

Educational Approval Board

June 13, 2013 Meeting
Open Meetings Law: A succinct summary

Bruce A. Olsen
Assistant Attorney General

I. General Requirements

A. Applies to all “meetings” of “governmental bodies”: meetings must be in public session unless a specific exemption applies, and must be preceded by timely and specific notice of the subjects to be considered at the meeting.

1. Board is “governmental body”: no need for detailed discussion on this point. Wis. Stat. § 19.82(1); 2010 Open Meetings Compliance Guide (“OML Guide”) at 2.

2. “Meeting” occurs whenever (a) members convene for purpose of conducting governmental business, and (b) sufficient number of members present to determine the body’s course of action. Wis. Stat. § 19.82(2); OML Guide at 6-7.

a. “conducting governmental business”: includes discussion, decision or information gathering. Not limited to formal action. “Information gathering” includes attending meetings of another governmental body for purposes of gathering information or becoming informed. OML Guide at 6-7

b. “sufficient numbers”: majority is critical number; i.e., 4 for this board when all positions are filled. One board member may discuss board business with another member, but discouraged, because (i) there may be circumstances where 2 members could determine the course of the board’s action; (ii) deprives public of fullest available information about workings of government; (iii) potential for walking quorum violations. If a board engages in a series of gatherings among separate groups of members each less than a quorum size who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum, the courts will find a “walking quorum,” and a violation of the open meetings law. OML Guide at 7-9.

c. Conference calls qualify as meetings. If held, they must be convened in open session, and the open session portions must be reasonably accessible to the public; e.g., through speakerphone at the board’s offices. OML Guide at 8.

d. Electronic communications. Sometimes used like written letters; sometimes used like face-to-face conversations. Where use is confined to one-way communication of information, little risk of OML violation. But where use is more conversational, and includes several members, risk of creating “walking quorum” violation. Since users lose control of message once “send” button is hit, DOJ discourages board members from using electronic communications, except for one-way transmissions. OML guide at 8-9.

B. Notice must be specific and timely and appropriate

1. “Specific” means that the presiding officer who is responsible for producing the notice (or his/her designee) must be careful to draft a notice which gives a person interested in a specific subject matter notice that the matter may be discussed at the meeting – consistent with the conduct of government business. Wis. Stat. § 19.84(2); OML Guide at 11-13.

2. “Timely” means at least 24 hours in advance of the meeting, unless “good cause” is shown, in which 2 hours will do. The DOJ hardly ever finds “good cause.” Wis. Stat. § 19.84(3); OML Guide at 13-14.

3. “Appropriate” means that notice must be given to the right people in the right way. Notice must be given to the public, to the news media who have requested notice, and to the state’s officially designated newspaper. Wis. Stat. § 19.84(1); OML Guide at 10-11.

C. Meetings must comply with certain formal requirements

1. Every meeting must be convened in open session – even if the only open session business items are motions to go into closed session, and a return to open session following a closed session discussion for the purposes of voting on the item(s) discussed in closed session and adjournment. Wis. Stat. §§ 19.83, 19.85(1); OML Guide at 14.

2. Although the OML does not require a governmental body to keep detailed minutes of its meetings, bodies often do so to comply with other legal provisions, or as a matter of internal policy. The OML, however, does require that bodies keep a record of the motions at each meeting, and of the roll call votes at each meeting. This record-keeping obligation extends to both open session and closed session motions. Bodies may not determine any matter by secret ballot – except for the election of its own officers. Wis. Stat. § 19.88; OML Guide at 16-17.

3. Bodies must allow the public to attend, observe, and record their open session proceedings. Bodies may permit members of the public to bring concerns to their attention or otherwise participate in the bodies' meetings, but are not required to do so. Wis. Stat. §§ 19.83(2), 19.84(2), 19.90; OML Guide at 16.

II. Closed sessions

A. General policies

1. In general, agenda items must be discussed in open session. An agenda item may be discussed in closed session only if a specific provision of the OML permits it. The exemptions permitting closed sessions are construed narrowly. Wis. Stat. § 19.83; OML Guide at 17.

B. Anticipated grounds for going into closed session for this board.

1. Sec. 19.85(1)(b): "Considering 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." *See* OML Guide at 19.

The provision covers both employees of the board, and persons licensed by the board. In either case, the board can conduct preliminary discussions or deliberations about the subjects in closed session, and return to open session to take final action. If the board plans to conduct a formal evidentiary hearing, the board must give the potentially affected person actual notice of the hearing, and the affected person has the right to demand that the evidentiary hearing be held in open session.

2. Sec. 19.85(1)(c): "Considering employment, promotion, compensation, or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." *See* OML Guide at 19-20.

This provision covers only employees of the board, and allows the board to convene to closed session to discuss specific employees, as opposed to general employment policy or positions of employment.

3. Sec. 19.85(1)(f): "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 histories or data, or involved in such problems or investigations.” *See* OML Guide at 20.

This exemption is extremely limited. The AG has cautioned that it applies only where (a) a member of a governmental body has actual knowledge of information that will have a substantial adverse impact on the person involved, and (b) there must be a probability that such information would be divulged. The persons discussed under this exemption need not be employees. Licensees or potential licensees could also qualify. Not every problem with a licensee or applicant is likely to have an adverse impact on the person. Allegations of fraudulent conduct by a school would almost certainly fit under this exemption (or another); other licensing issues perhaps not so much. considering a complaint on its merits.

4. Sec. 19.85(1)(a): “Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.” *See* OML Guide at 18-19.

Occasionally, the board may wish to conduct an evidentiary hearing with all board members present to hear the evidence. Whether the hearing takes place in open or closed session, the board can deliberate about the hearing in closed session.

5. Sec. 19.85(1)(g): “Conferring with legal counsel . . . concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.” *See* OML Guide at 21-22.

This section authorizes some, but not all, discussions with legal counsel to take place in closed session. The key elements are whether the discussion relates to strategy, and whether the discussion involves litigation in which the board is involved or is likely to become involved. The DOJ recommends that the board rely on legal counsel’s advice on whether litigation is sufficiently “likely” to justify closure under this section.

C. Procedures for going into closed session:

1. There must be a motion, made in open session, to go into closed session. Wis. Stat. § 19.85(1); OML Guide at 18.
2. Before the vote, the presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which justifies the closed session. Wis. Stat. § 19.85(1); OML Guide at 18.

3. The vote to go into closed session must pass by recorded majority vote. If the vote is unanimous, the votes need not be recorded individually. Wis. Stat. § 19.85(1); OML Guide at 18.

4. The closed session discussion must be limited to the business specified in the announcement. Wis. Stat. § 19.85(1); OML Guide at 18.

D. Voting in closed session.

1. DOJ recommends that all motions be made in open session, and voted on in open session, unless the motion cannot be made without jeopardizing the reason for the closed session. *See* OML Guide at 22-23.

E. Who can attend a closed session?

1. If the parent body has created committees comprised of a subset of the parent body's members to perform specific aspects of the body's work, members of the parent body can attend committee meetings. Wis. Stat. § 19.89; OML Guide at 22.

2. Generally, anyone whose presence the body determines is necessary to conduct the business of the closed session. *See* OML Guide at 22.

III. Enforcement and penalties.

A. Typically, citizens bring alleged violations of the open meetings to the attention of the district attorney in the county where the alleged violation occurred, or to the attention of the attorney general. Wis. Stat. § 19.97(1); OML Guide at 23.

B. Although allegations of open meetings violations against state governmental bodies are rare, the Department of Justice will typically represent the members of the state governmental body who have been accused of open meetings violations.

C. If a district attorney has received a citizen's verified complaint of an open meetings violation, more than 20 days has elapsed since receipt, and the district attorney has either refused to commence a prosecution or has not acted, the complaining citizen may bring an action to enforce the open meetings law. Wis. Stat. § 19.97(4); OML Guide at 24.

D. The penalty for knowingly violating a meeting held in violation of the open meetings law or for other violations is a \$25 to \$300 forfeiture per violation. Wis. Stat. § 19.96; OML Guide at 24-26.

h:\misc\2013-oml-training-eab.docx