “[c]onsidering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person” and **“the taking of formal action on any such matter.”** [Emphasis added.] Section 19.85(1)(e) allows a governmental body to meet in closed session to deliberate or negotiate the purchase of public properties, when competitive or bargaining reasons require a closed session. It makes no sense to conclude that a governing body would come into open session and vote on a motion to make an initial offer of \$175,000 for a particular property, with the agent authorized to offer as high as \$250,000. If that motion were made in open session, the governmental body would surely pay \$250,000 for that property!

VI. MISCELLANEOUS QUESTIONS

What action can a governmental body take against a member who discloses decisions made or information considered in closed session?

If a member discloses decisions made or information considered at a closed session, it is not a violation of the open meetings law. However, such behavior is understandably a matter of concern for governmental bodies and governing bodies can prohibit and establish consequences for such behavior. Some municipalities have local ethics ordinances which prohibit the use or disclosure of information which is considered confidential. Possible consequences may include a fine or censure. However, governing bodies should be aware that a prohibition against revealing information could possibly be challenged as unconstitutionally invading the First Amendment right of free speech.

Can a member of a governmental body who believes a closed session is being held under circumstances not authorized by the open meeting law and votes against going into closed session to protect himself from liability still go into the closed session if the governmental body votes to go into closed session?

Yes. Although the closed session may be improper, the governmental body has voted to go into closed session and the member has the right to go in and protect his or her constituents' inter-

ests. Action taken in violation of the open meeting law is not void, unless a judge later determines that the public interest in the enforcement of the open meeting law outweighs any public interest which there may be in sustaining the validity of the action taken. If the member does not attend the closed session, the member may lose the chance to have a say regarding the matter.

Even if the closed session is improper, the member will be protected. Section 19.96 provides that no member of a governmental body is liable under the open meeting law on account of attending a meeting held in violation of the law if he or she makes or votes in favor of a motion to prevent the violation from occurring.

VII. CONCLUSION

When the doors to government close, the interest in what is going on increases. Given Wisconsin's long and proud tradition of open government and the importance of maintaining the public's trust and confidence in local government, and in light of the increased scrutiny given to matters discussed behind closed doors, it is important for local officials to understand when closed sessions are properly authorized under Wisconsin's open meeting law and how they should be conducted.

Governing Bodies 375R-1

28. *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516, 539, 124 N.W. 809 (1963) (voting is integral part of deliberating and merely formalizes result reached in deliberating process). See also 66 Op. Att'y Gen 60 (1977) (procedural matters concerning the meeting and preliminary votes may be taken in closed session); and 67 Op. Att'y Gen. 117 (1978) (governmental body may take final action and vote in closed session where vote is integral part of deliberation process); Governing Bodies 305.