

Open meetings and public records promote transparency



By Jared Walker Smith

More than 75 citizens attended a July common council open meeting over the fate of the City of Richland Center utility commission. The substantial citizen response in support of the commission resulted in the common council postponing any decision in order to continue evaluating the issues. This process perfectly reflects the goal of Wisconsin's Open Meetings Law (OML) and the companion Public Records Law (PRL) to provide the greatest, fullest, and most complete information regarding the affairs of government in order to empower and inform the electorate. This objective of transparency in government extends to all forms of local government, including utility commissions and committees.

This article highlights utility-specific features of Wisconsin's Open Meetings Law (Wis. Stat. §§ 19.81-19.98) and Public Records Law (Wis. Stat. §§ 19.31-19.39). The scope of the laws are far too broad for a brief summary to do them justice. A thorough overview of both laws is available in the June 2024 edition of the League of Wisconsin Municipality's magazine, *The Municipality*,

or in the Wisconsin Department of Justice's Compliance Guides.

The OML applies to meetings of all local governmental bodies. These bodies include utility commissions and committees and any committee formed by those bodies. The basics of the OML require that a governmental body provide advance notice of the time, date, place, and subject matter of any meeting of the governmental body. The notice must have sufficient detail to reasonably inform the public of what will be discussed and acted upon at the meeting.

Public notice is typically required even when a quorum of one public body attends the meeting of another. For example, if a quorum of the utility commission attends the meeting of a subcommittee, the commission should properly notice its attendance as a meeting in the subcommittee's notice or as a separate notice. This is frequently referred to as a *Badke* notice, named for the Supreme Court case that clarified this issue.

Similarly, a meeting can be deemed to have occurred even when a quorum of members is not present in

one location at one time. This is the "walking quorum" trap. And this trap is easy to fall into with the proliferation of quick and easy ways to communicate. A walking quorum is when enough individual conversations and communications result in a tacit or explicit agreement to act uniformly in sufficient number to reach a quorum. Discussion, however, is supposed to take place in an open meeting. It is therefore a problem when a public body's members feel there is no need to discuss an

tion in Wis. Stat. § 19.85(1) to close the meeting.

The most common exemptions used by utilities to enter closed session include: par. (e), where competitive or bargaining reasons related to purchasing public properties, investing public funds, or conducting other public business require confidential discussion; par. (g), when conferring with legal counsel over strategy to be taken in pending or potential litigation, which includes contested cases before the Public Service Commission of Wisconsin;

and pars. (b) and (c), relating to employment matters. Notably, par. (g) requires that the utility's attorney actually be present and rendering legal advice concerning litigation strategy.

With cybersecurity continuing to be a hot topic for utilities, utilities are also turning to par. (d) to discuss strategies to enhance cybersecurity measures. Paragraph

(d) provides that, except for certain matters involving the parole commission, closed session may be held for "considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**" (the bolded portion being that cited by utilities). With the broader scope of par. (d) and its initial focus on persons

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Former City Utilities of Richland Center Commissioner Marsha Machotka was one of more than two dozen concerned citizens who spoke at a July 2 public hearing addressing the future of the utility's governance.

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agenda item because they have hashed out the issues outside of the meeting.

This presumption that all meetings must be open to the public is a key feature of the OML. The presumption holds unless any of the limited statutory exemptions to close a meeting apply. The OML requires that advance notice of the closed session be provided, along with the specific statutory authoriza-

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within the criminal justice system, it is recommended that a utility consult with its legal counsel when contemplating closing a session by reason of par. (d). Since closed session exemptions can also be used to support the denial of public records requests, it is important that there is no room to contest the validity of the closed session when cybersecurity is discussed.

Clearly, then, the OML and PRL are linked by a presumption of transparency. The PRL's presumption is of complete public access to records of a utility with denial to occur only in exceptional cases. Consequently, when a records request comes in, the utility's records custodian should analyze the request under a four-step process: (1) is the request for a record and, if so, does one exist; (2) if so, is the requester entitled to access the record by law; (3) if not, is the requester prohibited access by law; and (4) if not, is the public interest in disclosure outweighed by a competing public interest in non-disclosure (the "balancing test").

Unfortunately, knowing whether a statute or court case prohibits disclosure of all or a part of a record is not always straightforward. Unlike exemptions for closed session, no singular statute lists all the reasons why access can be prohibited. For a utility, however, one of the most common exemptions from disclosure under the PRL is for "customer information." Customer information is "any information received from customers which serves to identify customers individually by usage or account status." See Wis. Stat. § 196.137.

Except for statutorily identified persons, a utility is prohibited from releasing customer information, including under a PRL request. The statute specifically authorizes a utility to continue to utilize postcard billing statements.

The other portion of the PRL that is sometimes overlooked is the PRL notice requirements. The PRL requires that an "authority," which may include a utility commission or committee, adopt, prominently display, and make available for

inspection and copying at its offices, a notice about the utility's public records policies. The notice must contain specific information listed in Wis. Stat. § 19.34(1). Since municipal utilities are considered departments of their parent municipality from a legal standpoint, the municipality may have policies in place to be the one to prepare and provide these policies and notices. However, where a municipality grants its utility independence to act as its own "authority" (as defined in Wis. Stat. § 19.32(1)) with respect to public records, it would be on the utility to prepare and provide utility-specific public records policies and notices.

The OML and PRL provide transparency in government, which is the cornerstone of democracy. And, as was seen in Richland Center, compliance with the OML and PRL is not only the law but can have crucial implications for utility commissions. Consequently, it should be the practice of a utility that all members of its commission, committees, and administrative staff be intimately familiar with the requirements of both laws. ●

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