MADISON AREA TECHNICAL COLLEGE
BOARD DEVELOPMENT

“SO YOU’RE A BOARD MEMBER.... NOW WHAT?”

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I. OPERATING IN THE SUNSHINE

A. Open Meeting Law

1. Why do we have an open meetings law?

   a. General Principles

   “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).

   b. Reasonable Access

   “To implement and ensure the public policy herein expressed, 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).

   • Public place
   • Reasonable time
   • Reasonable distance
   • Consider whether attendance will be larger than usual
   • Reasonable access does not mean total access

2. What governmental bodies are covered by the law?

   a. “Governmental Body” means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation created under ch. 232; any public purpose corporation as defined in § 181.79(1); a nonprofit corporation operating an ice rink which is owned by the state; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111. Wis. Stat. § 19.82(1).
b. What’s covered?

- Governing bodies (common council, village or town board, school board, etc.)
- Statutory boards (zoning board of appeals)
- Statutory commissions (police and fire commission)
- Locally created boards and commissions
- Locally created committees
- State legislature
- Any formally constituted subunit comprised of members of the parent body (body that is only partially comprised of members of the parent body is not a subunit but might be governmental body in its own right)

c. What’s not covered?

- Bodies formed or meeting for purpose of collective bargaining (but what if just meeting for discussing negotiation strategies, is body then subject to law?)

3. What is a meeting?

“Meeting” means the 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).

a. Two-factor test

- Purpose (discussion, decision, or information gathering)
- Number (# of members present has to be sufficient to determine parent body’s course of action)
- Negative quorum (7 member body, 4 makes a quorum, 2 would be sufficient to block – thus gathering of two is a meeting) (but no presumption that gathering for purpose of conducting public business)
- Assume that a bare quorum of the body will be present and voting
- Avoid discussing governmental business outside of a properly noticed meeting if the number test may be met

b. Walking quorum (can’t have series of meetings under number requirement to avoid application of law)
c. Consider email

d. Exceptions (OK if not intended to avoid Open Meeting law)
   • Social Gatherings
   • Chance Gatherings
   • If members of one body plan to attend the meeting of another body, they should make sure notice is given and not discuss business of body not meeting.

4. What is proper notice?

a. Every meeting must be preceded by public notice.

b. Notice must be given as required by any other statutes (such as annual meeting).

c. Notice must be given “by communication from the chief presiding officer or designee” to:
   • The public (posting, in newspaper or both)
   • News media that have filed a written request for notice
   • The official newspaper, or if none exists, to a news medium likely to give notice

d. Notice must include time, date, place and subject matter, including anything intended for consideration at a closed session.

e. Must be in a form “reasonably likely to apprise members of the public and the news media” of what will happen.

f. Separate notice required for each meeting.

g. Can have a general public comment period but probably should not take action on anything new that is raised.

h. Notice must be given 24 hours in advance unless impossible or impractical. At least two hours’ notice is always required.

i. Notice of closed sessions should include specific statutory exemption relied upon and brief explanation of what will be considered. Do not need notice if nobody knew beforehand that a closed session would be necessary.

j. Subunits can meet during breaks or after a meeting of the parent body without giving advance notice if they are discussing or acting upon something which was discussed at the parent body’s meeting
5. Closed sessions

a. Procedure

- Must always begin in open session
- Motion to go into closed session must be made, explanation given, specific exemption announced, and approved by majority vote
- If plan is to reconvene in open session, should announce estimated time
- Only those matters announced may be discussed
- After adjournment, can’t go back into open session within 12 hours, unless had given notice of this in original public notice
- Ratifying collective bargaining agreement must always be done in open session

b. Common Statutory Exemptions

- Judicial or Quasi-Judicial Matters (1) (a) Limited to Deliberations after Open Hearings
- Discipline and Licensing of Public Employees (1)(b) Must give actual notice to employee Person can ask that it be held in open session, but not in closed session Statute seems to suggest can take “formal” action, i.e. voting, in closed session
- Employment, Compensation and Evaluation (1)(c) Applies to employees and appointed officials Does not apply to elected officials Should not apply to positions in general, should apply to specific employees
- Competitive or Bargaining Reasons (1)(e) Purchase or lease of public properties, investment of public funds or other specified public business “whenever competitive or bargaining reasons require a closed session”
- Personnel Matters (1)(f) If “likely to have a substantial adverse effect upon the reputation of any person referred to” Not restricted just to public employees Can’t use if person wants the meeting to be open
- Conferring with Legal Counsel (1)(g) Only applies to strategy with respect to litigation in which body is or is likely to become involved
6. Ballots, votes and records
   a. No secret ballots except for election of officers
   b. Any member may require a roll call vote
   c. Motions and roll call votes must be recorded and preserved and are open to inspection to extent allowed by Open Records law
      • Actions taken in closed session may not have to be disclosed if reason for closed session still applies
   d. Voting in Closed Session

7. Exclusion of members
   a. Can’t exclude member of that body
   b. Can’t exclude members of parent body from meeting of a subunit, unless rules of that body provide otherwise

8. Use of recording equipment
   a. Body meeting in open session has to make “reasonable effort” to accommodate anyone wanting to record, film or photograph the meeting as long as it doesn’t interfere with the meeting.

9. Enforcement
   a. Enforced by District Attorney or Attorney General

10. Penalties
    a. “Knowingly attends meeting in violation of law, or otherwise violates law, subject to: Civil forfeiture of $25-300 per violation
    b. Not liable if vote to prevent violation from occurring
    c. Probably not liable if relying on advice of counsel
    d. Action taken at unlawful meeting might be rendered void if public interest in enforcement of open meetings law outweighs public interest in sustaining decision

11. Interpretation by Attorney General
B. Public Documents Law

1. Wisconsin’s Open Records Law is contained in §§ 19.31 to 19.39, Stats.
   a. § 19.35, Stats., essentially codifies case law and generally requires that a record held by an authority remain open for inspection and copying.
   b. Broadly speaking, an “authority” is a state body, local body, or elected official having custody of a record.
   c. Further, an authority usually delegates to a named individual the responsibilities of acting as a legal custodian who will respond to requests for access to records. (See §§ 19.32(1) and 19.33, Stats.)

2. The Open Records Law, as interpreted by Wisconsin courts, provides that a record must remain open for inspection and copying unless:
   a. There is a clear statutory exception to this requirement;
   b. There exists a limitation on inspection and copying under the common law; or
   c. On a case-by-case basis, a record custodian decides that the harm done to the public by disclosure of a record outweighs the public’s interest in access to the record.

3. An authority receiving a record request must either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part, including specific reasons for the denial.
   a. Every written denial of a request by an authority must inform the requester that if the request for the record was made in writing, then the determination to deny the request is subject to review by mandamus or upon application to the Attorney General or a district attorney. (See § 19.35(4)(a) and (b), Stats.)

4. § 19.37(1), Stats., provides that if an authority withholds a record, or part of a record, a requester either may:
   a. Bring an action for mandamus asking a court to order release of the record; or
   b. In writing, request the district attorney of the county where the record is found, or request the Attorney General, to bring an action for mandamus asking a court to order release of the record.
5. In *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), the Wisconsin Supreme Court held that there is no blanket statutory or common law exception under the Open Records Law for public employee disciplinary or personnel records.

   a. The court stated that public employee personnel records are subject to the balancing test under which the custodian of the records determines whether permitting inspection would result in harm to the public interest outweighing the legislative policy recognizing the public interest in record inspection.

6. In *Milwaukee Teachers’ Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the supreme court formally extended to any public employee the right to notice about, and judicial review of, a custodian’s decision to release personnel information implicating the privacy or reputational interests of the individual public employee.

   a. Based on the Supreme Court’s decisions, a record custodian must determine whether the release of a record will implicate the privacy or reputational interests of a public employee.

   • If the custodian determines that the record in question would implicate the privacy or reputational interests of a public employee, the custodian must notify the individual to whom the record refers prior to the release and give the individual an opportunity to appeal the decision through a judicial proceeding.

   • The Supreme Court did not establish any criteria for determining when privacy or reputational interests are affected or for providing notice to affected parties.

7. Law now partially codifies *Woznicki* and *Milwaukee Teachers’.* In general, the law applies the rights afforded by *Woznicki* and *Milwaukee Teachers’* only to a defined set of records in the possession of governmental entities.

   a. Records relating to employees can be placed in the following three categories:

   • Employee-related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.

   • Employee-related records that may be released under the balancing test only after a notice of impending release and
the right of judicial review have been provided to the employee record subject.

- Employee-related records that are absolutely closed to public access under the Open Records Law.

b. The law defines the term “employee” to mean a public sector or private sector employee. The term does not include a person who holds a state or public office.

c. The law limits Woznicki by stating that, except as otherwise provided, no person is entitled to notice or judicial review of an authority’s decision to provide a requester with access to a record.

d. The law provides that if an authority decides to permit access to certain records, the authority must, before permitting access and within three days after making the decision to permit access, serve written notice (personally or by certified mail) of that decision on any record subject to whom the records pertain. The records to which this notice applies include only:

- a record containing information relating to an employee that is created or kept by the authority as a result of an investigation into a disciplinary matter involving the employee or a possible employment-related violation by the employee of a statute, ordinance, rule regulation, or policy of the employee’s employer, when the investigation is concluded;

- a record obtained by the authority through a subpoena or search warrant; or

- a record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

e. The law creates a system of expedited judicial review when a person attempts to prevent the release of a public record.

f. The law requires an authority to notify a record subject who holds a local public office or a state public office of the impending release of the record containing information relating to the employment of the record subject. The record subject may in turn, within five days of receipt of the notice, augment the record to be released with written comments and documentation selected by the record subject.
g. The law closes public access to all of the following:

- Information prepared or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an employee, unless the employee authorizes the authority to provide access to the information.

- Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

- Information pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited.

- Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

- Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an individual holding a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This provision does not apply to the home address of an individual who has been elected or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

- A record prepared or provided by an employer, performing under a contract requiring the payment of prevailing wages, which contains personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The term “personally identifiable information” does not include information relating to an employee’s work classification, hours of work, or wage or benefit payments received for work on such projects.
II. BEING A MEMBER OF THE BOARD

A. How Do Board Members Meet The Challenge Of Boardsmanship?

1. Do their homework before board meetings.
2. Keep abreast of current educational issues and trends.
3. Make every attempt to attend all board meetings.
4. Devote sufficient time, thought and study to proposed actions.
5. Orient their new colleagues.
6. Consider alternative solutions to problems.
7. Encourage ideas and opinions from diverse sources.
8. Establish effective policies by which the administration can administer the schools.
9. Establish fair and equitable terms and conditions of employment as well as evaluation for all school employees.

B. Working Together As A Team

Among board members:

1. Be willing to listen to others.
2. Express positions clearly, checking to be sure that the others understand statements and stands on issues.
3. Adhere to the code of ethics or conduct established by the board.
4. Publicly support decisions made by the entire board.
5. Attempt to avoid over-reaction to district problems and board disagreements.
6. Respect other people’s skills and abilities.

Between Board Members and the Administrative Team:

1. Know their job and don’t interfere with that of the administration.
2. Devote the time needed to do a good job. Read the background materials the administration prepares.
3. Admit what you don’t know.
4. Don’t jump to conclusions; instead, hear and weigh all the facts. Keep an open mind to change.
5. Understand that the administrator is practicing a career.
6. Communicate with the staff through the administration as much as possible.
7. Don’t make promises outside board meetings, not only for legal reasons, but also out of respect for the ethics of the situation and regard for the other board members and the administrator.
8. If someone complains to you about a member of the administration, listen, but don’t agree. Being supportive of the administration shows that you have confidence in yourself and in the district management team. If the complaint is serious, ask the person to put it in writing and ask the board as a whole to analyze it.
9. Don’t surprise the administration at a board meeting with resolutions, problems and issues without prior notice.

C. Meeting the Challenge

1. Base your decision on the available facts and your independent judgment. Refuse to surrender your judgment to individuals or special interest groups.
2. Take no private action that will compromise the board, or the administration.
3. Respect the confidentiality of information that is privileged.
4. Share the responsibility for all board decisions, regardless of how you voted.
III. BOARD MEMBER FREQUENTLY ASKED QUESTIONS

A. When is there a chance to talk to other board members off the record?

Board members need to take great care to ensure that “off record” discussions involving other members of the board do not violate the open meetings law. Although two members of a governmental body larger than four members may discuss the body’s business without violating the open meetings law, board members need to be careful that such discussion does not involve a sufficient number of board members to violate negative quorum or walking quorum rules.

A meeting, under the law, is defined as:

…the 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, authorities, 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. Stats. §19.82(2).

People often assume that the open meeting law applies only to gatherings of one-half or more of the members of a governmental body. That is not the case. The Wisconsin Supreme Court has held that the open meeting law applies whenever a gathering 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 are sufficient to determine the governmental body’s course of action. State ex rel Newspapers v. Showers, 135 Wis. 2d 77 (1987).

Governmental body is broadly defined under the law. The board is a governmental body but not the only governmental body within the district. Subcommittees of the board and other ad hoc committees established by the board are also governmental bodies subject to the provisions of the law. This means that, if a committee has three members, two members of that committee may not meet to discuss business without complying with the provisions of the open meetings law.

Typically, boards operate under a simple majority rule – that is, a margin of one vote is sufficient for the body to pass or block a proposal. In that instance, under the Showers test, noted above, and due to the language in Wisconsin Statute §19.82(2), the open meeting 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.
When a governmental body operates under a supermajority rule (a two-thirds majority rule for example), less than half of the members of the body could block a proposal by agreeing to vote in opposition to the proposal. A group of sufficient size to block a proposal is called a negative quorum. The Showers case made it clear that the open meeting law applies when such a group gathers for the purpose of conducting governmental business. Accordingly, if a governmental body operates under a two-thirds majority rule, or is considering business that requires a two-thirds majority vote (like budget adjustments under Sec. 65.90 (5) Stats.), the open meeting law applies whenever more than one-third of its members gather to discuss or act on matters within the body’s authority.

The requirements of the open meeting 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 State ex rel Lynch v. Conta, 71 Wis. 2d 662 (1976). In Conta, the supreme court recognized the danger that a walking quorum may produce a predetermined outcome and, thus, render a publicly held meeting a mere formality. The court noted that any attempt to avoid the appearance of a “meeting” through use of a walking quorum is subject to prosecution under the open meeting law.

Board members must also be aware that their use of email to communicate regarding district business could be considered violate the open meeting law again depending on the application of the Showers test. See question 6 below.

B. Can phone calls be placed to talk about upcoming agenda items?

Telephone conference calls among members of a governmental body fit the definition of a “meeting” subject to the open meetings law. 69 Op. Atty. Gen. 143 (1980). Under the Showers test, the open meeting 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. The same rules concerning “off record” communications among board members apply here.

To comply with the open meeting law relating to telephone conference calls, a governmental body conducting a meeting by telephone must notice the meeting and 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. 145 (1980). Of course, a walking quorum or negative quorum by telephone is also governed by the open meeting law.
C. **How do other board members gather information from outside sources pertaining to a certain topic?**

As a general rule, board members should not gather information from outside sources relating to a certain topic. Board members serve in an advisory and policymaking capacity to the administration in discharging their duties and responsibilities. To the extent appropriate, board members should be working through the administration in obtaining the information that they need to make decisions. Working through the administration assures that the information will be received and put in a form that would be most useful to the board in its consideration of a particular topic. Moreover, it will assure those who deal with a board that the board is working in a business-like fashion and will help to avoid multiple contacts from numerous board members seeking the same information.

That stated, board members also need to be respectful of the administration’s time. Working through the President in requesting information is the most efficient way to operate as a board. Discussing items needed at open board meetings also ensures that the administration is only responding to requests for information that the board, as a corporate body, wants the administration to research.

D. **Can board members meet and discuss ideas?**

Board members certainly can meet and discuss ideas. This can be done in one of two ways. The first way, and the one that is preferred under the policy underpinnings of the open meeting law, is for board members to do this in the context of lawfully noticed open board meetings. Board members also have the opportunity to meet and discuss as long as they are meeting and discussing in small groups that do not have the ability to affirmatively influence or negatively influence the outcome of a particular decision before the board.

E. **Do I have to keep all of the stuff I receive as a Board Member?**

Materials that you receive that relate to your office as a board member are clearly “public records”. The board packet you receive each week contains numerous pages that are “records” under the law. The College, however, maintains a copy of everything it sends to you in the packet. As such, you are not required to keep a copy of such material.

As a Board member, you are, however, required to maintain the records you have in your possession consistent with the law. This could include e-mail communications (see below), letters, reports and other documents you receive as a member of the board. As a general rule, you will be required to maintain any document that is not otherwise maintained by the College, either in electronic or paper form.
F. As a Board Member, do I need to be concerned about e-mail communications?

Yes, use of e-mail raises issues under both Wisconsin’s Public Records and Wisconsin’s Open Meetings Law.

E-mail communications of governmental officials and employees are clearly public records, just like letters, other documents or computer data. See Wisconsin Statutes §19.32(2).

Board members are the custodians of their own documents under the Public Records law because they are included within the definition of “authority” in Wisconsin Statute §19.32(1). Thus, if they choose to use e-mail as a form of communication, each member is responsible for maintaining those records so that they can be accessed according to the governmental body’s record policy. This would apply to home computers as well as office computers, if the topic of the e-mail is the business of the governmental unit, rather than personal communications. The same is true with respect to letters or files that an official may keep at his or her home.

Whether or not e-mail communications implicate open meeting law issues is a much more complicated question. The answer largely depends on specific facts of each individual situation. The answer to the question can best be described as depending on whether or not the e-mail exchange more closely resembles “correspondence” or a “conversation”. When e-mails are exchanged in close proximity and time to each other among a group of officials, they can become much more like a phone conference, a personal conversation or meeting, than a group of letters. Instant messaging, and chat rooms, make this all the more likely. However, the same problem could occur if people are responding quickly to each other by “forwarding” or pushing the “reply all” button in e-mails, even without instant messaging.

An open meeting law violation may occur if elected officials are instant messaging or contacting each other by e-mail within a close timeframe if (1) enough of them are involved in the messaging to determine the body’s course of action; and (2) there is a purpose to engage in governmental business. An open meeting law violation could also occur if a single official were to e-mail other officials in succession, asking for their support for a particular matter or position. If the sender (or others forwarding the mail) were to reach enough officials to constitute a quorum necessary to take the action contemplated in the e-mail, or to block a contemplated action, then a “walking quorum” or a “negative quorum” violation may occur. See State ex rel Newspaper v. Showers, 135 Wis. 2d 77 (1976) for a discussion of some of these issues.

E-mail is a convenient way to communicate. While e-mail is a valuable, timesaving device for quick and incidental communication, it should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny.
G. What is best practice to ensure that the board works well together and time in meetings is used efficiently?

The following ten practices will help the board to work together well and use time efficiently in meetings:

- Do your homework before board meetings.
- Keep abreast of current educational issues and trends.
- Devote sufficient time, thought and study to proposed actions.
- Make every attempt to attend all board meetings.
- Express yourself clearly to make sure that others understand what you are saying.
- Adhere to the Code of Ethics or conduct established by the board.
- Don’t surprise the administration at board meetings with resolutions, problems and issues without prior notice.
- Evaluate your own performance.
- Take no private action that would compromise the board or the administration.
- Respect the confidentiality of information that is privileged, including the confidentiality of information discussed in the closed session.
IV. TOP 10 THINGS TO KNOW ABOUT THE OPEN MEETING LAW

1. The policy of the law is open government. (When in doubt……..)

2. Notice meetings not only to comply with the law, but to let the public know what you are up to.

3. You can discuss items brought up in the “public comments” section of your agenda, but should you?

4. The law applies to committees established also by the board.

5. Only you can close a meeting. The union can’t. Neither can your employees.

6. If you oppose a closed session, you need not vote with your feet.

7. When is the public’s business not the public’s business? (Closed sessions)

8. Voting in closed session should be the exception, and not the rule.

9. The minutes of your board meetings need not be as long as War and Peace.

10. Remember it is your meeting.
V. TOP THINGS TO KNOW ABOUT THE PUBLIC RECORDS LAW

1. The policy of the law is open government.

2. The definition of a “record” is broad; electronic records are included.

3. Nearly everything you have bearing some relation to your office is a record.

4. The real issue is whether a record must be released and when.

5. Personnel records are records under the law.

6. The higher up the food chain, the less the privacy interest.

7. You don’t have to create a record.

8. The law compels the release of records, not comments about records.

9. Managing the records law is public relations at its finest.