

Milwaukee County Task Force
on the Mitchell Park Conservatory Domes

Public Records and Open Meetings Overview

Julie P. Wilson

Milwaukee County Assistant Corporation Counsel

October 12, 2016

Why do Public Records and
Open Meetings Laws Apply to
the Task Force?

County Board action created the Task Force to develop a long-term plan for the Domes.

- The Task Force is a “governmental body” for purposes of Open Meetings Law. Wis. Stat. § 19.82(1) and (2).
- The Task Force is an “authority” for purposes of Public Records Law. Wis. Stat. § 19.32(1).

Open Meetings

Open Meetings Law – Public Policy

- “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 government business.” Wis. Stat. § 19.82(1).

What is a “meeting”?

- A “meeting” satisfies two requirements:
 - 1) There is a purpose to engage in governmental business.
 - 2) The number of members present is sufficient to determine the body’s course of action.
- *State ex rel. Newspapers, Inc. v Showers*, 135 Wis. 2d 77, 102 (1987).

Task Force Meetings

5 things to know:

#1: Meetings must be properly noticed

- At least 24 hours in advance.
- Provide time, date, location, and reasonably alert public and media of meeting subject matter.
- Confer with Corporation Counsel to provide specific notice of legal grounds and reasons for any closed session.
- Neither Task Force Members nor public should discuss matters not properly noticed.

#2: Meetings must be open to the public

- Held in places reasonably accessible to the public. Doors remain unlocked throughout the meeting.
- Public may make audio or video recordings or photograph meetings, as long as doing so does not disrupt meeting.
- Public comment not required at every meeting. Provide notice of public comment and any limitations.
- Wis. Stat. § 19.85(1) contains 13 exemptions to the open session requirement which permit a governmental body to meet in closed session.

#3: Votes at meetings must be recorded

- Voting should generally be done in open session.
- No secret ballots may be used to determine any decision of a governmental body. Wis. Stat. § 19.88(1).
- Task Force must create and preserve a record of all motions and votes at its meetings. Wis. Stat. § 19.88(3).

#4: Not all “meetings” occur in person

- 11 members of Task Force
- 6 members needed for a quorum; 4 needed to take or block action
- Members need not all be in one physical location for “meeting” to occur.
 - Telephone conference call
 - Reply-all email communications

Beware of “walking quorums”

- Series of gatherings among separate members of a body, each group less than quorum size, who agree either explicitly or tacitly to act uniformly in a sufficient number so as to determine the body’s course of action. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687 (1976).
- Essential feature of a walking quorum is an agreement among members to take a certain action.

Not everything is a meeting

- If one-half or more of members are present, presumed to be a meeting.
- A chance or social gathering not intended as end-run on Meetings Law is not a meeting.
- Notify Chairperson if planning to attend:
 - Event/lecture/presentation/etc. related to the Domes.
 - Event which more than half of Task Force Members are likely to attend.
 - Chairperson will arrange for Notice to be provided.

#5: Be mindful and share any concerns

- Violations of Open Meetings Law are enforced by Attorney General, Milwaukee Corporation Counsel, and private citizens in the name of the State.
- Improper procedure may invalidate action taken by Task Force.
- “Knowing” attendance of meeting in violation of Open Meetings Law may result in forfeitures of between \$25 and \$300. Wis. Stat. § 19.96. Speaking up or voting appropriately offers protections.

Public Records

Public Records Law – Public Policy

- “It is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31.

What is a “record”?

- “Any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” Wis. Stat. § 19.32(2).
- Something created or kept in connection with the official purpose or function of the Task Force.

What is a record?

- *Content* rather than format or medium or location determine whether something is a “record.”
 - For example, a record kept at home or on a personal computer is still a record.
 - This does not convert everything in your home office or personal computer to a “public record.”
- Records received and kept by Task Force, not just those *created* by Task Force, may be public records.

What is *not* a record?

- Drafts, notes, preliminary documents, and other similar materials prepared for the originator's personal use. Wis. Stat. § 19.32(2).
- Drafts:
 - Limited exemption can be lost if drafts are shared with others.
 - Not a "draft" if used for the purposes for which it was commissioned.
 - Labeling a document a "draft" is not controlling.

What is *not* a record?

- Notes:
 - Limited exemption can be lost if notes are shared with others.
 - Notes used as an official communication may no longer be for “personal use.”
- Purely personal records.
- Published material available for sale or at a library.
- Copyrighted or patented materials.

Task Force Records

10 things to know:

#1: Access to records is presumed

- The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access is contrary to the public interest, and only in an exceptional case may access be denied.” Wis. Stat. § 19.31.
- Access is not absolute.
- Exemptions to the public records law are narrowly construed.

#2: Records custodian and format of requests

- Chairperson is Task Force records custodian and will receive records requests.
- Format of records requests:
 - Records requests may be submitted in writing or orally.
 - Records requests may be submitted anonymously.
 - Requesters need not explain the purpose of their requests.
 - To be legally sufficient, a request must be reasonably limited as to time and subject matter.
 - No special forms or magic words are required.

#3: Records requests seek existing records

- Requesters may receive records in existence at the time a request is made.
- The Public Records Law does not require custodians to respond to ongoing or continuing requests for records.
- Generally, custodians need not create a new record in order to respond to a records request.
- Custodians may, but are not required to, answer questions of interest.
- Records sought through subpoenas or other means are subject to different legal rules.

#4: Responding to a records request

- Must respond to a request.
- Denials and partial denials of records should be in writing if request was received in writing. Provide appeal rights with denials.
- Timeline for response: “As soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a).
 - Ten working days for a simple request without need for location or redaction work. Longer may be required for complex requests or to process large volume of requests, depending on availability of those responding.
 - Best to keep requester advised as to status.

#5: Evaluating a request

- Is there a responsive record?
 - If no, advise the requester. If yes, continue evaluation.
- Is the requester entitled to access the record pursuant to statute or court order?
 - If yes, provide record. If no, continue evaluation.
- Is the requester prohibited from access to the record pursuant to statute or court order?
 - If yes, provide written denial with explanation. If no, continue evaluation.
- Does balancing of public's interests compel access to record?
 - If yes, provide record. If no, provide written denial with explanation.

#6: Allowable costs

- Actual, necessary and direct costs of request may be charged to requester for:
 - Photocopying
 - Creating electronic media
 - Transcription
 - Location costs in excess of \$50.00
 - Shipping
- Prepayment may be required if costs exceed \$5.00
- Redaction costs may not be charged to requester.

#7: Redaction

- If a portion of a record is disclosable under the law, that part should be disclosed.
- Other parts of the record not subject to disclosure may be separated or redacted.
- Redactions should be made to a copy; the original record should never be altered.

#8: Special notice requirements

- Certain types of records require that notice be provided to an employee or an elected official prior to releasing records. Wis. Stat. § 19.356.
 - A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
 - A record obtained by the authority through a subpoena or search warrant.
 - 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.
 - Contains information relating to an officer holding local public office.
- Consult with Corporation Counsel.

#9: Retention of records

- Must retain Task Force records. Wis. Stat. § 19.21.
- Records requests and responses are, themselves, records to be retained.
- Must retain any records subject to a public records request:
 - While the request is pending.
 - For 60 days after the request is denied.
 - During the time any legal challenge to the denial is pending.

#10: Remedies

- Dissatisfied records requester may pursue mandamus action to compel release of records
 - On his or her own
 - Through Attorney General
 - Through Corporation Counsel
- If a mandamus complaint or petition is served on a Task Force member, he or she should immediately contact Corporation Counsel.

Resources available to Task Force Members:

- Milwaukee County Corporation Counsel
 - (414) 278-4300
- Wisconsin Department of Justice Compliance Guides
 - Open Meetings -- <https://www.doj.state.wi.us/sites/default/files/dls/2015-OML-Guide.pdf>
 - Public Records -- <https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf>