

AGENDA

**SCHOOL DISTRICT OF NEW GLARUS
COMMITTEE AS A WHOLE MEETING**

MONDAY, JUNE 13, 2022

**HIGH SCHOOL LIBRARY/MEDIA CENTER, ROOM 183 JOIN ZOOM MEETING USING
LINK**

**HTTPS://US02WEB.ZOOM.US/J/81355826156?PWD=U2RJUTLSQJBYUM5TRFRL
QKIZBGLWUT09 OR BY PHONE USING 1-646-568-7788 MEETING ID 813 5582**

6156 & PASSWORD 954478

1701 2ND STREET

NEW GLARUS, WISCONSIN 53574

7:15 PM

- I. **CALL TO ORDER**
 - A. Roll Call
- II. **BOARD TRAINING ON ROLES AND RESPONSIBILITIES - BOB BUTLER,
WASB** **2**

New Glarus School District: Board Member Roles & Responsibilities, Open Meetings Law, & Public Records



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Topics for Consideration & Discussion

**Roles of the board,
individual members
and administrators**

**Board Action
vs. the
Individual
Board Member**

**Open Meeting
Law**

Public records

**Access to
Information**

**Evaluation and
Chain of
Command**

**Conflicts of
interest**

Roles and Responsibilities of School Boards and School Board Members



Part I

School Board Roles and Responsibilities

- ▶ School Board and District Administrator roles and responsibilities are determined by state and federal law.
 - Laws define what must be done.
 - Laws identify what gets decided locally.
- ▶ Education research informs boards and administrators regarding most effective practices.
 - How are boards in high achieving districts different than boards in other districts?

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School Board Duties and Powers

- ▶ [§120.12](#) of the state statutes enumerates a list of specific *duties* of a school board in common and union high school districts.
- ▶ [§120.13](#) of the state statutes enumerates a list of specific *powers* of a school board in common and union high school districts.
- ▶ [§120.10](#) of the state statutes enumerates a list of specific *powers of an annual meeting* (which, for unified school districts, are powers of the school board).
- ▶ [§120.44\(2\)](#) of the state statutes gives unified school districts the powers and duties of the common school board and annual meeting.
- ▶ Other statutes (particularly in chs. [118](#), [120](#), and [121](#)) create other powers and duties.

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“Enumerated Powers” versus “Broad Powers”

- ▶ “The school board of a common or union high school district shall, subject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers, have the **possession, care, control and management of the property and affairs of the school district.**” (§120.12(1))
- ▶ “The school board of a common or union high school district may do **all things reasonable** to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils.” (§120.13) 7
- ▶ “A unified school district is a body corporate with the power to sue and be sued, to levy and collect taxes, to acquire, hold and dispose of property and to do **all other things reasonable** for the performance of its functions in operating a system of public education.” (§120.44(1))
- ▶ See” [WASB’s December 1996 Legal Note “The New Era of Expanded Powers and Duties for Wisconsin School Boards”](#)

“Broad powers” imply the power to delegate many (but not all) powers and duties

- ▶ Delegation can occur through policy, through specific board action/authorization, and sometimes the delegation of authority is implied through practices.
- ▶ Some **non-delegable** acts are of obvious significance (e.g., adopting and amending the budget, approving questions to submit to referendum, employment and dismissal of teachers and administrators, etc.)
- ▶ Some arguably **non-delegable** acts don't seem all that significant in light of other responsibilities that can be delegated (e.g., a statute provides that each school board shall adopt written policies *that include procedures* for the storage of pupil medications).
- ▶ [WASB Legal Comment October 2012](#)

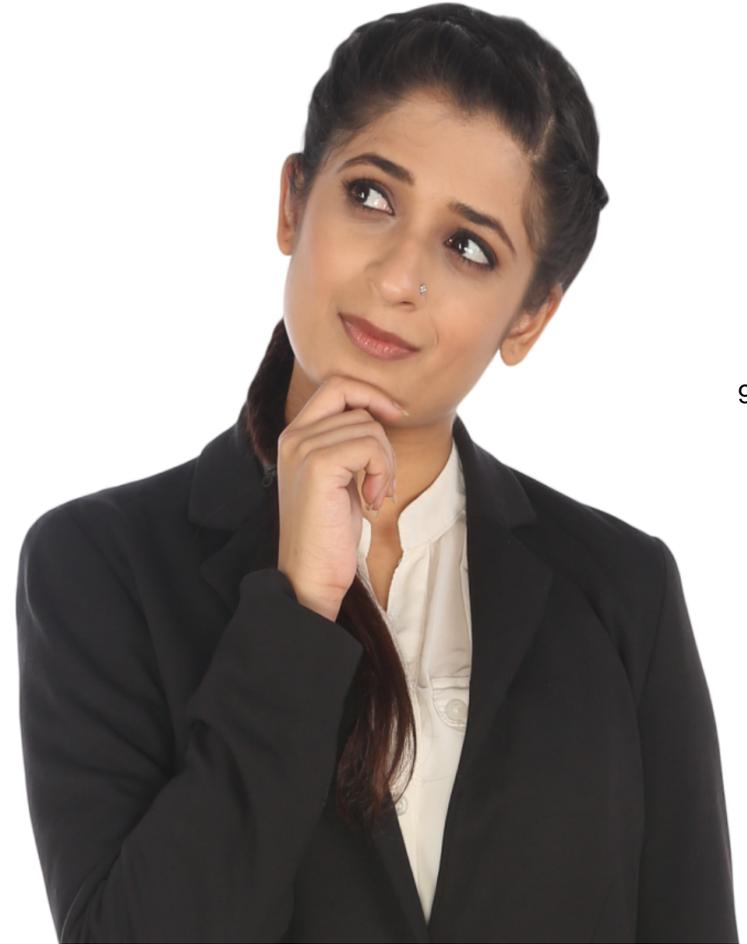
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Board Roles:

**How Do Boards
Exercise These
Statutory Powers And
Duties?**

And

What Do Boards Do?



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Board Job Description

- ▶ The job description is derived from:
 - Federal law.
 - State law.
 - Local School District Policy
 - Education research.



Board Job Description

- ▶ Provide **general oversight** for administration and district.
- ▶ Hire and evaluate District Administrator.
- ▶ Review **board policies** and update as needed.



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- ▶ Adopt a **budget and allocate resources** consistent with board priorities and district goals.
- ▶ Oversee negotiation and administration of critical contracts.
- ▶ Be **advocates** for the district in the community and at the state, federal and other local governments.
- ▶ Make **strategic decisions**.



Board Roles: Vision

School boards achieve their vision by:

- developing a **strategic plan** guided by the vision
- Establishing/approving **goals** that support the vision
- making **budgetary decisions** and **allocating resources** in a manner that is aligned with the school district's vision and goals





New Glarus School District: Vision & Mission

Vision

To be a leader in K-12 education and prepare *all* students for future success.

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Mission

Educating each student to contribute and succeed in our global community by fostering a passion for learning and the pursuit of excellence.



New Glarus School District: Strategic Goals

- 1. Increase the percent of students college, career, and life-ready by developing the whole learner.**
- 2. Recruit and retain high quality staff and assist all staff as they continually improve and grow.**
- 3. Provide high quality facilities that foster academic and emotional growth.**
- 4. Ensure equity so all students have equal access to high quality educational experiences.**

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Board Roles: Relationships



Board-Superintendent Relationships

Board	Superintendent
To serve as a policy making body.	To recommend and implement policies by formulating and enforcing rules and regulations.
To allow the superintendent to administer the schools.	To make Board policy effective through efficient administration.
To function as a Board rather than as individuals.	To deal with the Board as a whole rather than with individual members.

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Board Roles: Relationships



Board-Superintendent Relationships

Board	Superintendent
To approve an organizational framework for the administration.	To make assignments for each position.
To carry on communications with staff members through the Superintendent.	To see that the staff can have the necessary communication through the superintendent with the board.
To hold the superintendent accountable for controllable results.	To accept responsibility for controllable results.

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The Key Work of School Boards

Relationships:

An effective Board/Superintendent team is:

- **Prepared**
- **Professional & Objective**
- **Fair, Honest & Open**
- **Comprised of team players**
- **Respectful of everyone's time**



Examples of board roles through a more legalistic lens...

- ▶ **“Legislative”**
Making policy, determining the budget and the tax levy.
- ▶ **“Judicial”**
Serving as an impartial decision-maker in a “due process” hearing (finding facts, applying law/policy, reaching conclusions, issuing orders). For example, expulsion proceedings, non-renewals and terminations of employees.
- ▶ **“Executive”**
Serving as an employer (hiring, evaluating, compensating).

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Governance Protocols – How do you do business?

Question?	Local District Answer
How the board meeting agenda is developed and reviewed and by whom?	
Placing items on the board meeting agenda?	20
Obtaining additional information about board meeting agenda items before the meeting?	
Obtaining answers to questions about board meeting agenda items before the meeting?	
Alerting the board president of the desire to speak on a particular agenda item?	

Governance Protocols – How do you do business?

Question?	Local District Answer
Introducing new Ideas for the board's consideration?	
Responding to staff or community complaints or concerns at board meetings?	21
Communications between and among the board, board members and the superintendent?	
Communications between the board and other staff?	
Responding to community or staff complaints or concerns outside of board meetings?	

Governance Protocols – How do you do business?

Question?	Local District Answer
How, when and whom to notify about visiting school sites or participating in district activities?	
Board member participation on district committees and in district activities?	22
When and how the board conducts a self-evaluation?	
When and how the board evaluates the superintendent? Is there a policy that defines the relationship between the board and superintendent?	

The Elusive Dividing Line between a “Policy” and a “Rule/Procedure”

Policy	Rule/Procedure
What, why, who, and to what extent?	Who, how, when, where?
A general guide for action; defining goals, boundaries, and criteria	Detailed directions on how to put policies ²³ into practice
Primarily the responsibility of the school board	Primarily the responsibility of the administration
May address principles, beliefs, philosophy, values	Specific procedural steps
	Action relative to circumstance (if this...then this)



▶ Annual Board Self-Evaluation Tool

- The complimentary Annual Board Development Tool online survey. Created by School Perceptions and the Wisconsin Association of School Boards (WASB), the survey is designed to help boards identify their areas of strength and alignment as well as where further dialogue and discussion is needed.

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Board Action vs. the Individual Board Member



Individual Board Member Powers

Board members have **very few statutory powers** to exercise **as individuals**.

Some of the legal **duties** that **individual board members** have are duties to refrain from certain conduct.

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Local **policy** can grant power to and place boundaries on the authority of individual board members.

The **board's officers** have statutory powers and duties specific to their individual office.

Basic Expectations for Individual Board Members



Attend school board meetings.



Be prepared to discuss and act on meeting agenda items.

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Be informed about meeting agenda items and educational issues in general.



Participate when the board exercises its duties.

Board Officer Duties

- ▶ A comprehensive presentation on the duties and responsibilities of board officers, please view the WASB's recorded webinar entitled "Reorganization Meeting and Officers' Roles," which is located on the WASB's Website at: <https://vimeo.com/698805002>

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Delegation of Officer Duties to a Non-School board Member

▶ **General Rule:**

Officers may not delegate discretionary duties of their office to non-board members except as otherwise expressly provided by law.

Officers may delegate ministerial and administrative duties to non-board members (e.g., the clerk may delegate the duty of receiving declarations of candidacy and other election documents to the school district administrator).²⁹

A number of officer duties would likely be deemed “ministerial” or “administrative,” but there is no clear line that can be relied upon.

▶ **Delegation of Actual Responsibility Does Not Necessarily Transfer Legal Responsibility**

Scenarios in which Some Boards/Districts Have Struggled with “Role Definition”

Flow of Communication/Information Among the District’s Leadership Team (e.g. **chain of command**)

Establishing Meeting Agendas

Attending Meetings

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Speaking on Behalf of the District - Who is the spokesperson for the District?

Handling Complaints and Concerns (e.g., a personnel concern)

Requests / Directives to Staff

Visiting School Buildings / Classes

Individual Board Member Speech

▶ Board Member Role:

◦ First Amendment to the U.S. Constitution:

- *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech, or of the press**; or the right of the people₃₁ peaceably to assemble, and to petition the government for a redress of grievances.*
- Board members do not lose their first amendment rights by being a board member.
- Board members may speak for or against an issue with certain caveats.

Individual Board Member Speech

▶ Board Member Role:

- Board members may participate on outside committees or groups that advocate a particular viewpoint.
- Board members still need to be aware of **Open Meetings Law implications** if they participate in an advocacy group with other board members.
- Board members may also have **campaign finance** and **electioneering issues** that come into play as well.

Individual Board Member Speech

▶ Board Member Role: First Amendment Rights – Public Forum:

- [Knight First Amendment Institute at Columbia University v. Trump, No. 18-1691 \(2d Cir. 2019\)](#)

President Trump engaged in unconstitutional viewpoint discrimination by utilizing Twitter's blocking function to limit certain users' access to his social media account, which is otherwise open to the public at large, because he disagrees with their speech³³. The First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.

In this case, the government concedes that individual plaintiffs were blocked from President Trump's Twitter account after they criticized the President or his policies, and that they were blocked as a result of their criticism. The Second Circuit affirmed the district court's grant of summary judgment in favor of plaintiffs and entry of a declaratory judgment that the blocking of the individual plaintiffs from the account because of their expressed political views violates the First Amendment

Individual Board Member Speech

▶ Board Member Role: First Amendment Rights – Public Forum vs. Private

- First Amendment Rights – Public Forum - [BIDEN V. Knight First Amendment Institute At Columbia University, Et Al.](#) (April 5, 2021)
- The Supreme Court [vacated the decision](#) in a one-sentence opinion In April 2021 and remanded the case to the appeals court with instructions to dismiss the case as³⁴ moot, presumably on the grounds that Trump was no longer president and that Twitter’s owners had, in the wake of attacks on the U.S. Capitol, banned Trump from making further posts.
- Justice Thomas wrote a concurring opinion that could provide insight as to how the Supreme Court may view a future case where a governmental official is using a private social media account and where the private social media account can terminate accounts and/or block posts.

Individual Board Member Speech

- ▶ **Board Member Role: First Amendment Rights – Public Forum vs. Private**
 - [Davison v. Randall \(4th Cir. Jan. 7, 2019\)](#)
 - The interactive component of the Chair's Facebook Page constituted a public forum, and Randall engaged in unconstitutional viewpoint discrimination when she banned Davison's Virginia SGP Page from that forum 35
 - [Campbell v. Reisch, No. 19-2994 \(8th Cir. 2021\)](#)
 - The Eighth Circuit reversed, holding that plaintiff is not entitled to section 1983 relief because Reisch was not acting under state law when she blocked him from her Twitter account.
 - The court held that Reisch's account is the kind of unofficial account that the court envisioned in Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235–36 (2d Cir. 2019)

Open Meeting Law



Open Meetings Law: Core Concepts

Wisconsin's policy of openness in government.

See [Wisconsin Statute §19.81\(1\)](#)

- ▶ The Open Meetings Law applies to “meetings” of “governmental bodies.”

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See [Wisconsin Statute §19.83\(1\)](#)

Open Meetings: Law Core Concepts

▶ **Governmental Body**

- The term “**governmental body**” includes school boards and subunits (i.e., committees) created by a board.
- Exception for bodies created for or meeting for the purpose of collective bargaining.
 - However, exchange of initial proposals must be in open session.

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Open Meetings Law: Core Concepts

- ▶ Governmental bodies must give **appropriate and timely notice of the time, date, place, and subject matter of their meetings.** (There is a collective bargaining exception.)
- ▶ Meetings of a governmental body **shall be open and accessible to interested members of the public, unless the meeting has been lawfully convened in a closed session.**³⁹
- ▶ A governmental body **shall not conduct public business** (including meeting to gather information or discuss issues within the board's jurisdiction) **outside of the context of a properly noticed meeting.**

Open Meetings Law: Core Concepts

▶ Meeting

- In order for there to be a “meeting,” the “numbers” and “purpose” requirements must be met.
- **Numbers**: Typically, if one-half or more of the members of a governmental body are present, the numbers requirement is met.

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Open Meetings Law: Core Concepts

▶ Meeting

- **Numbers**: A “negative quorum” can be created if fewer than one-half of the members can block an action. 41
- **Purpose**: Members must be present to conduct governmental business (e.g., discussion, decision, or information gathering).

Open Meetings Law: Core Concepts

▶ Meeting

- **Walking quorum**: Series of gatherings of separate groups of members, each less than a quorum, who agree to act uniformly in sufficient number to reach a quorum.
- **Electronic communications**: Depending on how they are used, electronic communications such as email or texting could create a meeting.

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Open Meetings Law: Electronic Communications

- ▶ Each Board member has an obligation to ensure that he/she does not violate the Wisconsin Open Meetings Law through his/her participation in electronic communications (or other technology-facilitated activities) that involve multiple members of:
 - the Board,
 - a Board committee, or
 - any other District-created governmental body on which the Board member serves.

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Open Meetings Law: Electronic Communications

- ▶ As an example of actions regulated under the Open Meetings Law, board members must avoid creating a “**walking quorum**” through:
 1. Any series of communications among members of the board;
 2. Who agree, tacitly or explicitly, to act uniformly; and
 3. In sufficient number to determine the board’s course of action on any matter.

Open Meetings Law: Electronic Communications

- ▶ Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a “convening of members,” depending on how the communication medium is used.
- ▶ It is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—e.g., a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic⁶⁵ written correspondence, which generally does not raise Open Meetings Law concerns.
- ▶ If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body. **Krischan Correspondence (Oct. 3, 2000)**.

Source: Wisconsin DOJ Open Meetings Law Compliance Guide 2019

Open Meetings Law: Electronic Communications

- ▶ In addressing these questions, courts are likely to consider such factors as the following:
1. the number of participants involved in the communications;
 2. the number of communications regarding the subject;
 3. the time frame within which the electronic communications occurred; and
 4. the extent of the conversation-like interactions reflected in the communications.

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Source: Wisconsin DOJ Open Meetings Law Compliance Guide 2019

Open Meetings Law: Electronic Communications

- ▶ **How is the Technology Used:** Because the applicability of the Open Meetings Law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law.
- ▶ **Forward and Reply to All:** Although two members of a governmental body larger than four members may generally discuss the body's business without violating the Open Meetings Law , features like "forward" and "reply to all" ⁴⁷ common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message.
- ▶ **Real Time Basis:** Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Source: Wisconsin DOJ Open Meetings Law Compliance Guide 2019

Open Meetings Law: Electronic Communications

- ▶ **Inadvertent violations of the Open Meetings Law through the use of electronic communications can be reduced if:**
 - **One Way Communication:** electronic mail is used principally to transmit information one-way to a body's membership;
 - **Reply Warnings:** the originator of the message reminds recipients to reply only to the originator, if at all; and
 - **Forwarding:** message recipients are scrupulous about minimizing the content and distribution of their replies.

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[Source: Wisconsin DOJ Open Meetings Law Compliance Guide 2019](#)

Open Meetings Law: Electronic Communications

- ▶ **Discouraged use of Email:** The Attorney General's Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority. [Krischan Correspondence \(Oct. 3, 2000\)](#); Benson Correspondence (Mar. 12, 2004).
- ▶ **Email Voting:** Members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting. [I-01-10 \(Jan. 25, 2010\)](#).⁴⁹
- ▶ A decision of the Wisconsin Court of Appeals in, [State of Wisconsin ex rel Zecchino v. Dane County, App. No. 2017AP2](#) (Feb. 27, 2018) affirmed the dismissal of a complaint that had alleged that (1) a county board of supervisors had violated the Wisconsin Open Meetings Law by creating a "walking quorum," and (2) the county supervisors vote not to renew a lease was tainted by impermissible bias.

[Source: Wisconsin DOJ Open Meetings Law Compliance Guide 2019](#)

Some Special Voting Situations that may Affect a “walking quorum” Determination

- **Two-Thirds Vote:** Changes to the amount of tax to be levied or certified, or to the amounts or purposes of appropriations in an adopted budget require a 2/3 vote of the entire membership of the board (section 65.90(5)(a)).
- **Majority Vote of the Full Membership of the Board:** The employment or dismissal of persons holding contracts that are subject to section 50 118.22 or 118.24 of the state statutes must be determined by a majority vote of the full membership of the board.
- **Remaining Members:** Board vacancies are filled by a vote of the remaining members.
- **Negative Quorum:** A “negative quorum” can be created if fewer than one-half of the members can block an action.

Open Meetings Law: Remote Participation

- ▶ There is no express statutory authority that provides for a school board to convene by means of teleconferencing or other remote methods.
- ▶ Wisconsin Attorney General's opinions [[69 Op. Att'y. Gen. 143](#), 145] suggest that telephone conferencing among members of a governing body may be permissible for compliance under the Open Meetings Law when conditions provide for reasonable public accessibility. 51
- ▶ More recently, DOJ guidance deemed video conference calls acceptable as well. Wis. Dep't of Justice, [2019 Open Meeting Law Guide](#) pg. 11 (May 2019).

Open Meetings Law: Remote Participation

- ▶ **Means to Monitor, Public Access:** To comply with the law, a governmental body conducting a meeting by telephone conference call or virtual meeting must provide the public with an effective means to monitor the full content of the conference call.
- ▶ This may be accomplished by broadcasting the conference call through speakers located at one or more sites open to the public.

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Open Meetings Law: Remote Participation

- ▶ Opinions of school attorneys can vary as to, for example:
 - **Quorum:** whether a board member participating in a meeting via teleconference or web/video conference should be counted in the quorum requirements, and
 - **Voting:** whether it is appropriate to allow a board member to vote on a matter when the board member⁵³ is not physically present.
 - **Closed Session:** Concerns can also arise with allowing an individual board member to participate in a meeting remotely when the board has convened in closed session.

Open Meetings Law: Remote Participation

- ▶ **Due Process Proceedings:** Many school attorneys (including WASB Attorneys) have taken the position that it is inadvisable for a school board to permit an individual board member who is not physically present at a meeting to participate in the discussion, deliberations, or vote on any matter that involves an individual's due process rights or a quasi-judicial proceeding (e.g., expulsions, employee discipline, etc.).

Open Meetings Law: Remote Participation

wishes to allow an individual board member to participate in a meeting via teleconference, web/video conference, or similar means, it is recommended that the board provide such authority expressly by motion or policy and, minimally, ensure that the open meetings requirements regarding public accessibility have been adequately addressed.

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- ▶ In the absence of such express authority granted by the board, an individual board member should not assume that he/she has any right to insist upon participating in a meeting at which he/she is not physically present.

Open Meetings Law: Remote Participation

- ▶ WASB Sample Policies to Support Local Decisions for Changes to School Board Meetings: “Virtual Meeting” Policies (last revised March 19, 2020)
- ▶ WASB Remote Meeting Tips for School Board Members

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Open Meetings Law

ADDITIONAL RESOURCES

- ▶ [Wisconsin Statutes §§19.81-98](#)
- ▶ Department of Justice [2019 Open Meeting Law Guide](#)
- ▶ WASB [Open Meetings Law Brochure](#)
- ▶ WASB Legal Comments, Aug. 2007, May 2006, Sept.-Oct. 2004 (www.wasb.org; go to the “School Law Information” drop-down menu; click on “Quick Links;” click on “WASB Legal Comments”).

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Public Records



Public Records: Core Concepts

- ▶ The public records law presumes complete public access to district records and that the denial of public access is generally contrary to the public interest.
- ▶ A district may only deny access to public records⁵⁹ in “exceptional cases.”
- ▶ The purpose is to shed light on the workings of government and the acts of public officers and employees.

Public Records: Core Concepts

- “Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.
- In other words, a “record” is any information created or kept in connection with the official purpose or function of the school district.

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Public Records: Core Concepts

- ▶ Not all documents or information constitute a public record.
- ▶ A record does not include (for example):
 - Drafts, notes, preliminary documents and similar materials prepared for the originator's personal use.
 - Published material available for sale or at the library.
 - Material with access limited due to copyright, patent, or bequest.
 - An identical copy of an otherwise available record.

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Public Records: Core Concepts

- Legal Custodian:
 - Additionally, districts are required to provide the name of the legal custodian, and a description of the nature of his or her duties as records custodian, to all employees of the district entrusted with records that are subject to the records custodian's⁶² supervision. § 19.33(4).
 - An elected official such as a school board member is the legal custodian of his or her records;
 - The school board president is responsible for the board's records unless a records custodian is designated.

Public Records: Electronic Communications

- School boards have legal obligations to ensure that electronic communications that they send or receive related to district business are appropriately retained such that the communications can be:
 - retrieved,
 - evaluated, and,
 - where appropriate, disclosed pursuant to a lawful request.

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Public Records: Electronic Communications

- **Emails** regarding matters within the authority of the district are subject to records retention requirements and are likely subject to release as public records, ***regardless of whether the email is from a district or personal email account.***
- Which email account should staff members use?
 - **School district account.**
 - ~~◦ Personal account.~~
 - ~~◦ Private sector employer account.~~
 - ~~◦ Public sector employer account.~~

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Public Records: Electronic Communications

- **Blogs, social media entries and even text messages** can be subject to the public records law.
- **Records subject to the Request:** Once a records request is received, the record(s) subject to the request may only be destroyed under very limited circumstances.
- **When to Respond:** Upon receiving a request for a record, the district's records custodian must respond to the request "**as soon as practicable and without delay.**"

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Public Records: Electronic Communications

- **Criminal penalties** exist for the alteration or falsification of public records, as well as for the destruction, concealment, damage or removal of public records with intent to injure or defraud.
- **Transfer of Records:** Employees must pass on any official records connected to their employment to their successor.

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Public Records: Electronic Records and Communications

- ▶ Email sent or received on an authority's computer system is a record. This includes personal email sent by officers or employees of the authority. [Schill, 2010 WI 86, ¶ 152](#) (Bradley, J., concurring), ¶ 173 (Gableman, J., concurring), ¶ 188 (Roggensack, J., dissenting)
- ▶ Email conducting government business sent or received on the personal email account of an authority's officer or employee also constitutes a record. 67
- ▶ Information regarding government business kept or received by an elected official on her website, "Making Salem Better," more likely than not constitutes a record. [19 OAG I-06-09](#), at 2-3.

Source: Wisconsin Department of Justice
Public Records Compliance Guide 2019

Public Records: Electronic Records and Communications

- Electronically stored information generally constitutes a “record” within the meaning of the public records law so long as the recorded information is created or kept in connection with official business.
- The substance, not the format, controls whether it is a record or not. [Youmans](#), 28 Wis. 2d at 679.
- Emails and other records created or maintained on a personal computer or mobile device, or from a personal email account, constitute records if they relate to government business.

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[Source: Wisconsin Department of Justice Public Records Compliance Guide 2019](#)

Public Records: Electronic Records and Communications

- Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include:
 - word processing documents,
 - database files,
 - email correspondence,
 - web-based information,
 - PowerPoint presentations,
 - and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions.

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[Source: Wisconsin Department of Justice Public Records Compliance Guide 2019](#)

Public Records: Electronic Records and Communications

- Electronic records include content posted by or on behalf of authorities to social media sites, such as Facebook and Twitter, to the extent that the content relates to government business.
- If an authority uses social media, the content must be produced if it is responsive to a public records request.
- This includes not only currently “live” content, but also past content.

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Source: Wisconsin Department of Justice
Public Records Compliance Guide 2019

Public Records: Electronic Records and Communications

- [Wisconsin Stat. § 16.61](#), which governs retention, preservation, and disposition of state public records, includes “electronically formatted documents” in its definition of public records. [Wis. Stat. § 19.32\(2\)](#); OAG I-06-09, at 2. 425 Youmans, 28 Wis. 2d at 679. 426 See Key Definitions, above. 427 See Analyzing the Request, above.
- If an authority makes use of social media, or if employees use mobile⁷¹ devices to conduct government business (whether the device is personal or provided by the authority), **the authority should adopt procedures to retain and preserve all such records consistent with [Wis. Stat. § 19.21](#)**, and applicable records disposition authorizations.

Source: Wisconsin Department of Justice
Public Records Compliance Guide 2019

Public Records: Electronic Records and Communications

- **Electronic documents may contain contextual information and file history preserved only when viewed in certain formats**, such as data generated automatically by computer operating systems or software programs. Whether this information is considered a “record” subject to public access is largely unanswered.
- **Metadata.** Literally defined as “data about data,” metadata has different meanings, depending on context. In the context of word processing documents, metadata is information that may be hidden from view on the computer screen and on a paper copy, but, when displayed, may reveal important information about the document.

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[Source: Wisconsin Department of Justice
Public Records Compliance Guide 2019](#)

Public Records: Electronic Records and Communications

Electronic Copies of Electronic Records

- [Lueders v. Krug, App. No. 2018AP431 \(June 5, 2019\).](#)
- Once expressly requested in their original electronic format, a public records authority was required to provide electronic copies of email messages that the authority had already made available to the same requestor in paper format. ⁷³

Public Records: Electronic Records and Communications

- Computers contain “cookies,” temporary internet files, deleted files, and other files that are not consciously created or kept by the user, but are instead generated or stored automatically. In addition, although a user may delete files, deleted materials remain on the computer until overwritten, unlike conventional documents discarded and destroyed as trash.
- Some of these materials are akin to drafts or materials prepared for personal use, or are simply not materials created or kept in connection with official business.
- Nonetheless, when such materials are collected, organized, and kept for an official purpose, they may constitute a record accessible under the public records statute.

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[Source: Wisconsin Department of Justice Public Records Compliance Guide 2019](#)

Public Records: Electronic Records and Communications

- ▶ In general, school districts must keep public records in their custody for seven years (other timelines may be in effect due to the status of the record).
- ▶ This requirement may be complicated when the record is in an electronic format that is not completely under the official's control.
- ▶ Under the terms of use of many social networking sites, users of the sites enter into a contractual relationship with the site's operator.
- ▶ Under these contracts, individual users often give up their rights to fully and unilaterally control content placed on the site.
- ▶ [School Board Member and Employee Use Of Social Networking Sites WASB Legal Note, Drafted by Lathrop & Clark, November 2010](#)

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Public Records: Electronic Records and Communications

- ▶ **The website's rules for retention and maintenance of site postings:** Individuals who choose to use a social networking site in their official capacities must understand the site's rules for retention and maintenance of site postings.
- ▶ **Archival Methods:** Employees are likely going to need to consider alternative archival methods such as:
 - regular printing or
 - electronic retention of social network content.

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Source: School Board Member and Employee Use Of Social Networking Sites WASB Legal Note, Drafted by Lathrop & Clark, November 2010

Public Records: Suggestions for Board Members

- Review your board's public records notice.
- Establish sound practices in regard to the use of email (and for other correspondence) from the start.
- Solely use your school email address for all school-related business so that all of your school-related emails are automatically retained by the district's records' custodian/server.

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Public Records: Suggestions for Board Members

- An elected official such as a school board member is the legal custodian of his or her records.
- If you receive a public records request, review it ⁷⁸ with your district's records custodian (and possibly legal counsel) immediately.
- Review your board's related records policies and any retention schedule that the board has approved.

Public Records Resources:

- ▶ [Wisconsin Department of Justice Public Records Compliance Guide 2019](#)
- ▶ [Legal Comments:](#)
 - “Recent Statutory Changes to the Public Records Law (Part I),” September 2003; Part II, October 2003.
 - “Final Candidates Under the Wisconsin Public Records Law,” August 2008.
 - “Disclosure of Employee Investigation and Disciplinary Records,” July 2007.
 - “Records Retention Schedules,” October 2002.

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Board Member Access to Information



General – Board Member Access to Confidential Information

Individual school board members possess all the rights granted to them by applicable state law, federal law and Board policies.

Individual board members may request and obtain statistics and reports, etc.:

- as directed by the Board,
- as required by their office (i.e. President, Clerk or Treasurer),
- as available as a parent/guardian, or
- as available pursuant to a public records or directory data request.

General – Board Member Access to Confidential Information



How information is shared may be addressed in board policy.

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In addition, the sharing of information between and amongst board members may create:

- Open meeting law issues
- Public Records Issues

General – Board Member Access to Confidential Information

▶ Wisconsin Statutes

- ▶ [Sections 19.21 – 19.39](#) [Public Records Law and related statutes]
- ▶ [Section 19.65](#) [rules of conduct; employee training; and security regarding personally-identifiable information]
- ▶ [Section 48.396](#) [law enforcement officer records]
- ▶ [Section 115.812\(2\)](#) [reporting information regarding specified students with disabilities to appropriate county departments]
- ▶ [Section 118.125](#) [state student records law; policies required]
- ▶ [Section 118.126](#) [privileged communications related to student alcohol and drug use]
- ▶ [Section 118.127](#) [law enforcement agency record information]

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General – Board Member Access to Confidential Information

▶ Wisconsin Statutes

- ▶ [Section 118.51\(8\)](#) [full-time open enrollment; disciplinary records]
- ▶ [Section 118.52\(10\)](#) [course options; disciplinary records]
- ▶ [Section 120.13\(28\)](#) [board authority to designate legal custodians]
- ▶ [Section 146.82](#) [confidentiality of patient health care records]
- ▶ [Section 146.83](#) [access to patient health care records] 84
- ▶ [Section 252.15](#) [access to HIV test results]
- ▶ [Section 767.41\(7\)](#) [custody and physical placement; parent access to records]
- ▶ [Section 938.396](#) [access to records; law enforcement and court records]
- ▶ [Section 950.08\(2w\)](#) [information provided by district attorney to schools in criminal cases]

General – Board Member Access to Confidential Information

▶ Federal Laws

- ▶ [Family Educational Rights and Privacy Act](#) [federal student records law]
- ▶ [34 C.F.R. part 99](#) [U.S. Department of Education FERPA Regulations]
- ▶ [34 C.F.R. part 300](#) [U.S. Department of Education IDEA regulations; confidentiality and maintenance of records]
- ▶ Elementary and Secondary Education Act ([20 U.S.C. § 7908](#)) [military access to student information]
- ▶ [National School Lunch Program](#) [heightened privacy rules for students' eligibility status and other NSLP records]

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Policies and Laws that refer to Complaint Procedures and the Chain of Command



Complaint Procedures

- ▶ Complaint procedures are policies specifying **how complaints by individuals are processed and resolved** and if necessary brought before the school board.
- ▶ Complainants are directed to go to the employee or immediate supervisor, then principal, then district administrator and only then to the board.
- ▶ When a complaint gets to the board, the district administrator has had opportunity to investigate matter and will have answers for the board's questions.

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Chain of Command and Grievance Process

- ▶ Chain of command structures and grievance procedures tell employees how to communicate and process complaints to administration and board:
 - **A chain of command describes supervisory and subordinate structure of an organization.**
 - Employees take direction from and direct questions and concerns to an immediate supervisor.
 - Employees do not circumvent the chain of command except as allowed by board policy.

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Chain of Command and Grievance Process

- ▶ Chain of command structures and grievance procedures tell employees how to communicate and process complaints to administration and board:
 - A **grievance process** is the board authorized way employees can raise complaints with the administration and board.
 - The grievance process is like a complaint procedure – employees bring their complaint to the immediate supervisor or the level of administration authorized to resolve their complaint and then may appeal to the district administrator and board if dissatisfied with the resolution of the complaint.

Chain of Command and Grievance Process

- ▶ **Advantages of the chain of command structure:**
 - Staff receives consistent direction from management, does not need to resolve conflicting directives from administration and/or board.
 - Trust is built between staff, immediate supervisors, district administrator and board. 90
- ▶ **The grievance process can provide an outlet for concerns.**
 - The statutory grievance process need cover only terminations, discipline and employee safety.
 - Board may by policy expand the grievance process to cover other employee concerns.

Chain of Command and Grievance Process

- ▶ **Enforcement of chain of command policies is limited by First Amendment rights of employees to speak as citizens:**
 - Employees may be required to address concerns about matters relating to the performance of their jobs or their responsibilities to their immediate supervisor.
 - Employee speech that is not part of their job duties and is done as a citizen on a matter of public concern remains protected under the First Amendment.

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Conflicts of Interest



Conflicts of Interest

Code of ethics for public officials. Wisconsin Statute §§19.41-59

Criminal liability under Wisconsin Statute §946.12 (misconduct in public office) and Wisconsin Statute §946.13 (private interest in public contracts) of the Wisconsin statutes.

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Doctrine of incompatible offices. Some exceptions for volunteer positions.

“Common law” conflicts of interest.

Bias and partiality.

Conflicts of Interest



Code of Ethics for Public Officials

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No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

Wisconsin Statute §19.59

Conflicts of Interest

Code of Ethics for Public Officials

- ▶ No local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official.

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[Wisconsin Statute §19.59](#)

Conflicts of Interest

Code of Ethics for Public Officials

- ▶ No local public official . . . may . . . give . . . or withhold . . . his or her vote or influence . . . upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, Wisconsin Statute §19.59

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Conflicts of Interest

Criminal Liability ([Wisconsin Statute §946.13](#))

- ▶ **General Rule:** A board member may not have a private pecuniary interest in contracts with the school district if those contracts involve receipts and disbursements of more than \$15,000 in any year. Violation of this requirement constitutes a felony.97
 - A “strict liability” statute
 - This statute can be violated either in an individual capacity or in a board member’s public capacity.
 - Abstention from all board discussion/action on a contract does NOT necessarily cure this kind of conflict of interest.

Conflicts of Interest

Criminal Liability (Wisconsin Statute §946.12)

- ▶ **Misconduct In Office:** Several different provisions, including:
 - Taking certain actions in an official capacity with an intent to obtain a dishonest advantage.
 - Intentionally falsifying certain records in a “material respect” 98
 - Intentionally doing an act one knows is in excess of one’s lawful authority.
 - Intentionally soliciting or accepting anything of value for the performance of any service or duty that is other than the value that has been fixed by law.

Conflicts of Interest

Incompatible Offices

- ▶ Doctrine of incompatible offices involves two governmental offices or positions.
- ▶ A board member may not hold multiple offices/positions if they impose conflicting duties upon the board member or if there are many conflicts of interest between the two offices/positions.
 - e.g., board member and employee

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School board members as volunteer coaches and activity supervisors (Wis. Statute §120.20)

A school board member is able to serve as a volunteer coach or volunteer supervisor of an extracurricular activity under the following conditions:

1. The board member must not receive compensation for serving as a volunteer coach or supervisor;
2. The board member must agree to abstain from voting on any issue that comes before the school board that substantially and directly concerns the activity that he or she coaches or supervises while he or she is serving as a volunteer coach or supervisor; and
3. The school board must receive the results of a criminal background investigation of the school board member that has been conducted by the department of justice or the federal bureau of investigation.

A board member who is serving as a volunteer coach or volunteer activity supervisor is not required to abstain from voting on the school district's annual budget in order to remain in compliance with the second condition listed above.

Conflicts of Interest

Resources

- ▶ Please see WASB Legal Comments: [April 2016](#), [May 2013](#), [Nov. 2013](#), [March 2008](#), [April 2007](#), [July 2003](#)

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(www.wasb.org; go to the “School Law Information” drop-down menu; click on “Quick Links;” click on “WASB Legal Comments;” login is required)



Presenter Bio

Bob Butler has been a WASB staff counsel since 1990. He is also, along with attorney Barry Forbes, the Association's co-associate executive director. Bob directly represents more than 40 school districts in Wisconsin on employment, human resources and school law matters. Bob also provides membership services, including general legal information, to all school districts that are members of WASB.

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III. **ADJOURN**

PURSUANT TO APPLICABLE LAW, NOTICE IS HEREBY GIVEN THAT A QUORUM OR A MAJORITY OF THE NEW GLARUS SCHOOL DISTRICT BOARD MEMBERS MAY ATTEND THIS MEETING. INFORMATION PRESENTED AT THIS MEETING MAY HELP FORM THE RATIONALE BEHIND FUTURE ACTIONS THAT MAY BE TAKEN BY THE NEW GLARUS SCHOOL DISTRICT BOARD.

UPON REQUEST TO THE DISTRICT OFFICE, SUBMITTED TWENTY-FOUR (24) HOURS IN ADVANCE, THE DISTRICT SHALL MAKE REASONABLE ACCOMMODATIONS INCLUDING THE PROVISION OF INFORMATIONAL MATERIAL IN AN ALTERNATIVE FORMAT FOR A DISABLED PERSON TO BE ABLE TO ATTEND THIS MEETING.