

Department of Agriculture, Trade and Consumer Protection

OPEN MEETING LAW

What Is the Open Meeting Law?

The Wisconsin Open Meeting Law is contained in subch. IV of ch. 19, Stats. The general policy of the 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."

To implement this policy, the law requires that all meetings of state and local "governmental bodies" must 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."

Who Is Covered?

The Open Meeting Law applies to "governmental bodies" as defined in the law. This includes:

- The Board of Agriculture, Trade and Consumer Protection (DATCP Board), which sets policy for the Department of Agriculture, Trade and Consumer Protection (DATCP).
- Statutory boards, such as the Land and Water Conservation Board (LWCB) and the Livestock Facility Siting Review Board, which are attached to DATCP.
- Advisory councils formally appointed by DATCP. The DATCP Secretary appoints advisory councils in consultation with the DATCP Board.

The Open Meeting Law also applies to any "formally constituted sub-unit" (subcommittee) of a governmental body. To date, the Open Meeting Law has not been applied to DATCP internal staff meetings, or to routine meetings between DATCP staff and persons outside the department. But whenever DATCP organizes an "advisory council" to make policy recommendations, the DATCP Secretary should appoint the council and the council should comply with the Open Meeting Law. Divisions should consult with the Office of Legal Counsel if they have questions.

When Is There a "Meeting" Subject to the Law?

Whenever the members of a "governmental body" gather for the purpose of exercising the responsibilities, authority, power or duties of that body, the gathering constitutes a "meeting" under the Open Meeting Law. Likewise, whenever the members of a subcommittee gather to exercise the authority of that subcommittee, the gathering constitutes a "meeting" under the Open Meeting Law.

A governmental body may not hold secret (unannounced) “meetings.” A gathering may constitute a “meeting” even though the members do not contemplate any formal action at that meeting. A “meeting” may exist whenever there is a purpose to engage in governmental business -- be it discussion, decision, planning or information gathering.

Whenever one-half or more members of a governmental body gather to consider the business of that governmental body, the gathering is a “meeting” under the Open Meeting Law. But the law can also apply to a smaller gathering if there are enough members present to approve or block action on the matter being discussed. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77 (1987). For example, if 3 DATCP Board members gather privately to discuss an issue, knowing that only 5 Board members will be present at the next day’s Board meeting to vote on the issue, the gathering could constitute an illegal meeting under the Open Meeting Law.

The same rule applies to a subcommittee, if subcommittee members meet to discuss the business of that subcommittee. This can pose a problem, because subcommittees are often quite small. At the extreme, if 2 members of a 4-member subcommittee meet to discuss the business of that subcommittee, the discussion could conceivably be considered a “meeting” subject to the Open Meeting Law. But to date, no court cases have applied the law to one-on-one discussions between individual members of a governmental body.

Discussions between an individual board member and the DATCP Secretary or staff do not constitute a “meeting” subject to the Open Meeting Law. But a telephone conference call between several members may constitute a “meeting,” just as if the participants had gathered in person. Likewise, if several members privately transact business over lunch or in another informal setting, the discussions could constitute an illegal meeting under the Open Meeting Law.

The Open Meeting Law does not apply to social or chance gatherings that are not intended to avoid the law. But if members use “social” gatherings to transact business of the governmental body, they may violate the law.

Notice Required

Under the Open Meeting Law, a public notice must precede every meeting of a governmental body. The notice must set forth the time, date, place and subject matter of the meeting, including any matters contemplated for consideration in closed session. The form and contents of the notice must be adequate to apprise the public and the news media of the matters to be considered at the meeting.

Notice of each meeting must be given at least 24 hours prior to the meeting. Shorter notice may be given if, for good cause, 24-hour notice is impossible or impractical. For example, shorter notice may be justified if there is a genuine emergency that was not previously contemplated. But even in this special case, notice must be given at least 2 hours prior to the meeting.

The chair of a governmental body is legally responsible for issuing meeting notices and agendas. But as a service to the chair, DATCP normally prepares a draft agenda for each meeting and publishes a meeting notice after the chair has approved the agenda. DATCP posts the open meeting notice at the department and on its website, and distributes it to the official state newspaper and other interested news media. The Secretary's Office coordinates the publication of open meeting notices.

As part of the agenda at each meeting, a governmental body typically discusses its schedule of future meetings. Based on this discussion, DATCP schedules future meetings in consultation with the chair of the governmental body. The Secretary's Office schedules meetings and prepares draft agendas for the DATCP Board. The Agricultural Resource Management Division schedules meetings and prepares draft agendas for the Land and Water Conservation Board and the Livestock Facility Siting Review Board. DATCP divisions schedule meetings and prepare meeting agendas for advisory councils assigned to them.

The administrator of each division is responsible for coordinating the meetings of advisory councils assigned to that division. The administrator, or the administrator's designee, must develop advisory council agendas and prepare open meeting notices for publication by the Secretary's Office.

Meeting Agenda

Every meeting notice must specify the matters that the governmental body will consider at the meeting. The agenda must be reasonably specific, so that members, the public and the news media will be reasonably apprised of the matters to be considered. The agenda should specifically identify action items and major discussion items.

An agenda may state that additional agenda items, not contemplated at the time the agenda was prepared, may be added at the meeting if the governmental body determines that immediate action is needed on those items. This allows members to add discussion items, or minor action items, where appropriate. It also gives the governmental body *some* latitude to handle unforeseen emergencies.

But a governmental body must normally avoid taking up matters that are not included on its published agenda. A governmental body should defer major new agenda items until a subsequent meeting, so it can give appropriate advance notice to the public, the news media and absent members. Action on a major new agenda item, taken without appropriate public notice, may violate the Open Meeting Law.

Meetings Open to Public; General

Except where a closed session is specifically authorized by law, every meeting of a governmental body is open to the public. Meetings must be held in locations that are reasonably accessible to the public, and members of the public must be given free access at all times. Any person may record, film or photograph a meeting in open session, provided that the person's action does not interfere with the conduct of the meeting.

Closed Sessions Authorized Only for Certain Reasons

A governmental body may move a meeting into closed session for certain limited reasons specified in s. 19.85(1), Stats. But a governmental body must begin *every* meeting in open session, and must follow specific procedures to move into closed session. Governmental bodies attached to DATCP seldom, if ever, have legitimate reason to move into closed session. Reasons for moving into closed session may include:

- Considering the dismissal, demotion or discipline of an employee over whom they have authority, or the investigation of charges against that person. (s. 19.85(1)(b), Stats.)
- Considering employment, promotion, compensation or performance evaluation data of any public employee over whom they have authority. (s. 19.85(1)(c), Stats.)
- Deliberating 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. (s. 19.85(1)(e), Stats.)
- 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 which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such matters. (s. 19.85(1)(f), Stats.)
- Conferring with their legal counsel, who is providing oral or written advice related to pending or prospective litigation.

Closed Session; Notice and Procedure

If a governmental body contemplates a closed session as part of any meeting, its meeting notice should say so. The notice should identify the nature of the business to be considered in closed session. It should also identify the specific exemption under s. 19.85, Stats., that authorizes the closed session.

Every meeting must begin in open session. After it convenes in open session, a governmental body may move into closed session solely for purposes authorized by law. After holding a closed session, the governmental body may not reconvene in open session for at least 12 hours *unless* its meeting notice included notice of the subsequent open session.

A governmental body may not move into closed session unless it first adopts a motion to go into closed session. The governmental body must approve the motion by majority vote, and the minutes must record the vote of each member. Before a governmental body votes to move into closed session, the presiding officer must announce the nature of the business to be conducted in closed session and the specific exemption under s. 19.85, Stats., that authorizes the closed session. The presiding officer must make the announcement to all those present at the meeting, and minutes must record the announcement.

Deliberations in Closed Session

A governmental body may not take up, in closed session, any business not covered by the presiding officer's announcement of the closed session. A member does not have the right to tape record a closed session of a governmental body.

Actions in Closed Session?

The Open Meeting Law authorizes a governmental body to "consider" certain matters in closed session (see above). According to some Attorney General's Opinions, a governmental body may also take a final vote on these matters in closed session. But some court decisions cast doubt on this interpretation. Although a governmental body may take non-binding "straw polls" (on authorized matters) in closed session, it may be well advised to take any final binding vote in open session, pursuant to the published agenda.

Record of Actions

DATCP normally takes minutes for governmental bodies attached to DATCP. The governmental body normally approves the minutes at its next meeting. DATCP and the governmental body must preserve the minutes as public records. The minutes are subject to inspection under the Open Records Law. At a minimum, the minutes record the actions taken by the governmental body.

Under s. 19.88(3), Stats., a governmental body must record all *motions* and *roll call votes*, including motions and roll call votes taken in closed session. Since DATCP staff may be excluded from a closed session, a designated member of the governmental body (such as the DATCP Board secretary) must record actions taken in closed session. These records are open to later public inspection, to the extent provided under the Open Records Law (see below).

Not all votes are “roll call votes.” For example, a governmental body may decide a matter by voice vote or a showing of hands. But under s. 19.88(2), Stats., any individual member may demand that a vote be taken as a “roll call vote,” such that the vote of each member is specifically recorded. If there is no “roll call vote,” the minutes may record the action taken on each motion without identifying how each individual member voted.

Section 19.88(1), Stats., prohibits a governmental body from using any “secret ballot,” except in its election of its own officers. A “secret ballot” is one that prevents members from knowing how other members voted.

Records Open to Public Inspection

The state Open Records Law is contained in ss. 19.31 to 19.39, Stats. The Open Records Law applies to public records created, considered or kept by a governmental body, including records that DATCP keeps on behalf of the governmental body. The Open Records Law applies to minutes and other records that document the actions of a governmental body. Under the Open Records Law, public records are presumptively open to public inspection upon request.

To withhold a record from public inspection, a governmental body must be prepared to show a court that there is a compelling *public* interest in keeping the record confidential at the time it is requested, and that this public interest in nondisclosure outweighs the statutory presumption in favor of disclosure. This analysis must be done on a case-by-case basis, based on the specific records requested.

A governmental body may be able to withhold records of actions properly taken in closed session, but only if there remains a compelling *public* reason for withholding those records. For example, once a governmental body announces the action that it has taken in closed session, it may no longer have a compelling reason to withhold records related to that action.

Penalties and Remedies

Violations of the Open Meeting Law may be prosecuted by the Attorney General or, upon the verified complaint of any person, by a district attorney. If a district attorney fails to take action in response to a verified complaint, the complainant may file a court action against the alleged violators.

A court may void any action taken in violation of the Open Meeting Law. A person who violates the Open Meeting Law is also subject to a civil forfeiture of \$25 to \$300 per violation. This is a personal liability that the state will not reimburse. But persons wrongly accused of violating the Open Meeting Law may seek reimbursement of costs incurred in a successful defense.

Prepared by: DATCP Office of Legal Counsel, January 22, 2008 (Update). This document is merely a summary of the Open Meeting Law, and is not a substitute for the law. Court cases also interpret the Open Meeting Law. Interpretations may vary, depending on the specific facts involved. DATCP Board members and staff may consult with DATCP's Office of Legal Counsel if they have questions.