Wisconsin’s Open Meetings Law (OML)

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

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

What constitutes a meeting?

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

The “Purpose” Requirement

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

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

“Convening” of Members

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

Walking quorums

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

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

Social or chance gatherings

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

Notice

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

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

Closed sessions

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

Bottom line

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

Wisconsin’s Public Records Law (PRL)

“All persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”

Bottom line: There’s a presumption that everything created or maintained by a governmental entity is a public record.

The Records Request

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

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

Exceptions – Not a “record”

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

Statutorily required or exempt

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

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

Closing thoughts

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