

# the Municipality

A publication of the LEAGUE of Wisconsin Municipalities

AUGUST 2014, Volume 109, Number 8

**FOR THE LOVE of Cities!**



**ANNUAL CONFERENCE KEYNOTE**

## UNDERSTANDING & Complying with

By Claire Silverman, Legal Counsel

**W**isconsin's open meeting law applies with equal force to every city and village, regardless of size or other characteristics. Because it applies whenever a governmental body conducts the business that it is entrusted with, it is critical that members of local governmental bodies be aware of the open meeting law and understand its requirements. This month's legal comment provides an overview of the law, as well as a more detailed explanation of some of the law's key provisions.

The open meeting law is found in sections 19.81 through 19.98 of the Wisconsin Statutes. The law does not require absolute openness. However, the legislature has declared 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."<sup>1</sup> To that end, the law requires that all meetings of governmental bodies be preceded by public notice, be held in places reasonably accessible to the public, and be open to all citizens except as otherwise specifically provided.<sup>2</sup> The law authorizes governmental bodies to meet in closed session if the subject matter comes within one of a set number of exemptions set forth in the law.<sup>3</sup>

### DEFINITIONS ARE KEY TO UNDERSTANDING LAW

The open meeting law only applies to meetings of a "governmental body" as defined by Wis. Stat. sec. 19.82(1). This definition, together with the definition of "meeting" in sec. 19.82(2), is the key to understanding when the open meeting law applies to a particular gather-

ing of local officials. A "governmental body" includes a "local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order," as well as "formally constituted" subunits of any of these bodies. Thus, a common council and village board are obviously subject to the open meeting law, as are municipal committees, boards and commissions. Quasi-governmental bodies are also subject to the open meeting law.<sup>4</sup>

Bodies formed for or meeting for the purpose of collective bargaining are specifically excluded from the definition of "governmental body."<sup>5</sup>

A "meeting" is defined as the convening of members of a governmental body for the purpose of exercising the responsibilities vested in that body. A meeting does not include social or chance gatherings that are not intended to avoid the law. When one-half or more of the members of a governmental body are present, a meeting is "rebuttably presumed" to be for official purposes.<sup>6</sup>

1. Wis. Stat. sec. 19.81(1).

2. Wis. Stat. secs. 19.81 and 19.83.

3. The exemptions are set forth under sec. 19.85.

4. A private entity is a "quasi-governmental corporation" within the meaning of the open meetings and public records laws if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. Key factors include but are not limited to: (1) the entity's finances; (2) whether the entity serves a public function; (3) whether it appears to the public to be a government entity; (4) whether the entity is subject to government control; and (5) the degree of access that government bodies have to the entity's records. No one factor is determinative and determinations must be made on a case-by-case basis. *State of Wisconsin v. Beaver Dam Area Development Corporation*, 2008 WI 90. See *Governing Bodies* 386 for a more detailed summary of this case.

5. Wis. Stat. sec. 19.82(1).

6. Wis. Stat. sec. 19.82(2).

## WISCONSIN'S OPEN MEETING LAW

In addition to the above two definitions, the term "open session" is also important. It is defined as a meeting "which is held in a place reasonably accessible to members of the public and open to all citizens at all times."<sup>7</sup> The Wisconsin Supreme Court has interpreted this to mean "that a governmental body must meet in a facility which gives reasonable public access, not total access, and that it may not systematically exclude or arbitrarily refuse admittance to any individual."<sup>8</sup>

### WHEN IS THERE A MEETING SUBJECT TO THE LAW?

The simplistic answer to this question is, "Whenever a governmental body meets." Although the application of the open meeting law is usually straightforward, determining whether there is a "meeting" can sometimes be complicated and there are pitfalls for the unwary.

The statutory definition of a meeting, which provides that a meeting is presumed if one-half of the members of a governmental body are present at a meeting, may lull officials into a false sense of security. The trouble is that the courts have interpreted the law to apply when there is less than one-half of the body present. In the *Showers*<sup>9</sup>

case, the Wisconsin Supreme Court ruled that the test of whether a meeting occurs is twofold: "First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed."

With regard to the second part of the *Showers* test, the potential of a gathering to determine the parent body's course of action concerning a proposal can be either the affirmative power to pass or the negative power to defeat. Thus, a gathering of less than one-half the members of a body may constitute a meeting if the number of members present constitutes a "negative quorum," (i.e., a sufficient number to block action by the body on a particular issue).

For example, when a proposal requires a two-thirds vote of the entire body, such as a budget amendment under Wis. Stat. sec. 65.90(5), if more than one-third of the governmental body members are present at an unnoticed meeting, discussion of that particular proposal would violate the open meeting law. This is what happened in the *Showers* case. Four out of eleven

members met privately to discuss a budget matter. The court held that the meeting was illegal because four members constituted a negative quorum since they could determine the outcome by voting as a block against the budget change, which required a two-thirds majority vote.

The same principle would seem to apply with regard to matters that can be passed by a vote based on the quorum rather than total membership, such as a majority or fraction of a quorum. In such cases, the minimum figure for triggering the open meeting law may be less if it is known that fewer members will attend a meeting. For example, if a village board has seven members and all attend a meeting, a matter requiring a majority vote may be blocked by four members. But if only four members attend, the matter may be blocked by two.<sup>10</sup>

Local officials must also be aware of and avoid what is sometimes called a "walking quorum." 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 num-

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7. Wis. Stat. sec. 19.82(3).

8. *State ex rel. Badke v. Village Bd. of Greendale*, 173 Wis.2d 553, 580, 494 N.W.2d 408, 418 (1993).

9. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 102, 398 N.W.2d 154, 165 (1987).

10. A UW law review note criticized the *Showers* court for not considering this issue, and recommends that "To be safe, officials will need to hold in public all meetings at which at least a majority of a quorum is present." 1988 Wis. L. Rev. 827, 851, 856. This is hardly the safe approach where, as in the example in the above text, less than a majority of the quorum can block a matter. Consider also an eleven member village board. A quorum of the board is six and four is thus a majority of the quorum. So three can defeat a matter if only six are present.

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ber to reach a quorum.<sup>11</sup> A series of gatherings, telephone calls, or e-mails between a small enough number of officers so as not to trigger the law at one specific gathering may constitute an illegal meeting.<sup>12</sup>

From the public's perspective, the danger of the walking quorum is that it may produce a consensus or predetermined outcome with the result being that the publicly-held meeting is a mere formality without any real discussion or consideration of the issue being conducted in public.

The use of a walking quorum to conduct business is subject to prosecution under the open meeting law.<sup>13</sup> Local officials must use caution when using electronic message technologies. These technologies have the potential to create walking quorums because of the rapid pace of communication and the inability of the sender to control whether and how other members may choose to respond. For this reason, the Attorney General strongly discourages members of governmental bodies from using electronic mail to communicate with other members of the body about matters within the body's realm of authority.<sup>14</sup> The Wisconsin Department of Justice's 2010 *Open Meeting Compliance Guide* provides as follows:

Because the applicability of the open meetings law to such electronic communications depends on the particular

way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Because e-mail is so easy, quick and inexpensive, it is unlikely that governmental bodies will be able or willing to refrain from using it completely. However, it is advisable to set procedures in place or parameters for the use of e-mail to ensure that its use does not violate the open meeting law. The Attorney General's Open Meeting Compliance Guide suggests that 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."

In addition to being careful about the number of members of a particular body that gather to talk about topics pertaining to that body, it is important to be aware that a "meeting" might take place when a sufficient number of members are present at meetings of other governmental bodies. Clearly, planned joint meetings of governmental bodies must be separately noticed by each governmental body planning to attend the joint meeting. But what about situations where members of one governmental body independently attend the meeting of another governmental body?

In the *Badke* case,<sup>15</sup> a majority of the village board regularly attended meetings of the village plan commission to gather information about subjects over which they had decision-making responsibilities. The Wisconsin Supreme Court concluded that since the trustees regularly attended plan commission meetings, the gatherings were not chance and therefore should have been noticed as meetings of the village board. Specifically, the Wisconsin Supreme Court held that when one-half or more of the members of a governmental body attend a meeting of another governmental body to gather information about a subject over which

11. *Showers*, 135 Wis.2d at 92.

12. *See Showers*, 398 N.W.2d at 161, 164; 1988 Wis. L. Rev. at 846-7, 855; *Governing Bodies* 339 and 371.

13. *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 687, 239 N.W.2d 313 (1976).

14. *Wisconsin Department of Justice Open Meeting Compliance Guide* (2010), at p. 8 citing Correspondence, October 3, 2000.

15. *Badke, supra*, n.7.

they have ultimate decision-making responsibility, such a gathering is a “meeting” within the meaning of the open meeting law and must be noticed as such, unless the gathering is social or chance.

Thus, whenever a majority of the members of one governmental body regularly attend or plan in advance to attend the meeting of another governmental body, it is necessary to provide notice that a majority of that body will be attending the meeting of another body for the purpose of observing and gathering information. However, municipalities should avoid routinely placing boilerplate language designed to comply with *Badke* at the bottom of all committee, commission and board meetings notices.

Such a *Badke* notice should be provided only if:

- 1) governing body members routinely attend the meetings of a second body, such as a committee or commission;

or

- 2) the chair of the governing body or clerk has been informed or otherwise has reason to believe that governing body members will likely be attending the meeting of the second body.

For a further discussion of this issue see Governing Bodies 353.

*Badke* also held that when a quorum of a governing body is present at a meeting of a second governmental body merely because all of the indi-

vidual members of the quorum make up the membership of the second governmental body, additional notice is not required.<sup>16</sup>

Local officials should not place too much reliance on the exception to the definition of a meeting for chance or social gatherings. Remember, that exception is qualified by the tag “not intended to avoid” the law. If a negative quorum (or more) of a body gets together by chance or for a social occasion there is no violation of the law unless the discussion turns to matters pertaining to that body, in which case the gathering probably converts to an improper meeting.

By now it should be clear that governmental body members must be very careful when discussing public body business with other members outside of a properly noticed meeting. The numbers test raises a troubling question, however, relating to the legality of one-on-one conversations between members outside of a meeting. The obvious problem is that prohibiting person-to-person discussions outside of meetings does not jibe with how government works. Officials need to discuss matters they are working on. In addition, the legislature chose not to make the requirements of the open meeting law automatically applicable whenever two members of a governmental body get together.

The Wisconsin Supreme Court strongly suggested in an earlier case that such one-on-one discussions would be protected by the First Amendment and would not violate the open meeting

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16. *Id.* at 417-418.

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law, but, unfortunately, this was not discussed in the *Showers* or *Badke* cases.<sup>17</sup>

If governmental body members should arguably violate the law by discussing matters outside of a meeting, a wise course to take would be to make sure that the matter receives an appropriate level of discussion at a properly noticed meeting before it is voted on. This may help avoid prosecution and decrease the likelihood that a court will void the action.

#### NOTICE REQUIREMENT

The open meeting law requires that all meetings of a governmental body be preceded by public notice. The presiding officer of a governmental body, or that person's designee (typically the clerk), must give proper notice of a meeting twenty-four hours in advance. If good cause exists and twenty-four-hour notice is impossible or impractical, shorter notice may be given but in no case may the notice be provided less than two hours in advance of the meeting.<sup>18</sup> If the notice is mailed, it must be mailed early enough to allow it to arrive within the statutory time frame.<sup>19</sup>

The notice must specify the date, time, place and subject matter of the meeting, and any contemplated closed sessions must be included.<sup>20</sup> The notice

must be in such form as is “reasonably likely to apprise” members of the public and the news media of the time, date, place and subject matter of the meeting.

A few years ago, the Wisconsin Supreme Court overruled *State ex rel. H.D. Enterprises II, LLC v. City of Stoughton*, which held that general notice of a topic (e.g., licenses) is sufficiently specific to comply with the notice requirement in sec. 19.84(2).<sup>21</sup> The Wisconsin Supreme Court stated that the notice requirement in sec. 19.84 is not amenable to a bright line rule but, rather is subject to a “reasonableness standard.” This reasonableness standard requires taking into account the circumstances of the case in determining whether notice is sufficient. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate.<sup>22</sup>

The court further stated:

The determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it would be reasonable for the officer to know. Thus, whether there is particu-

17. The earlier case is *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313, 331 (1976), and this issue is discussed in *Governing Bodies* 309, which was published in the July 1987 issue of the *Municipality*, pp. 262-263.

18. Wis. Stat. sec. 19.84(3).

19. 77 Op. Att’y Gen. 312 (1988).

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

21. *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71

22. *Id.*, 2007 WI 71 para. 28.

lar public interest in the subject of a meeting or whether a specific issue within the subject of the meeting will be covered, and how that affects the specificity required, cannot be determined from the standpoint of when the meeting actually takes place. Rather, it must be gauged from the standpoint of when the meeting is noticed.<sup>23</sup>

League attorneys are often asked whether it is appropriate to rely on broad umbrella clauses such as “old business” or “miscellaneous business” on the agenda to take up unforeseen matters which arise shortly before the scheduled meeting. In most cases, the answer is no. It is best to deal with late-breaking events by amending the notice, with twenty-four hours, or postponing the matter until it can be properly noticed. Minor matters may appropriately be subsumed under broader topics, but matters of particular interest should be given explicit notice. In recent years, the attorney general has taken the view that governing bodies may not rely on a general designation clause in their agenda, such as “other business,” to discuss, receive information or take action on a matter not identified in the notice of that meeting.

A related issue is whether governmental bodies may discuss or act on matters raised by citizens during a “public comment” or “citizen participation” portion of a meeting if the subject is not on the agenda. The open meeting law allows governing bodies to designate a period for public comment in the notice of the meeting.<sup>24</sup> During such a designated public comment period, a governmental body may “discuss” information raised by a member of the public.<sup>25</sup> A governmental body may not take action on matters raised during a public comment period if the subject was not on the agenda.

Some governing body members have inquired whether they, as members of the public, can bring up items not specifically designated on the agenda under a period of public comment allowed by Wis. Stat. sec. 19.84(2). The answer is no. The limited exception allowing members of the public to bring up items not specifically on the agenda during a period of noticed public comment was intended to allow local governments to be responsive to their constituents and to allow the governing body to receive information from members of the public. It was not intended to allow governing body members to bring up items for discussion without placing the items on the agenda. Any such use of the excep-

tion by governing bodies in that way will likely be viewed as an attempt to circumvent the notice requirements of the open meeting law.<sup>26</sup>

With regard to who must be given notice of a meeting, notice has to be given to any news medium that has requested the notice, and to the official newspaper or, if there is none, to a newspaper, TV or radio station that is likely to give notice in the area.<sup>27</sup> The open meeting law does not require that the notice actually be published,<sup>28</sup> although it does require that notice be given as required by other specific statutes governing the subject matter (e.g., Wis. Stat. sec. 62.23 (7)(d)2, requires a Class 2 notice be published in advance of a proposed rezoning).<sup>29</sup> As an alternative to written notice, telephone or other verbal communication to members of the news media is sufficient.<sup>30</sup> The law also requires some form of direct notice to the public; this requirement may be met by posting the notice in one, or preferably several, public places.<sup>31</sup>

A limited exception to the notice requirement allows subunits of governmental bodies<sup>32</sup> to meet during the meeting of the parent body, during a recess, or directly after such meeting,

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23. *Id.*, para 32.

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

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

26. For additional discussion of this issue see *Governing Bodies* 361.

27. Wis. Stat. sec. 19.84(1)(b).

28. *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979); 77 Op. Att’y Gen. 312 (1988).

29. Notice requirements of other statutes must be met in addition to the requirements of the open meeting law. Wis. Stat. sec. 19.84(1)(a).

30. 77 Op. Att’y Gen. 312 (1988).

31. Wis. Stat. sec. 19.84(1)(b); 63 Op. Att’y Gen. 509, 510-11 (1976); 66 Op. Att’y Gen. 93, 95 (1977).

32. The League has opined that statutory boards or commissions, such as a library board, a utility commission and a police and fire commission, are not subunits of a common council or village board, although committees (e.g., a finance committee, a public safety committee) are typically subunits. *Governing Bodies* 310.



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to discuss or act on matters that were the subject of the meeting of the parent body.<sup>33</sup> The presiding officer of the parent body must announce the time, place and subject matter of the subunit meeting in advance at the meeting of the parent body. This announcement must mention any contemplated closed session.<sup>34</sup>

No charge may be made for providing notice to meet the requirements of the open meeting law. However, once these notice requirements have been met, charges may be made, under the public records law, for additional notices and supplementary information.<sup>35</sup>

## CLOSED SESSIONS

Generally, meetings of governmental bodies must be held in open session. However, the law authorizes meetings to be closed if the subject matter falls within one of the specific exemptions set forth in Wis. Stat. sec. 19.85. Note that the general authority to close a meeting is inapplicable where specific authority requires openness, as in the case of hearings before a police and fire commission under Wis. Stat. sec. 62.13(5), and Board of Review meetings under sec. 70.46(2m).

As a general rule, we recommend using the term “closed” session or meeting instead of “executive” session,

which suggests that meetings may be closed whenever the body wishes to take action on a matter.

Section 19.85 authorizes closing meetings for a number of reasons including the following:

- 1) deliberating after a quasi-judicial hearing;
- 2) considering the discipline of an employee or person licensed by the municipality;
- 3) considering employment, promotion, compensation or performance evaluation data of a public employee;
- 4) deliberating or negotiating the purchase of public properties, or conducting other business whenever competitive or bargaining reasons require a closed session;<sup>36</sup>
- 5) considering financial, medical, social, personal history and disciplinary data of specific persons or specific personnel problems which, if discussed in public, would be likely to have a substantial adverse effect on the person’s reputation; and
- 6) conferring with legal counsel with respect to litigation in which the body is involved or is likely to become involved.

See Wis. Stat. sec. 19.85(1)(a)-(j), for the specific exemptions. For more detailed information on the appropriate use of these exemptions, see *Governing Bodies* 375.

When deciding whether it is appropriate to hold a particular meeting in closed session, a good rule of thumb is to ask the preliminary question: “Is there a reason why this matter is best discussed privately, other than the desire to escape the scrutiny of the public eye or the media?” When closing a meeting is appropriate, it is important to follow the statutory procedures. As mentioned above, closed sessions planned in advance must be specified in the public notice; however, if the closed session was not contemplated, the meeting may still be closed for a valid reason.<sup>37</sup> The body must first convene in open session and vote to go into closed session. Before the vote is taken, the presiding officer must announce the nature of the business to be discussed and the specific statutory provision which authorizes the closed session. The vote of each member must be recorded and preserved.<sup>38</sup>

Attendance at the closed session is limited to the body, necessary staff and other officers, such as the clerk and attorney, and any other persons whose presence is necessary for the business at hand. If the meeting is of a subunit of a parent body, such as a committee, the members of the parent body (i.e., the common council or village board) must be allowed to attend the closed session, unless the rules of the parent body provide otherwise.<sup>39</sup> Discussion in the closed session must be limited to the topics for which the meeting was closed.<sup>40</sup>

33. Wis. Stat. sec. 19.84(6).

34. 65 Op. Att’y Gen. Preface vi (1976).

35. 77 Op. Att’y Gen. 312 (1988); *Governing Bodies* 323.

36. This exemption was read rather narrowly by the Wisconsin court of appeals in *State ex rel Citizens for Responsible Development v. City of Milton*, 2007 WI App. 114, 300 Wis.2d 649, 731 N.W.2d 640. For an in-depth summary of that case, see *Governing Bodies* 380 (*the Municipality*, May 2007).

37. Wis. Stat. sec. 19.84(2); 66 Op. Att’y Gen. 106 (1977); *Governing Bodies* 325.

38. Wis. Stat. sec. 19.85(1). These requirements also apply to a closed session of a subunit meeting without notice as provided by sec. 19.84(6). 65 Op. Att’y Gen. Preface vi (1976).

39. Wis. Stat. sec. 19.89.



Questions sometimes arise as to whether a member of a governmental body may tape record closed sessions. An individual member of a governmental body does not have the right to tape record closed sessions of the governmental body. Although a governmental body is obliged under sec. 19.90 to make a reasonable effort to accommodate any person desiring to record, film or photograph an open meeting (provided the person does not do so in a disruptive manner), the law does not apply to closed sessions.<sup>41</sup>

A governmental body may not reconvene in open session until twelve hours after completion of the closed session, unless notice of the subsequent open session was given at the same time and in the same manner as the public notice of the meeting held prior to the closed session.<sup>42</sup>

## PENALTIES AND REMEDIES

Violations of the open meeting law may be prosecuted by the district attorney, the attorney general, or by a private individual, if the district attorney does not take the case.<sup>43</sup> Governmental body members who violate the open meeting law are subject to a forfeiture of between \$25 and \$300; this is a personal liability which may not be reimbursed by the municipality.<sup>44</sup> However, members may very likely obtain reimbursement for costs and attorney fees incurred in defending against prosecutions under the open

meeting law.<sup>45</sup> Members may protect themselves from liability by voting in favor of a motion to prevent the violation (e.g., voting against going into an unauthorized closed session).<sup>46</sup> In addition to finding personal liability for violations of the law, a court may also order the violations to cease and void action illegally taken. In order to void action taken in violation of the open meeting law, the court must find that the public interest in enforcing the open meeting law outweighs the public interest in sustaining the validity of the action taken.<sup>47</sup>

## CONCLUSION

Members of local governmental bodies must understand and comply with the open meeting law. As with other legal matters, officials should consult their municipal attorneys if they have questions.

For additional information on Wisconsin's open meeting law, see the Wisconsin Department of Justice's Open Meeting Compliance Guide on the Department of Justice's website [www.doj.state.wi.us](http://www.doj.state.wi.us). Another good source of information is the State Bar of Wisconsin, Government Lawyers Division's *Wisconsin Public Records and Open Meeting Handbook* which is available from the State Bar for a fee. The Bar's phone number is (800) 728-7788.

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

41. See 66 Op. Att’y Gen. 318 (1977).

42. Wis. Stat. sec. 19.85(2).

43. Stat. sec. 19.97(1), (2) and (4).

44. Wis. Stat. sec. 19.96.

45. Wis. Stat. secs. 62.115, 895.35 and 895.46(1)(a); 77 Op. Att’y Gen. 177 (1988).

46. Wis. Stat. sec. 19.96.

47. Wis. Stat. sec. 19.97(3).