Closed Sessions

As a matter of transparency, schools boards should conduct business in open session in places reasonably accessible to members of the public and open to citizens at all times.* This principle is embodied in Wisconsin's Open Meetings Law ("WOML"), which requires that any meeting of a "governmental body" occurs in open session[1] unless the WOML explicitly authorizes a closed session when the nature of an issue is not compatible with conducting such business in open session. The WOML recognizes that confidentiality concerns may at times outweigh the public's right to access meetings and, therefore, contains specific, limited exceptions to the general requirement of open sessions.

This *Legal Comment* will address the circumstances under which a "governmental body" can meet in closed session, the process it needs to follow to do so, and the ramifications for failing to comply with these requirements. A "governmental body" includes not only the school board, but also authorized committees[2], and their subunits (collectively referred to herein as "board").

Permitted Closed Sessions

The WOML itemizes the circumstances that allow boards to convene in closed session. Even when the WOML allows for a matter to be discussed in closed session, a board is not required to go into closed session for that purpose. Boards have the discretion whether to discuss such matter in open or closed session. Furthermore, the WOML does not give any individual who may be the subject of a potential closed session matter the right to demand that the matter be held in closed session, except for expulsion hearings.[3]

Among the subjects which permit a board to convene in closed session are the following:[4]

- To conduct quasijudicial hearings. In order to fall within this exemption, there must be a "case" that is subject to a quasi-judicial proceeding.
- To consider the dismissal, demotion, licensing, or discipline of or the investigation of charges against a district employee, and/or the taking of formal action on such matter. If a board contemplates taking evidence or final action on an employment matter, the employee subject of the hearing or final action must be given notice of the meeting and the opportunity to request that the matter be held in open session. If the employee requests that final action take place in open session, the board may convene in closed session to discuss or deliberate the matter, and then return to open session to take final action.
- To consider the hiring, promotion, compensation, and performance evaluations of specific persons. This includes interviewing applicants for district positions. It does not include general discussion regarding employment policies, budgetary compensation, or employment positions. This exemption does not cover elected officials and, thus, a board may not use this exemption to fill board vacancies.
- To consider the financial, medical, social or personal histories, or disciplinary data regarding, or the investigation of charges against, specific persons which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of the person referred to in such discussion.
- To deliberate or negotiate the purchase of public property or the investment of public funds, or to conduct public business with competitive or bidding implications which require a closed session. The Wisconsin Attorney General has advised that mere inconvenience, delay, embarrassment, frustration, or speculation as to the probability of success is an insufficient basis to close a meeting.[5] Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect negotiations with a third party, but not where the discussions might be one of several factors that indirectly influence the outcome of those negotiations.[6] A private entity's desire for confidentiality does not in and of itself warrant a closed session under this exemption.[7]
- To confer with legal counsel either orally or in writing concerning litigation which the district is (or likely will become) involved. The presence of legal counsel or the rendering of legal advice is not sufficient to move into closed session. Legal counsel must be present and render advice specifically related to potential or actual litigation involving the district.

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- To consider strategy with respect to crime detection or prevention. This would include board discussion about potential school safety plans which, if held in open session, would undermine the district's attempts to keep safety strategy confidential so as to not allow individuals to plan around those strategies.
- To consider a request for confidential written advice from applicable governmental bodies regarding ethics issues.
- To collectively bargain or conduct specific business, including strategy sessions, directly related to collective bargaining.[8]

These exceptions are strictly construed. If there is any doubt about whether the subject matter of a meeting satisfies an exception, it is advisable to hold the meeting in open session.[9]

Process

Notices must be published for both open and closed meetings and must include the time, date, and place of the meeting. Notices, including those for closed sessions, must also describe the subject matters in a form that will give sufficient information about the business to be conducted so that the public can make an informed decision about whether to attend.[10] Mere citation to the statutory provision under which a closed session will be held is not sufficient. The level of descriptive detail required in a meeting notice, however, varies depending on the matter. The Wisconsin Supreme has indicated that districts must balance the public's right to information and the district's need to efficiently conduct its business and has identified the following factors as relevant in this balancing: the burden of providing detailed information, whether the subject is of particular public interest, and whether the meeting involves non-routine action that the public is unlikely to anticipate.[11] For example, a closed session notice referencing "personnel matters" or "employment matters" is wholly noncompliant with the WOML's requirements.

Every meeting of a governmental body must convene initially in open session. The WOML imposes strict requirements on the process used by boards to move into closed session. Before a board votes on a motion to move into closed session, the presiding officer must announce in open session the nature of the governmental business to be discussed in closed session and the specific statutory exemption(s) which authorizes the closed session.[12] It is not sufficient to simply recite the statutory citation as the basis for the closed session; the presiding officer must describe the subject matter to be discussed in closed session with enough specificity to give board members the ability to

vote intelligently on the motion to convene in closed session. If there are different closed session topics on the agenda, the presiding officer's announcement and the motion should make it clear which statutory section applies to each subject of the closed session.

In order to move into closed session, a board must pass a motion by majority vote. The vote should be taken by roll call; however, if the vote is unanimous, there is no legal requirement to record the individual votes in the minutes and the minutes can simply reflect that the motion passed by unanimous vote.[13]

A board may not commence a meeting, convene into closed session, and subsequently reconvene into open session within 12 hours after completion of the closed session unless the agenda includes language that the board may convene into open session after the conclusion of the closed session. Therefore, if a board intends to reconvene into open session, including to take action on any item discussed in closed session, the agenda should include that possibility although it need not specify a time when such would occur.

Attendance

The WOML gives a board discretion to determine who to admit to the closed session as long as that person's presence is required for consideration of the subject matter of the discussion. In addition, district support staff necessary for the administration of the meeting can attend. A board member cannot be excluded from the closed session, even if the subject matter of the discussion involves the board member.[14] In addition, a board member has the right to attend the closed session of any of the "subunits" of the board unless the rules of the board provide to the contrary.[15]

Discussion and Voting

Discussion in closed session can only involve the topic which forms the basis for the closed session by reason of the agenda, announcement, and motion.

The WOML requires that "[t]he motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection…"[16] This applies to both open and closed sessions. Wisconsin courts have suggested that a board may vote in closed session on matters that are the legitimate subject of deliberation and consideration in closed session.[17] However, the Attorney General recommends that boards vote in open session unless doing so would compromise the need for a closed session.[18] Furthermore, the WOML provides that a board must vote on the ratification of a collective bargaining agreement in open session.[19]

Minutes

The district clerk is responsible for recording the minutes of all board meetings, including open and closed sessions, and for entering the minutes of the meetings in the record book provided by the board.[20] The minutes are the legal record of board meetings

and are presumptive evidence of all official acts of the board. Minutes of a closed session should only reflect the statutory basis for entering the closed session, the time the board went into closed session, the fact that discussion occurred, any motions and roll call votes, the motion to return to open session or adjourn, and the time of return to open session or adjournment.

Closed session minutes may be approved in open session; however, the Attorney General has advised that boards should publish the proceedings of a closed session in a manner that preserves the confidentiality of the closed session if the public interest still weighs in favor of keeping the proceedings confidential.[21] Accordingly, as long as the need for confidentiality exists, it is advisable for a board to approve closed session minutes in closed session and to withhold publication of them.

Minutes from closed sessions may be subject to disclosure under the Public Records Law; however, certain information may be protected from disclosure if there is a continuing need for confidentiality. In addition, the Wisconsin Supreme Court has held that the WOML does not create a blanket privilege shielding closed session contents from discovery in legal actions and that the content of those sessions is generally subject to disclosure in litigation.[22]

Violations of the Open Meeting Law

Actions taken at a meeting may be voided if the meeting is found to be in violation of the WOML. Additionally, the WOML establishes monetary fines for board members who have an awareness of the high probability that the meeting is illegal.[23] A district may pay for the legal defense of board members accused of violating the WOML; however, if it is concluded that a member violated the WOML, the district may not reimburse that member for any fine.[24] Board members are protected from WOML liability if they vote against going into an unlawful or unauthorized closed session. If a board member does so, the board member can still attend the closed session.[25]

The intent of legal closed sessions is to keep the information, discussion, and votes made in closed session from public dissemination. Accordingly, those in attendance should keep such information confidential. The WOML, however, does not contain any enforcement mechanism to penalize closed session attendees who disseminate closed session information. Intentional disclosure of closed session information may constitute "misconduct in office" which is a felony.[26] Such a breach can also be addressed through board policy and/or sanctions. Additionally, board members risk losing their qualified immunity from legal action if the disclosure of confidential closed session information results in litigation against the district, board, or individual member.

Conclusion

Under limited circumstances, boards can meet in closed session to discuss and take action on matters which require the confidentiality that such sessions afford. The WOML provisions which authorize closed sessions are narrowly construed and boards must follow specific procedures to legally conduct business in closed session. In order to assure that any action taken in closed session is valid and to avoid potential legal ramifications, boards should consult with legal counsel if there is any doubt as to whether the reason for going into closed session is covered by one or more WOML exceptions and to make sure that the notice and process used by the board comports with the WOML requirements.

End Notes

For additional information regarding this topic, see *Wisconsin School News*: "Courts Decide Significant Cases Involving Open Meetings Law" (August 2007); "What is a Governmental Body Subject to the Open Meetings Law" (May 2006; "Compliance with Wisconsin's Open Meetings Law (Parts 1 and 2)" (September/October 2004).

1. Wis. Stat. s. 19.81(2).
2. In a recent case, the Wisconsin Supreme Court concluded that a curriculum review committee, which was established pursuant to district rule regarding the process for curriculum review and was to make recommendations to the school board, was subject to the WOML. *State ex. rel. Krueger v. Appleton Area Sch. Dist.*, 2017 WI 70, ¶ 43, 376 Wis. 2d 239, 898 N.W.2d 35 (June 29, 2017).
3. Wis. Stat. s. 120.13(1)(c)3.
4. Wis. Stat. s. 19.85(1)(a)-(h).
5. *Gempeler Correspondence* (Feb. 12, 1979).
6. *Henderson Correspondence* (March 24, 1992).
7. *Wisconsin ex. rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 13, 300 Wis.2d 649, 731 N.W.2d 640.
8. Wis. Stat. s. 19.82(1).
9. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); 74 Wis. Att'y Gen. Op. 70 (1985).
10. Wis. Stat. s. 19.84(2).
11. *State ex. rel. Buswell v. Tomah Area School District*, 2007 WI 71, 301 Wis.2d 178, 732 N.W.2d 804.
12. Wis. Stat. s. 19.85(1); 66 Wis. Att'y Gen Op 93 (1977).
13. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 51, 370 N.W.2d 271 (Ct. App. 1985).
14. Wis. Stat. s. 19.89.
15. *Id.*
16. Wis. Stat. s. 19.88(3).
17. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 538, 124 N.W.2d 809 (1963).
18. Wisconsin Department of Justice, Attorney General Brad D. Schimel, *Wisconsin Open Meetings Law Compliance Guide* (2018).
19. 81 Wis. Att'y Gen. Op. 139 (1994).
20. Wis. Stat. ss. 120.11(4) and 120.17(3).
21. *Litscher Correspondence* (March 30, 1981).
22. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 47, 312 Wis. 2d 1, 754 N.W.2d 439.
23. Wis. Stat. s. 19.96; *State v. Swanson*, 92 Wis. 2d 310, 319, 284 N.W.2d 655 (1979).
24. 66 Wis. Att'y Gen. Op. 226 (1977).
25. Wis. Stat s. 19.96.
26. Wis. Stat. s. 946.12.

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