

City of Eau Claire Handbook for Public Officials

SECTION 3 – General Public Official Information

The information contained in this section applies to all public officials, whether elected by the public or appointed by the City Council.

A) OPEN MEETINGS LAW

1. Wisconsin Law: A Policy of Openness.

Public officials must conduct their collective works as members of boards or commissions in public and only after public notice of their meetings or other gatherings. If a majority of the members of a board or commission are together to discuss City matters, whether together physically, by telephone, or by a series of e-mail communications, they are presumptively meeting, for purposes of the Open Meetings Law, and must stop the discussion until proper public notice and public location for the meeting can be established.

2. Governmental Bodies.

A governmental body includes the City Council and any “agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order;” including any formally constituted subunit thereof. Wis. Stat. § 19.82(1). Certain meetings are expressly excluded from coverage under the Open Meetings Law, including a governmental body which is formed for the purpose of collective bargaining for labor purposes; and meetings called by City staff, unless under formal order from Council.

3. Meeting.

A meeting is 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.” Wis. Stat. § 19.82(2). If one-half or more members are present, there is a rebuttable presumption that the gathering is a “meeting.” Even less than half of the members can constitute a “meeting.” A “negative quorum” is the number of members required to defeat an item scheduled to come before the governmental body. A meeting for the purpose of discussing a matter requiring an extraordinary (3/4, 2/3) vote could be as few as two (2) members, depending on the size of the governmental body. Even a series of meetings, phone calls, or e-mails between members to discuss board business, if involving a negative quorum, is a potential violation of the Open Meetings Law. The Open Meetings Law does provide an exception for social or chance gatherings not intended to avoid the Open Meetings Law. However, please advise the City Manager’s office if a public official thinks there is the appearance of a violation at a social gathering so City staff can consider the matter and issue a public notice if warranted.

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4. Public Notice.

Public notice is provided to inform the public of the meeting topic and location and allow an opportunity to attend and observe as desired any meeting of a government body. Even if the government body has a lawful reason for entering closed session, it must notice the meeting and the intended closed session, commence in open session and only then follow the statutory procedure to move into closed session. A few standards related to public notice are as follows:

- “Every meeting of a governmental body shall be preceded by public notice...” Wis. Stat. § 19.83(1).
- Notice must be provided to news media at least 24 hours before meeting, UNLESS, for “good cause such notice is impossible or impractical,” then at least two-hours’ notice must be provided.
- Notice need not be published. It may be given verbally or in writing, although written notice is the normal and better practice. Notice is also posted in City Hall and other public places. Notice must contain “time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session.” (If subject matter is not included, it cannot be discussed.) Wis. Stat. § 19.84(2).
- Notice must “reasonably apprise” the public of the subject of any closed session, with greater notice required in matters of heightened public interest. *State ex rel. Buswell v. Tomah Area School Dist.*, 2007 WI 71, 732 N.W.2d 804.
- The government body cannot commence a meeting, which must always be in open session, convene in closed session, and then reconvene in open session within 12 hours thereafter, unless advance public notice is provided. Wis. Stat. § 19.85(2).

5. Closed Session.

Meetings are to be held in open session, except as otherwise explicitly provided by the Open Meetings Law. Wis. Stat. § 19.83. Exemptions include those stated in Wis. Stat. § 19.85, including the following, which are most often used:

- Deliberation of a quasi-judicial hearing held before that governmental body. Wis. Stat. § 19.85(1)(a).
- Considering employment matters regarding a public employee over which the board exercises responsibility. Wis. Stat. § 19.85(1)(c).
- Negotiating purchase of property or whenever competitive or bargaining reasons otherwise require confidentiality. Wis. Stat. § 19.85(1)(e).
- Conferring with legal counsel with respect to litigation in which it is or is likely to become involved. Wis. Stat. § 19.85(1)(g).

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The following procedures are used to move into closed session:

- Presiding officer announces the nature of the closed session by reading the public notice and statutory justification for closed session.
- Upon motion and second, a majority roll call vote is necessary to proceed to closed session. (Unanimous consent acceptable, but not preferred. *Schaeve*, 370 N.W.2d 271).

Voting in closed session is not expressly authorized by state statute, but according to an Attorney General Opinion may occur when the vote is “clearly an integral part of the deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1).” The exemptions to the Open Meetings Law contained in Wis. Stat. § 19.85(1) use terms such as “considering”, “deliberating”, and “conferring” to describe the permitted actions by a governmental body in closed session. In order to consider, deliberate and confer, a decision or direction by the governmental body is often required.

Decisions in closed session are permissible by either formal vote or informal consensus. In a 2008 letter to Don Huebscher of the Leader-Telegram, the Attorney General’s Office stated in regard to whether it is “permissible for a governmental body in closed session to make decisions by consensus” that “[n]othing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote...” The opinion then goes on to note that formal votes may also take place in closed session and may be preferred, at least for matters that are more than routine. It is not the form of the decision that mattered to the Attorney General, stating in the letter that “regardless of whether a particular decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a record of that decision.” When votes or consensus decisions are made in closed session they must be recorded in confidential closed session minutes, which is the City’s practice.

Closed session decisions are not often the final word or decision on an issue. Rather, they typically involve deliberations or considerations leading to ultimate action that will occur later during a properly noticed open session of the governmental body, such as public action to approve a development agreement or labor contract. This is not always the case, as for example in matters of litigation, performance evaluations of direct reports to the body, or an agreement that fails to materialize. However, in furtherance of the purpose of the Open Meetings Law, the City minimizes voting or other decisions that are not ultimately made in an open session and only makes decisions by vote or consensus in closed session when it is an integral part of the closed deliberations and then properly recorded in closed session minutes. “Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session.” Wisconsin Department of Justice, Wisconsin Open Meetings Law: A Compliance Guide 23 (2009).

Minutes of closed session record attendance, any votes taken and the time the session begins and ends. As with open session minutes, they are not a verbatim transcription. Minutes of closed sessions held pursuant to Wis. Stat. § 19.85(1)(c) are kept by the

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Department of Human Resources. All other closed session minutes are kept by the City Clerk.

- As noted above, notice is required to return to open session, as boards cannot meet in open session, convene in closed session, and re-convene in open session within 12 hours thereafter. Wis. Stat. § 19.85(2)
- Some meetings must remain in open session (e.g., Board of Review, exchange of initial labor negotiation proposals or action to ratify a collective bargaining agreement).

6. Walking Quorum Issues.

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.” Wisconsin Dep’t of Justice, Wisconsin Open Meetings Law: A Compliance Guide 9 (2010), citing *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 92 (1987). An attempt to circumvent the Open Meetings Law and avoid the appearance of a meeting through use of a walking quorum may constitute a violation of the Open Meetings Law. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687 (1976).

A walking quorum is an Open Meetings Law violation. The purpose of the Open Meeting Law is to provide the public with the “fullest and most complete information” regarding the conduct of governmental business. Wis. Stat. § 19.81 (1). Gatherings of a majority or more of members of a public body are presumed to constitute a meeting that requires public notice. Wis. Stat. § 19.82 (2). A series of meetings that convey information among a quorum of members intent on evading the purpose of the Open Meeting Law is equally a violation of the law as if all the members communicated at once as either approach equally deprives the public from full and complete access to the decision-making process of their public officials. Members of a governmental body may communicate with one another outside of a meeting without violating the Open Meetings Law if they avoid doing so in numbers, at once or through a series of communications, approaching a quorum or a negative-quorum (a sufficient number of members to defeat an item).

Communication through the staff liaison is a recommended approach to avoid walking quorums. Another tip is to avoid multiple forwards and the “reply all” function of email messages to public officials on the same public body.

7. Enforcement and Penalty.

Enforcement of the Open Meetings Law is through the office of the Attorney General or by the district attorney upon a verified complaint. Wis. Stat. § 19.97(1). If a person files a verified complaint and the district attorney does not take action within 20 days, the person may commence the action and recover costs and fees, including attorney fees, if he/she prevails. Wis. Stat. § 19.97(4). A judge may void action taken by the governmental body in violation of the Open Meetings Law. Wis. Stat. § 19.97(3). Each member in violation is subject to a penalty of \$25 to \$300. Wis. Stat. § 19.96.

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8. Advice.

Please contact the City Attorney regarding interpretation of the Open Meetings Law. The City Attorney may also consult with the Wisconsin Attorney General's office that provides opinions on the Open Meetings Law to state agencies and municipalities.

"[A]ll meetings of ... 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).

B) RULES OF ORDER

The manner in which meetings of Eau Claire governmental bodies are conducted is governed by local ordinance, at times by state law, the bylaws of an individual governmental body, and absent any conflicting authority, by Robert's Rules of Order. Each desk in City Council Chambers is provided with a copy of Robert's Rules of Order, along with a copy of the City Code of Ordinances. It is difficult to master all the formal rules and procedures for conducting business in a group because the detailed rules are so numerous and hard to remember or retain. To help with this process, copies of Parliamentary Procedure at a Glance, written by O. Garfield Jones, a professor of political science from the University of Toledo, are available. The book arranges the sequence of motions based upon their rank or precedence, not alphabetically, which the members of a governmental body may find useful as a reference.

1. Meeting Chair.

Every governmental body has a Chair, who is the person designated to preserve order and run a meeting. The Chair of each governmental body is selected according to the bylaws of that governmental body.

2. Parliamentary Procedure.

The City Attorney serves as advisory parliamentarian for the City and is available to answer questions or interpret situations according to parliamentary procedure.

3. Role of the Chair in Maintaining Order.

It is the responsibility of the Chair to keep comments, debate, and discussion of governmental body members and the public on track during public meetings. Members should endeavor to assist and support efforts of the Chair to focus discussion on current agenda items and the topic at hand. If there is a disagreement about the agenda or actions of the Chair, those objections should be voiced politely and with reason, using the appropriate procedures.

4. Meeting Decorum.

The City Council, boards and commissions are composed of individuals with a wide variety of backgrounds, personalities, values, opinions, and goals who represent a broad spectrum of resident interests. Difficult questions, tough challenges to particular points of view and criticism of ideas or information are legitimate elements of a free democracy in action. Members should maintain civility and decorum by refraining from personal, threatening, abusive, or disparaging remarks to fellow Council, commission, board or committee members, guests at the meeting, the public or City staff.

5. Use of Formal Titles.

Out of respect for the position, members should refer to one another formally during public meetings. Appropriate titles include "President," "Vice President," "Mr. or Madam Chair" or "Vice Chair", "Council Member," "Member" or "Commissioner" followed by the individual's last name. This will also make it easier for the person taking minutes to track and record motions made during the meeting.

C) LIABILITY ISSUES

1. Liability Limited.

In general, public officials are well protected against personal liability for acts they perform within the scope of their official duties. The courts do not impose personal liability upon local officials for their exercise of or failure to exercise legislative discretion. As long as a municipal official performs his or her duties in good faith, the official should have no concern about personal liability for those actions.

Of course, if a municipal official performs a ministerial (non-discretionary) act in a careless or negligent manner, or intentionally, dishonestly, or illegally causes damages, personal liability may result. For example, a public official could not use his or her position to defame another person. Such expressions and statements are protected only where the municipality has an interest in the matter.

Also, if a public official has a private pecuniary interest in a City contract and participates in the making of the contract, the contract is not only void, but the public official may be required to reimburse third parties for their losses. Wis. Stat. § 946.13.

2. Liability Caps.

The amount recoverable in a legal action against a municipality is generally limited by statute to \$50,000. Wis. Stat. § 893.80(3). Public officials are covered by this statutory limitation. The limitation is not comprehensive, however. For example, a limit of \$250,000 is imposed where a City vehicle used on City business causes damage through negligence. Wis. Stat. § 345.05(3). Furthermore, some legal actions have no limit, such as actions based on the deprivation of civil rights. 42 USC § 1983.

3. Legal Defense and Payment.

Despite the foregoing protections, the possibility exists that an action may be brought and judgment rendered against a public official, which activates yet further protections. State law provides that if a City official is personally sued for an action taken within the scope of official duties, the City must either provide legal counsel or pay reasonable attorney fees and costs of defense. Wis. Stat. § 895.46(10)(a).

Furthermore, if the court or jury finds that the official acted within the scope of official duties, any judgment rendered, both as to damages and costs, must be paid by the City. Wis. Stat. §§ 62.25(2) and 895.46(1)(a).

4. Personal Liability for Statutory Violations.

However, some judgments exist that are not reimbursable under these statutes. One is a judgment of forfeiture against the public official for an Open Meetings Law violation. In that case, the law expressly provides that payment is to be made by the violator without reimbursement from the municipality. Wis. Stat. § 19.96. Such exemptions are rare, however, and usually require the commitment of an intentional or wrongful act.

Another law permits but does not require reimbursement in certain legal actions of costs and expenses incurred in an official's defense. Wis. Stat. § 895.35. These are actions where the public official is sued in an official capacity and the action is dismissed, discontinued, or decided in his/her favor, or the public official is reinstated, or where the public official, without fault, is subjected to such personal liability.

A separate area of potential liability is in the area of civil rights. 42 USC § 1983. Public officials can be personally sued, either in Federal or State court, for actions that deprive persons of their constitutional rights. However, the courts have granted various types of immunity to local legislators in these types of actions. Under these decisions, public officials are generally held to be absolutely immune when acting in a legislative capacity. Not all public officials act in a legislative capacity; many governmental bodies act in a quasi-judicial capacity. While acting in other official capacities, public officials may have only qualified immunity. This means that a member is immune from damages if he/she acts in good faith with a reasonable belief that his/her actions were lawful. (Note, however, that even if good faith exists, this does not immunize the City itself from liability.) Judgments and costs against a public official for actions taken within the scope of official duties would be absorbed by the City in accordance with Wis. Stat. § 895.46, as noted above.

5. City Insurance.

City insurance also provides coverage in the extremely unlikely event of a judgment against a public official arising out of his or her official duties. These insurance policies cover all City employees, including Council members and other public officials, while acting within the scope of their official duties. These coverages are for commercial general liability, business

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auto, and for public officials' liability for errors and omissions. The City also has an umbrella policy, which provides for increased coverage and limits.

The comprehensive general liability policy covers personal injuries, including property damage. Among other things, this policy covers damages for statements which are defamatory or which are an invasion of privacy. The policy limit is \$5 million per occurrence.

The business auto policy provides coverage to a public official operating either a personal vehicle or a City vehicle on City business. However, if a personal vehicle is used, City coverage is secondary to the public official's own auto policy. If a City-owned or -leased vehicle is used, City coverage is primary. The policy has a single limit of \$10 million per occurrence.

The public official liability policy covers injuries other than bodily injury or property damage that are caused by an error or omission. The policy limit is \$5 million per occurrence.

6. Summary.

In summary, the law recognizes that public officials cannot properly perform their public duty if they are in continuous fear of being held personally liable for their actions. Accordingly, they are provided with substantial protections against such personal liability. Public officials who take official actions in good faith need not worry about being held personally liable for those actions.

D) CONFLICT OF INTEREST - ETHICS

All public officials of the City of Eau Claire should exemplify the best of common values in their professional and personal lives. If public officials conduct themselves with civility, respect others' opinions, and maintain the best interests of the City of Eau Claire as a foremost goal, public officials will honor themselves and the City with their public service. During a public official's term in office, the public and press will observe the public official's behavior. They will certainly note the public official's conduct at public meetings and other meetings and events attended in an official capacity. Also expect even personal conduct, especially unflattering conduct, to be reported and scrutinized by the public. The following is intended to summarize ethical, legal requirements of public officials and to suggest ways to avoid even the perception of ethical missteps.

1. Ethics Law.

State law and local code prohibit certain conduct as inherently unethical. These laws and standards are briefly outlined below. Beyond these minimum required levels of ethical conduct, there is an additional sphere of actions which, while not illegal, may be perceived as unethical by the public and, therefore, should be avoided. Public officials are encouraged to seek the legal advice of the City Attorney if public officials believe their conduct may fall into either area. While the City Attorney's office represents the entire City as an

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organization, this is one area in which the office is able to provide public officials with confidential advice. Wis. Stat. § 19.59(5).

The following are violations of either state or local ethics laws:

- Use of public office for private gain. Wis. Stat. § 19.59(1)(a).
- Improper influence; offer or receipt of anything of substantial value. Wis. Stat. § 19.59(1)(b).
- Receipt of gifts or gratuities of any value from any person or entity that may be substantially affected by the public official or by action of the City Council, board or commission. Eau Claire Code of Ordinances 2.72.130.
- Taking official action in matters in which the official or a family member has a substantial interest. Wis. Stat. § 19.59(1)(c).

2. Conflict of Interest.

In addition to the above-referenced statutory ethical violations that must be avoided either initially or minimized by use of abstention, there are also non-statutory sources of conflict law. There is a common-law or case law concept that no person can serve two masters at the same time. A public official must serve the public with undivided loyalty, uninfluenced by private interests.

Here are some general rules to consider when deciding whether to participate in a discussion and vote on a topic before City Council or any board, commission or committee on which a public official serves:

- Would an actual or apparent personal interest in a matter override the public official's interest in the matter as a City official?
- Does the public official, any member of the public official's immediate family, or any organization with which the public official is affiliated have a pecuniary or financial interest in the matter?
- Would the public official's personal interest tend to influence the public official to vote differently than the public official would if it did not exist?

However, the apparent conflict does not extend to matters in either of the following situations:

- The public official's personal interest is speculative or remote (e.g., an increase in hotel room tax may affect the public official's family-owned restaurant).
- The public official's personal interest is no greater than the whole class of persons or interests affected by the action. (e.g., the public official lives in the same neighborhood as a street or sidewalk project).

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The public appearance of a conflict is also a concern.

- Even though an actual conflict of interest does not exist, the public official should be sensitive to the public appearance of a conflict. In such a case, the public official should consult with the City Attorney first to get his/her opinion on whether a legal conflict exists and then, if the public official is interested, for advice on how to best address the situation. Understand that if a legal conflict does not exist, it is entirely up to the public official on whether to abstain or to take other action to minimize the appearance of conflict.

What to do if a public official has a conflict of interest.

- Public officials should refrain from discussion and abstain from voting or becoming involved in any action on the matter. If a public official makes any statement on the issue from the public official's personal perspective during a City Council, commission, committee or board meeting, the public official should step down from their chair. If the public official's personal comments are made outside of a meeting, the public official should take steps to clarify that their statement is of a personal nature and not as a public official or as the official position of the City.

3. Criminal Law.

Misconduct in public office is a potential source of criminal conduct for a public official. Wis. Stat. § 946.12. The law prohibits intentionally failing to perform mandatory official duties, actions in excess of lawful authority, improper exercise of discretionary authority (e.g., a public official voting in favor of a rezoning solely to increase the value of property owned by the official), acceptance of bribes or falsifying a public document.

4. Legal Opinions/Advice/Enforcement.

The City Attorney's office will provide assistance and advice in conflict matters and can offer confidential legal opinions for ethics questions arising under Wis. Stat. § 19.59. The City Attorney can also request an opinion of the State Ethics Board. Such opinions are issued to a requesting public official and are not enforcement procedures one member may bring against another. Enforcement of ethics laws is in the name of the state and is initiated by the district attorney. Wis. Stat. § 19.59(8).