



CITY OF WAUWATOSA

COMMITTEE OF THE WHOLE

MINUTES • MAY 6, 2014

Regular Meeting

Common Council Chambers

6:00 PM

7725 West North Avenue, Wauwatosa, WI 53213

PRESENT: Alds. Wilson, Berdan, Bryne, Causier, Dubinski, Kofroth, McBride (6:55 p.m.), Moldenhauer (7:15 p.m.), Pantuso, Roznowski, Stippich, Tilleson, Walsh, Walz-Chojnacki (6:45 p.m.), Wilke - 12

ABSENT: Alds. Hanson, Pantuso, Roznowski, Walsh

ALSO Mr. Archambo, City Administrator

PRESENT: Mr. Kesner, City Attorney

COMMITTEE OF THE WHOLE ITEMS

1. Training by the City Attorney on open meetings, public records, public official ethics and meeting procedures

City Clerk Carla Ledesma called the meeting to order for the purpose of selecting a Chair Pro-Tem.

It was moved by Ald. Wilson, seconded by Ald. Berdan to nominate Ald. Tilleson as Chair Pro-Tem. -12

Ald. Tilleson assumed the Chair at 6:07 p.m.

Open Meetings. Mr. Kesner began his open meetings presentation by referencing specific laws that must be adhered to regarding open meetings and public records. Wisconsin has strong open meetings laws that support the premise that government's business is to be conducted in the open so that decisions are based upon public information. Wisconsin Statutes 19.81(1) specifically applies to meetings of governmental bodies.

Section 19.82(2) defines a meeting as a 'gathering to conduct governmental business.'

Mr. Kesner addressed the issue of 'walking quorums' and 'negative quorums,' noting that a quorum of Wauwatosa's Common Council is 11. A two-thirds vote requires eleven votes; thus, six individuals can block action on a two-thirds vote. In instances where a three-quarter vote is required, just five members can block a vote. Therefore, five members is generally considered too many individuals to speak with on an issue as it is generally considered a negative quorum.

Mr. Kesner also counseled Council members to be aware of creating email meetings by virtue of communication with other elected officials on an issue. This situation is similar to a conference call or to a gathering of persons. Elected officials should avoid the use of the 'Reply All' function when using email, as this can create a group discussion. Mr. Kesner reminded the Committee that emails are public records.

Atty. Kesner also stated that whispering in meetings should not be done; members should refrain from debate, deliberation, or discussion away from the public view. The same applies to text messaging or note-passing. While some of these points have not been challenged in court, the concept is that discussion and comments should be conducted in the open.

The final point discussed was the issue of closed sessions during meetings. These are typically noticed in advanced on the agenda and can be held only for specific reasons.

Records of Elected Officials. The second training topic was the issue of elected officials' public records. Section 19.31 of the Wisconsin Statutes sets forth the public policy and purpose. Mr. Kesner noted that the subject of public records deals with both preservation of records, and providing information pursuant to open records requests.

In Wauwatosa, the city email accounts are archived, as are agendas and minutes created by staff. Elected officials may have other records, however, that are the responsibility of the official to maintain.

When open records requests are made, the official is not obligated to create records that do not exist. However, if a requested record exists and should have been retained, it should be produced. An open records request must be responded to and any denials made must be specific.

Mr. Kesner described what constitutes a record, noting that a draft for the official's use only is not an open record. However, if that draft is shared with others and comments are received, the document becomes an open record. He added that disclosure must be balanced against any response for not disclosing a record.

Electronic records differ somewhat from paper records and must be retained in the electronic format.

Mr. Kesner noted that most board and commission members do not have city email accounts; however, if these members include a city employee on all of their city-related emails, they can be assured that their emails will be archived.

Since there is no way the city's archive system can save text messages, this technology should not be used for official city business. The same inability applies for phone providers through servers outside of the city's control. Mr. Kesner reiterated that official business is defined as any business having to do with the city. This includes constituent conversations about, say trains or bees.

Ald. McBride arrived and assumed the Chair at 7:07 p.m.

Ethics for Local Officials. Beginning his ethics presentation, Mr. Kesner stated that Section 19.59 (1)(b) of the State Statutes sets forth a code of ethics for local government officials, employees, and candidates where these individuals may not use his/her public position or office to obtain financial gain or anything of substantial value for private benefit. A code of ethics strengthens citizen confidence in the integrity of government officials and helps preserve the integrity of the decision-making process. Penalties can be imposed for those violating the code of ethics.

Mr. Kesner encouraged officials to contact his office for guidance if a question should arise concerning this subject.

Meet Procedures. Mr. Kesner briefly addressed meeting procedures used in Wauwatosa, noting that Section 2.02.010 of the Wauwatosa Municipal Code sets forth general guidelines. Roberts Rules of Order are also generally complied with as appropriate.

The order of motion precedence in a meeting was reviewed; Mr. Kesner noted that no debate is permitted on motions to adjourn, to table, and to close debate.

Mr. Kesner stressed that speakers need to seek and obtain recognition by the Chair before making comments in order to maintain the orderly flow of a meeting. Questions and comments need to be confined to the issue under debate; speakers are limited to two opportunities per issue. Personalities should be avoided.

Voting members are expected to vote 'aye' or 'no' on every issue; if a situation occurs where an official wishes to abstain from voting, any other member may request the reason therefor. If the abstaining member declines to state a reason, this shall be noted in the minutes. Mr. Kesner added that if an official has questions about possible conflicts of interest and the need to abstain from voting, s/he may contact the City Attorney's office for advice.

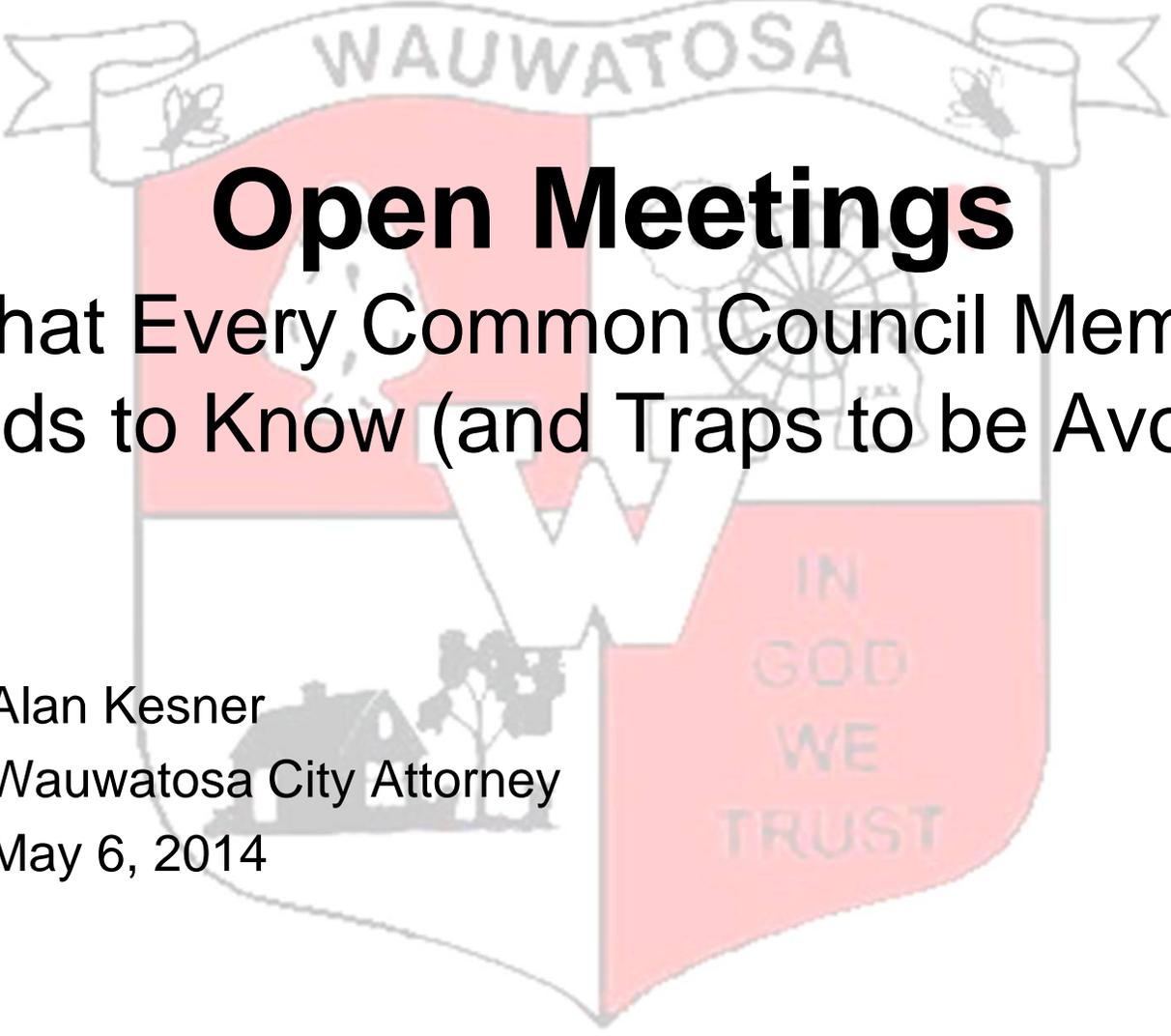
Mr. Kesner stated that any member voting with the prevailing side on a question may move for reconsideration of the vote at any time during the same meeting, or at the next succeeding regular Council meeting if that member announces his/her intention to so move for reconsideration at the prior meeting.

Members desiring to change his/her vote on a question must do so before the presiding officer announces the result of the vote. Roll call votes may be taken on any issue upon request.

In closing, Mr. Kesner referred to George Washington's *Rules of Civility and Decent Behaviour* where the author compiled 110 rules of decent behavior. President Washington urges that every action taken be done in a respectful manner (#1), that comments be short and comprehensive (#35), that no reproachful language be used (#49), that individuals not be hasty to believe disparaging reports about others (#50), that conversations be without malice or envy (#58), that speakers not detract from others (#67), that speakers refrain from whispering (#77) and not be tedious in discourse, nor repeat the same manner of discourse (#88), and finally, to "labour to keep alive in your breast that little celestial fire called conscience." (#110).

The training session adjourned at 7:23 p.m.

Carla A. Ledesma, CMC, City Clerk

The background of the slide features a large, faint watermark of the Wauwatosa City Seal. The seal is a shield-shaped emblem. At the top, a banner reads "WAUWATOSA". The shield is divided into four quadrants: top-left (red), top-right (white with a sunburst), bottom-left (white with a house and trees), and bottom-right (red with the text "IN GOD WE TRUST").

Open Meetings

What Every Common Council Member Needs to Know (and Traps to be Avoided)

Alan Kesner
Wauwatosa City Attorney
May 6, 2014

Policy Considerations

- “Sunshine Law”
- Decisions made in public
- Based on public information



Sec 19.81(1)

- “a representative government of the American type is dependent upon an informed electorate”
- “the public is entitled to the fullest and most complete information regarding the affairs of government”
- “as is compatible with the conduct of governmental business”

Quick Overview

- all meetings
- all state and local governmental bodies
- publicly held
- in places reasonably accessible to members of the public
- open to all citizens at all times
- unless otherwise expressly provided by law

When does the Open Meetings Law apply?

- A meeting
- A governmental body



What is required if the Open Meetings Law applies?

- A proper agenda
- Posted in public places
- Advance notice
- A publicly accessible meeting place
- Discussion and voting in the open
- Record of votes taken

What is a “Meeting”?

A “meeting” is defined as:

[T]he 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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter. . . .

Wis. Stat. § 19.82(2).

The open meetings law applies . . .

whenever a gathering of members of a governmental body satisfies two requirements:

1. there is a purpose to engage in governmental business
2. the number of members present is sufficient to determine the governmental body's course of action.

When is a body “gathered to conduct governmental business”?

- any formal or informal discussion, decision or information gathering, on matters within the governmental body’s realm of authority
- members gather to simply hear information on a matter within the body’s realm of authority
- need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business

“Walking quorum”

- A series of gatherings among individuals or 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 decision
- I told a friend, and she told two friends, and so on, and so on . . .
- Includes telephone and conference calls

Negative Quorum

- Usually a concern on issues where the body operates under a super majority rule
- A group of sufficient size to block a proposal

“E-Mail Meetings”

- E-Mail is a Public Record
 - One-way messages are like a “memo” and are saved and accessed later
- E-Mail discussions can be a “Meeting”
 - Interactive discussions are like a meeting and should only occur under the procedures for meetings (advance notice, agendas, open real-time public access and minutes)
 - Avoid the use of “Reply All”

Whispering in Meetings

Milwaukee County Corporation Counsel:

- refrain from debate, deliberation or discussion away from the public view
- “communication through whispering, side discussion or note passing which would involve a quorum or negative quorum of the Board or any of its committees and would involve issues which are the business of the Board would potentially generate a complaint which would validly object to a violation of the tenets cited above”

Closed Meetings

Meeting may convene into closed session *only if*:

- Noted on agenda
- Specific motion made, must note
 - (1) business being considered, and
 - (2) specific subsection of statute
- Majority vote
- May only consider item(s) specified
- May only vote in closed session if voting in open session would frustrate the purpose of the closed session
- May only reconvene in open session if noted in motion closing meeting

Closed Meetings

Common exemptions under sec. 19.85(1):

- (g) - Conferring with legal counsel regarding litigation strategy
- (b), (c) or (f) - Certain personnel matters
- (e) - Competitive or bargaining reasons
- Other specified reasons
- NOT for final ratification of a collective bargaining agreement

What Are Penalties?

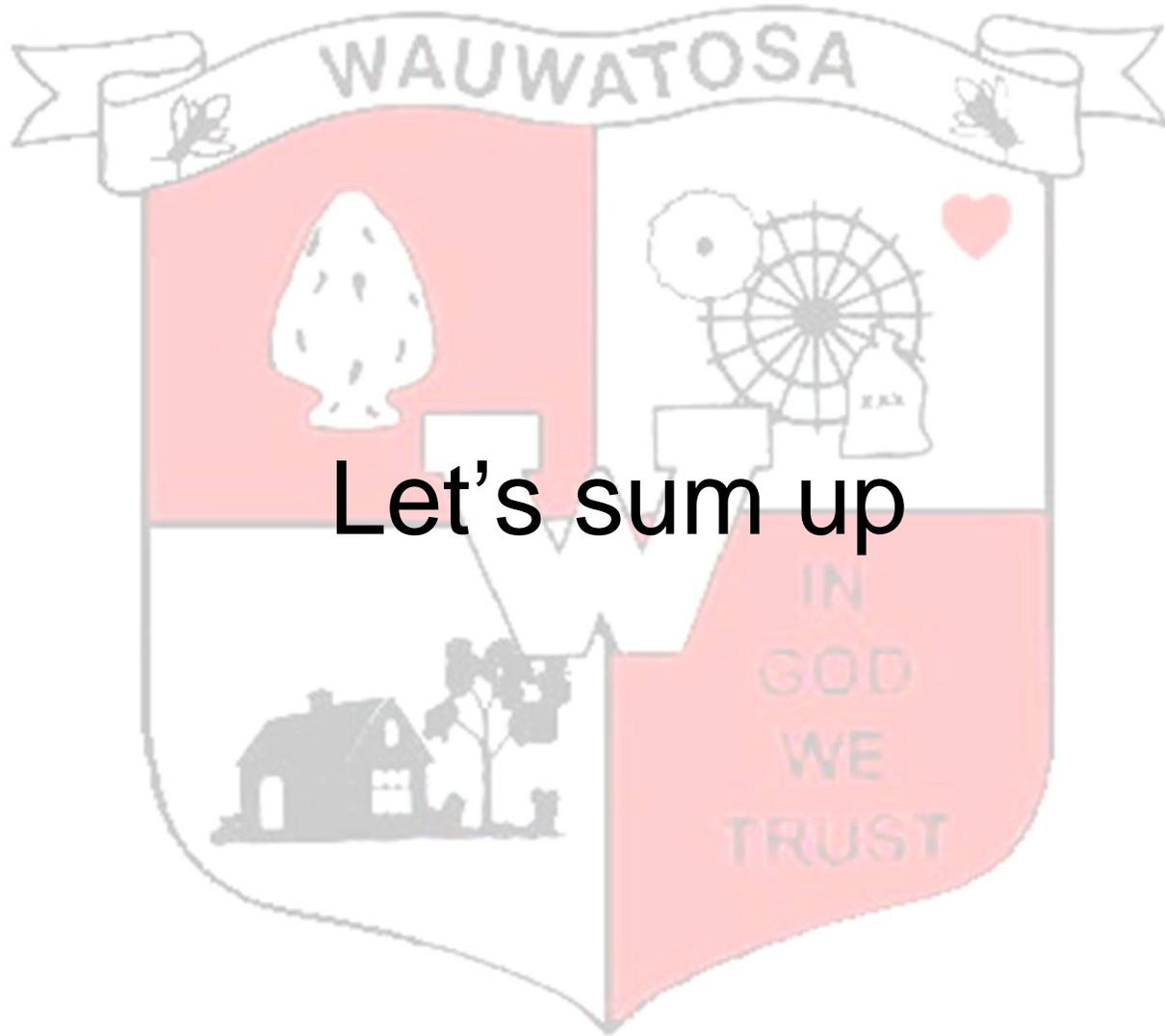
- “Any member ... who knowingly attends a meeting . . .
- shall forfeit *without reimbursement*
- not less than \$25 nor more than \$300
- for each such violation.”

Who Enforces the Open Meetings Law?

- Milwaukee County Corporation Counsel
- Wisconsin Department of Justice
(Attorney General)

Other issues (we just don't have time to discuss EVERYTHING):

- “Governmental Body”
- Agendas, timing and posting
- Meeting locations
- Minutes of meetings



Let's sum up



Records of Elected Officials

Alan Kesner
Wauwatosa City Attorney
May 6, 2014

Public Policy and Purpose

“[I]t 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.

Providing citizens with information on the affairs of government is:

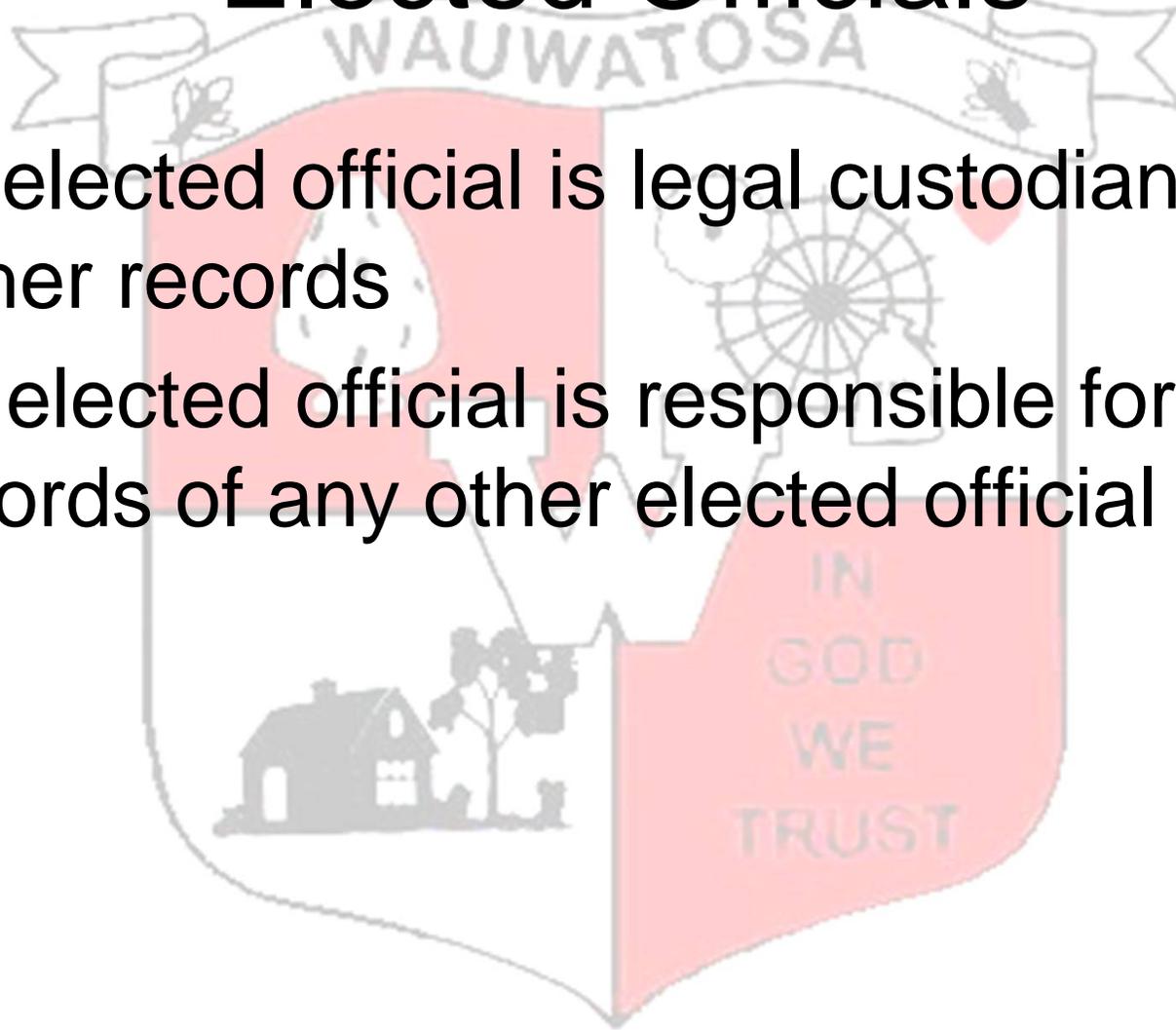
- [A]n essential function of a representative government
- an integral part of the routine duties of officers and employees
- a basic tenet of our democratic system

The Request

- Requests do not have to be in writing
- Requester generally does not have to identify himself or herself
- Requester does not need to state the purpose
- Must be reasonably specific
- “Magic words” are not required

Elected Officials

- An elected official is legal custodian of his or her records
- No elected official is responsible for the records of any other elected official

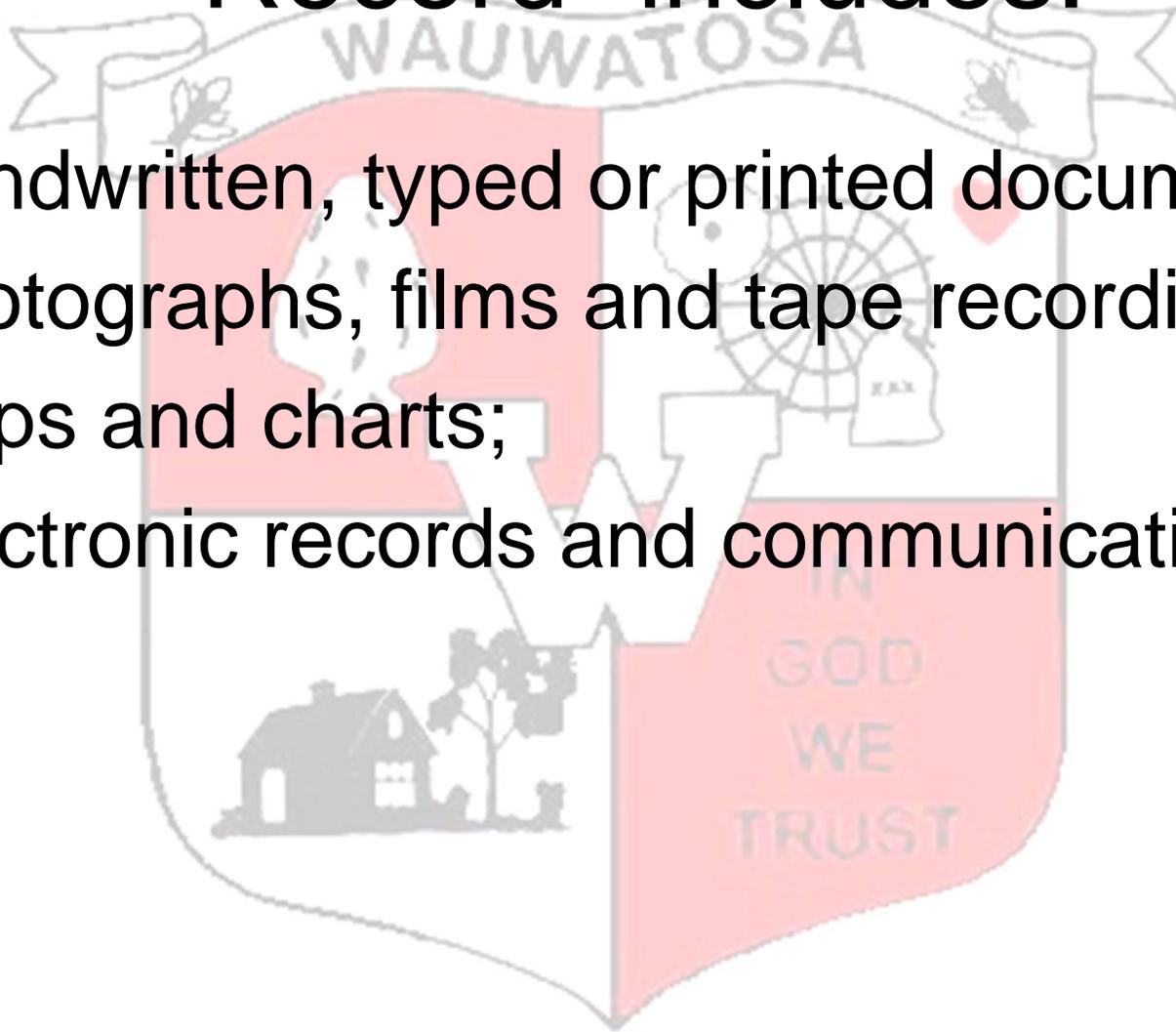


What is a “Record”?

- Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved
- Created or kept in connection with official purpose or function
- Not everything a public official or employee creates is a public record

“Record” includes:

- Handwritten, typed or printed documents;
- Photographs, films and tape recordings;
- Maps and charts;
- Electronic records and communications.



“Record” does not include:

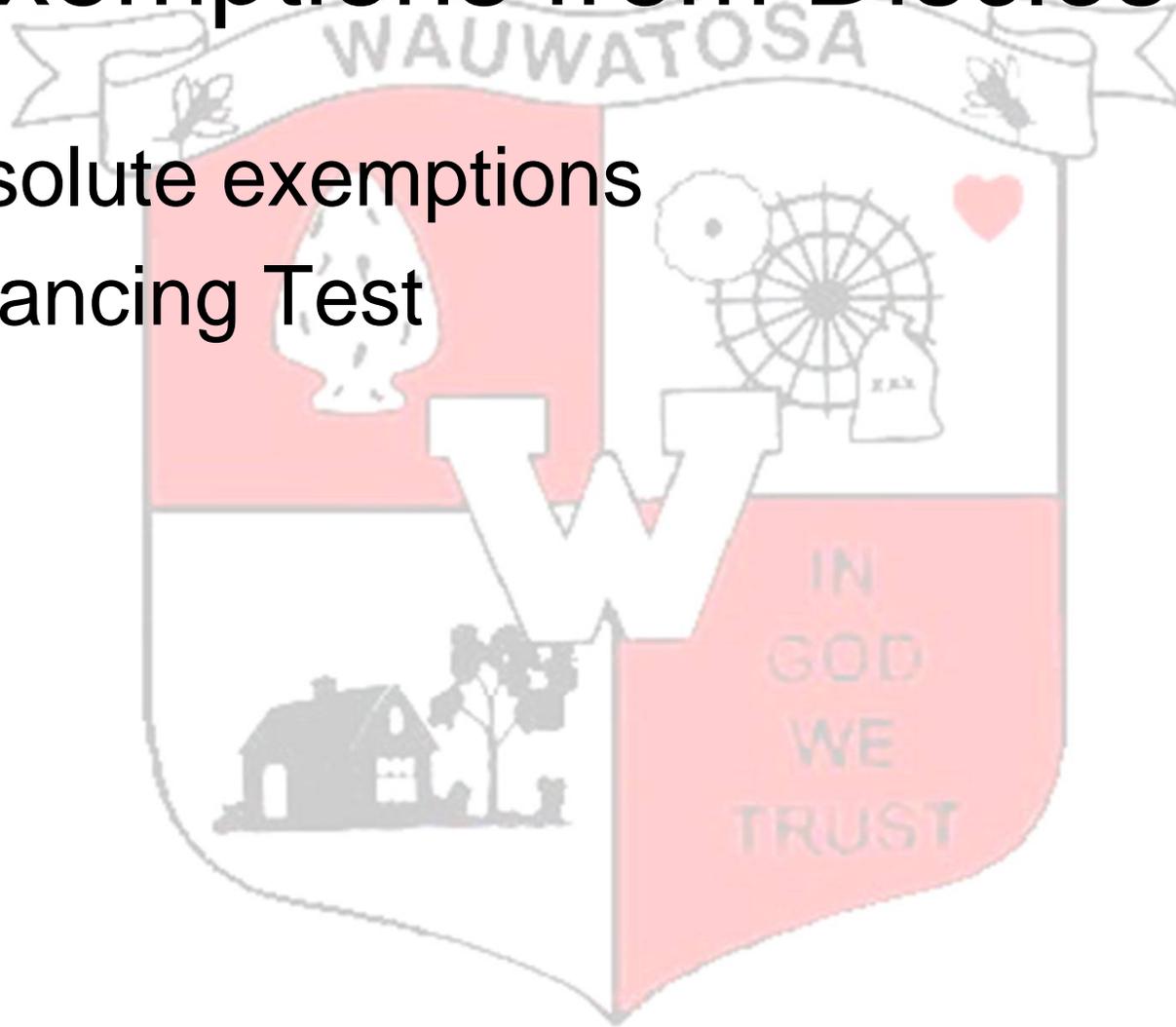
- Drafts, notes, preliminary documents and similar materials prepared for the originator’s personal use
- Published material available for sale or at the library
- Purely personal property with no relation to the office
- Material with access limited due to copyright, patent or bequest

The Response

- The custodian **MUST** respond to a public records request
- Response must be given “as soon as practicable and without delay.”
- If the request is in writing, a denial or partial denial of access also must be in writing
- Reasons for denial must be specific and sufficient

Exemptions from Disclosure

- Absolute exemptions
- Balancing Test



Electronic Records

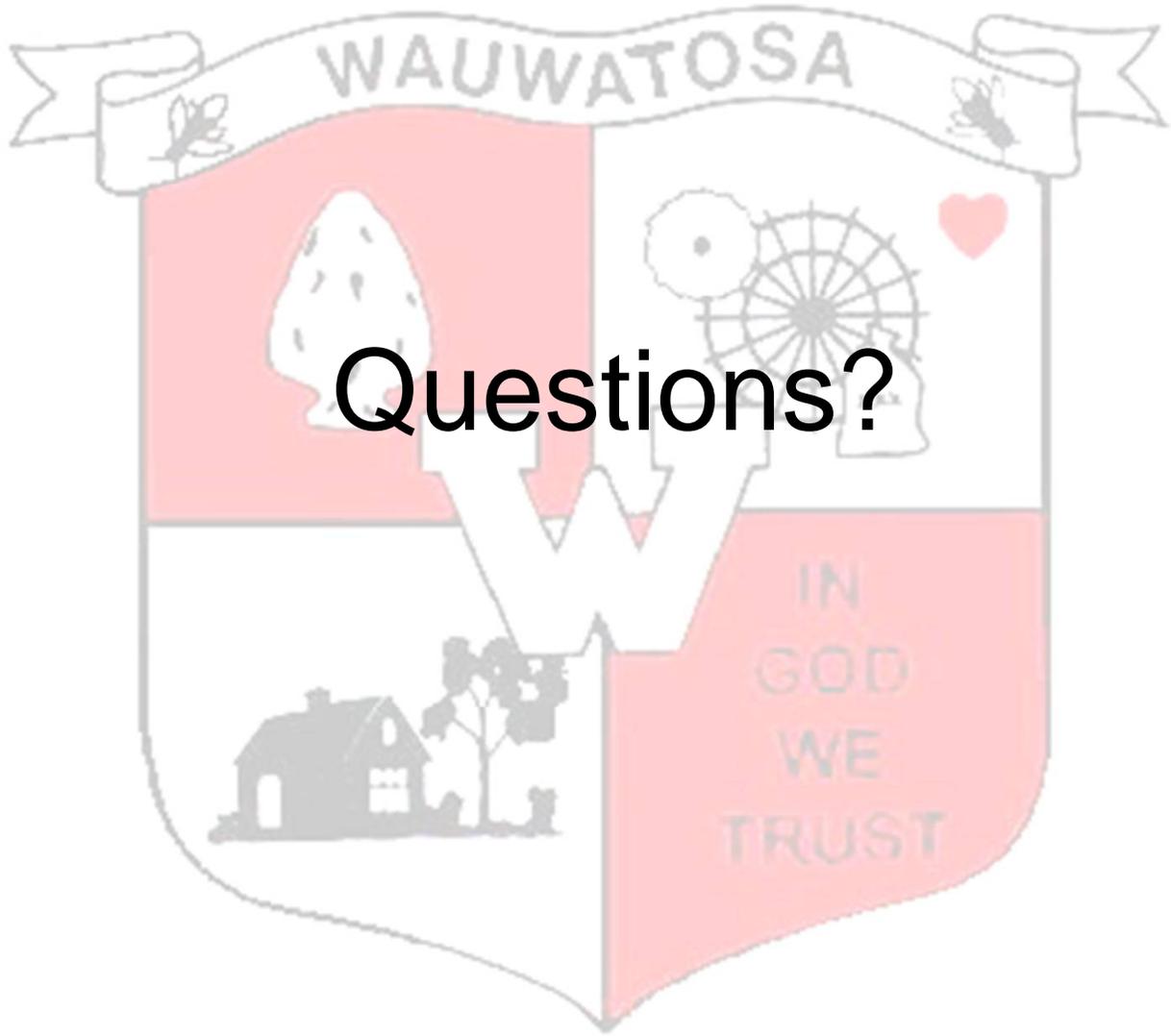
- Different from paper records
- Maintain in electronic format
- Electronic Mail – all “@wauwatosa.net” messages are archived by the City of Wauwatosa
- Text messaging – No viable way to archive appropriately, therefore prohibited from use for official business

Enforcement

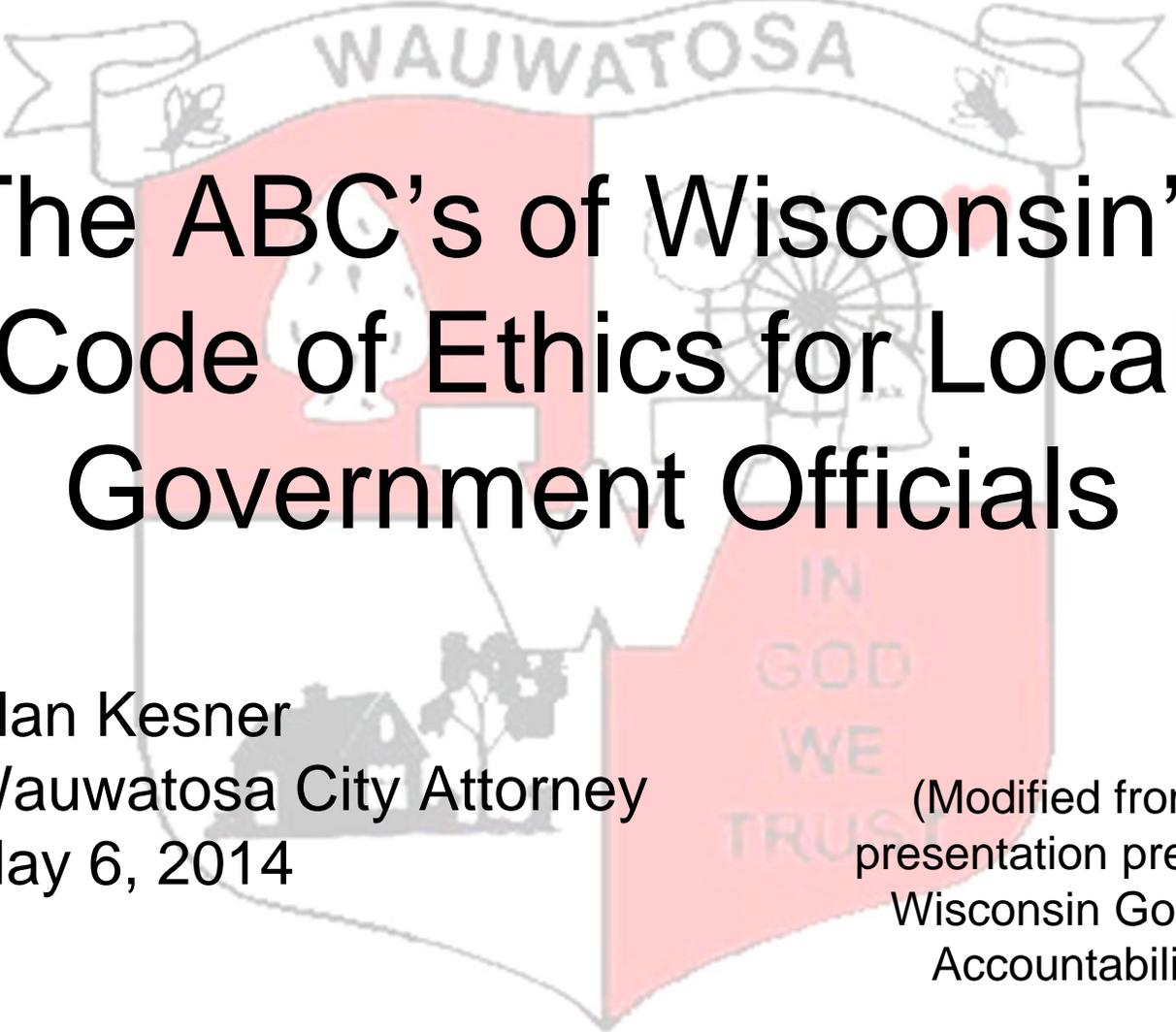
- Mandamus Action
- District Attorney
- Attorney General
- Attorneys' fees, damages of not less than \$100, and other actual costs
- Civil forfeiture of not more than \$1,000 if an legal custodian arbitrarily or capriciously denies or delays response

Penalties

- Attorneys' fees, damages of not less than \$100, and other actual costs
- Civil forfeiture of not more than \$1,000 if a legal custodian arbitrarily or capriciously denies or delays response
- Criminal Penalties for:
 - Destruction, damage, removal or concealment of public records with intent to injure or defraud.
 - Alteration or falsification of public records.



Questions?

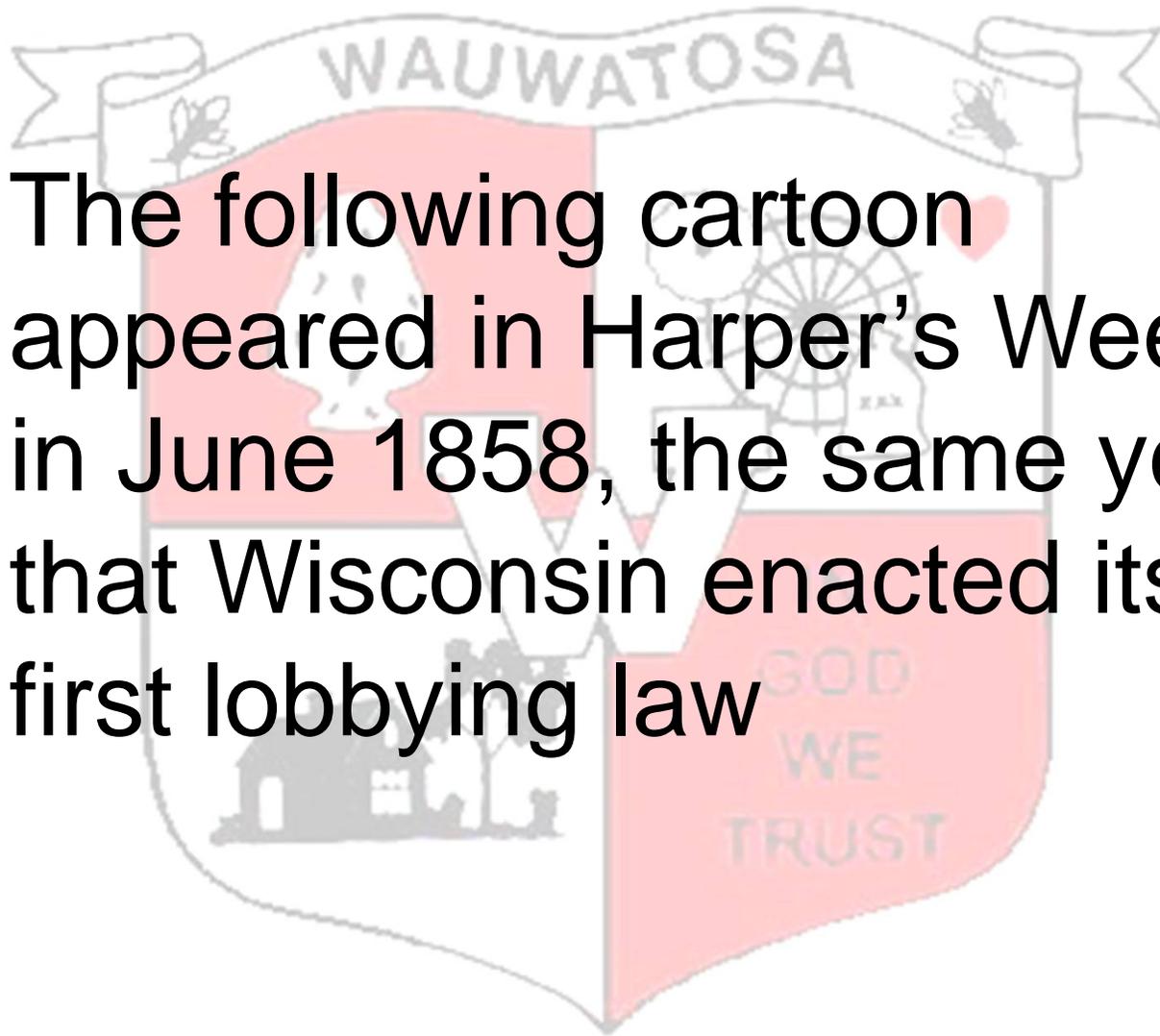


The ABC's of Wisconsin's Code of Ethics for Local Government Officials

Alan Kesner
Wauwatosa City Attorney
May 6, 2014

(Modified from original
presentation prepared by
Wisconsin Government
Accountability Board)

The following cartoon appeared in Harper's Weekly in June 1858, the same year that Wisconsin enacted its first lobbying law





POLITICAL MARKET

Conscientious Rail- road President to

Dealer: "Ah! Let me see. I think I'll take this bunch of Legislators at \$5000 a head. The Senators, at - what price did you say?"

Dealer: "Can't afford 'em less than \$10,000 each."

R.R.P.: "Well, hand them over. I suppose I'll have to take the lot."

Cartoon published in *Harper's Weekly* of June 12, 1858, at the time of the Land Grant Investigation

The big picture (why have a code of ethics?)

- Strengthen citizens' confidence in the integrity of governmental officials
- Help preserve the integrity of the governmental decision-making process
- Officials not to profit from holding public office

What local units of government are covered? [19.42(7u)]

Officials of:

§ All political subdivisions

§ Special purpose districts

§ An instrumentality or corporation of either

Who is covered within these units? [19.42(7w)]

- Elected officials
- County administrators and city and village managers
- Individuals appointed for a specified term
- Appointees serving at the pleasure of the governing body or chief executive

Use of Office For Private Benefit [19.59(1)(a)]

No local public official

May use his or her public position or office

To obtain financial gain or anything of substantial value

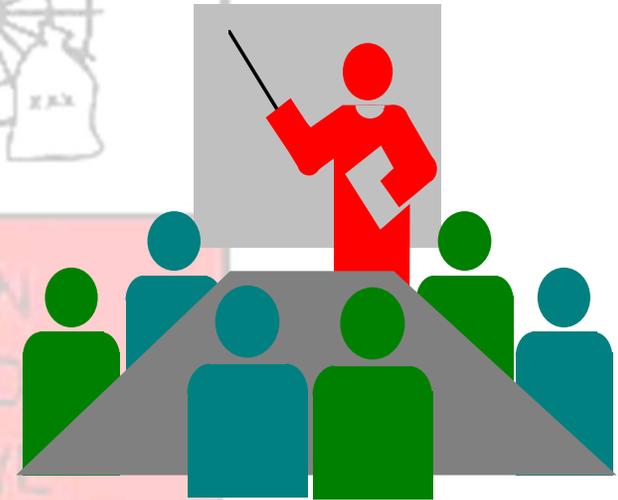
For the private benefit of himself or herself,

Or his or her immediate family,

Or for an organization with which the official is associated.

Exceptions:

- Items received on behalf of the local governmental unit and primarily for the benefit of the governmental unit
- Items unrelated to the individual's holding public office or position



Influence and Reward

[19.59(1)(b)]

No local public official

May solicit or accept

Anything of value

If it could reasonably be expected to influence the official's judgment

Or could reasonably be considered a reward for official action.

Conflicting Interests

[19.59(1)(c)]

No local public official

May take any official action

Substantially affecting a matter

In which the official, a member of his or her immediate family, or an organization with which the official is associated

Has a substantial financial interest.

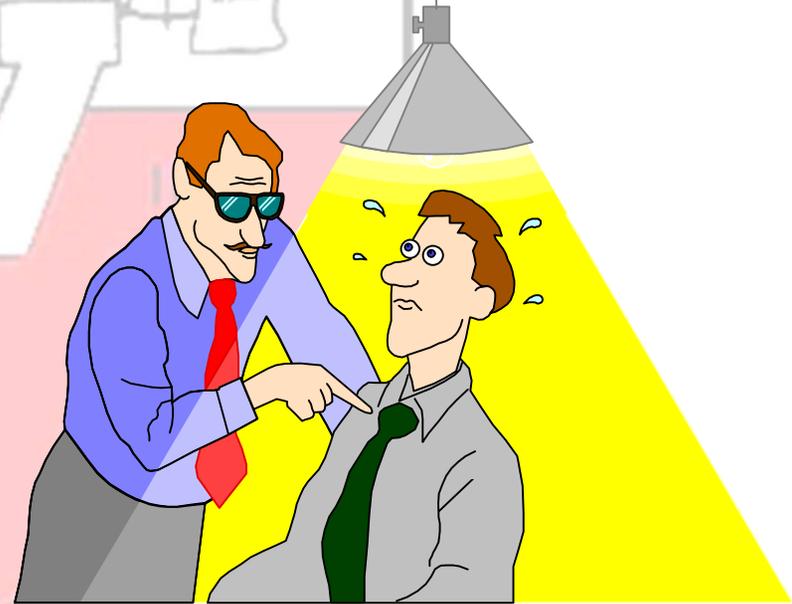
Standards and rules an official has to know!!



- *Don't accept items or services offered to you because of your position*
- *Don't participate in decisions which affect you financially*

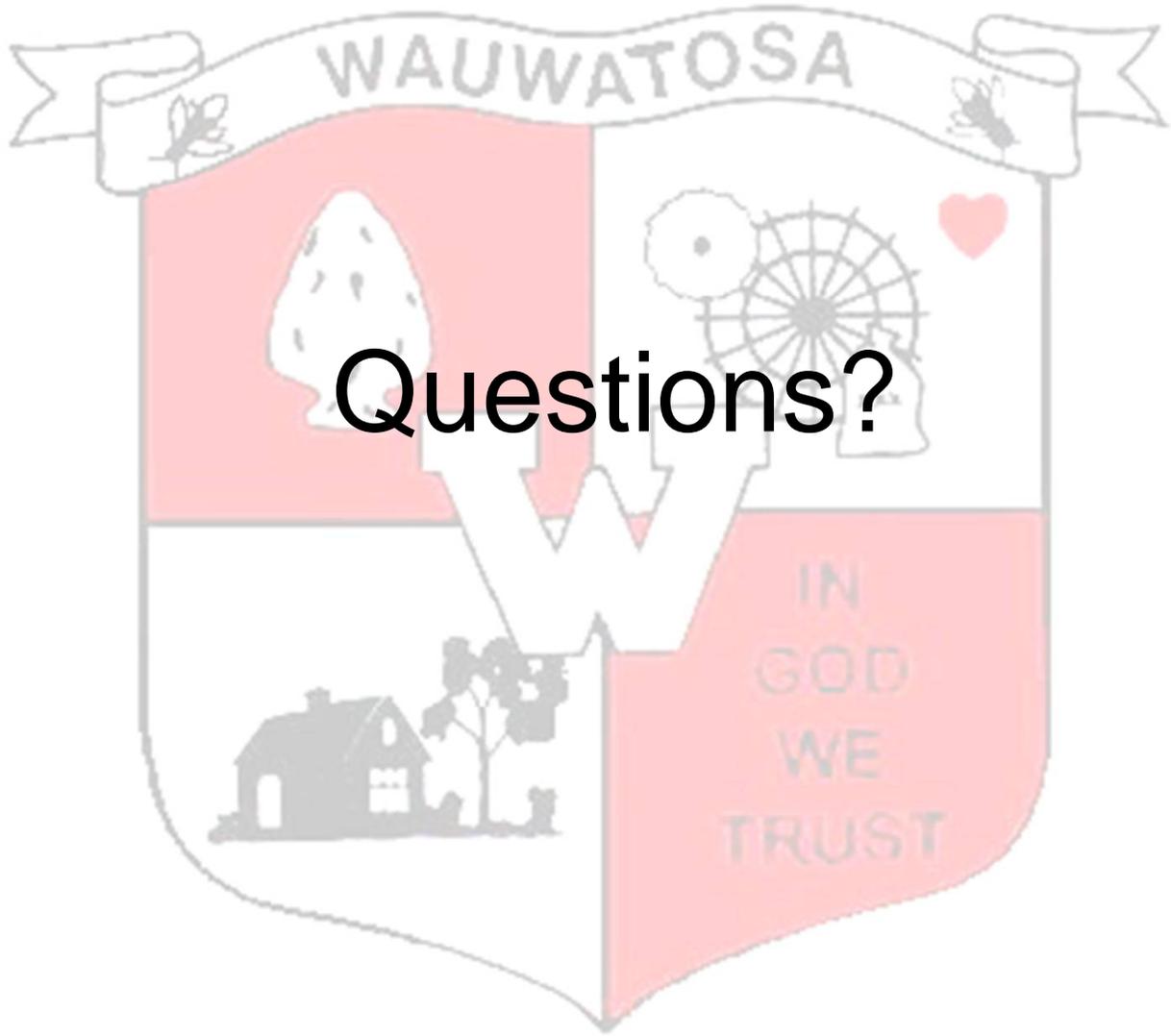
Enforcement and penalties

- District Attorney, Attorney General
- \$1,000 forfeiture
- \$5,000 fine and 1 year imprisonment



Where to get more information

- City Attorney
- Government Accountability Board, Ethics and Accountability Division
<http://gab.wi.gov/ethics>
 - Guidelines
 - Advisory opinions [Prompt, confidential, authoritative]
 - Ethics Board's staff

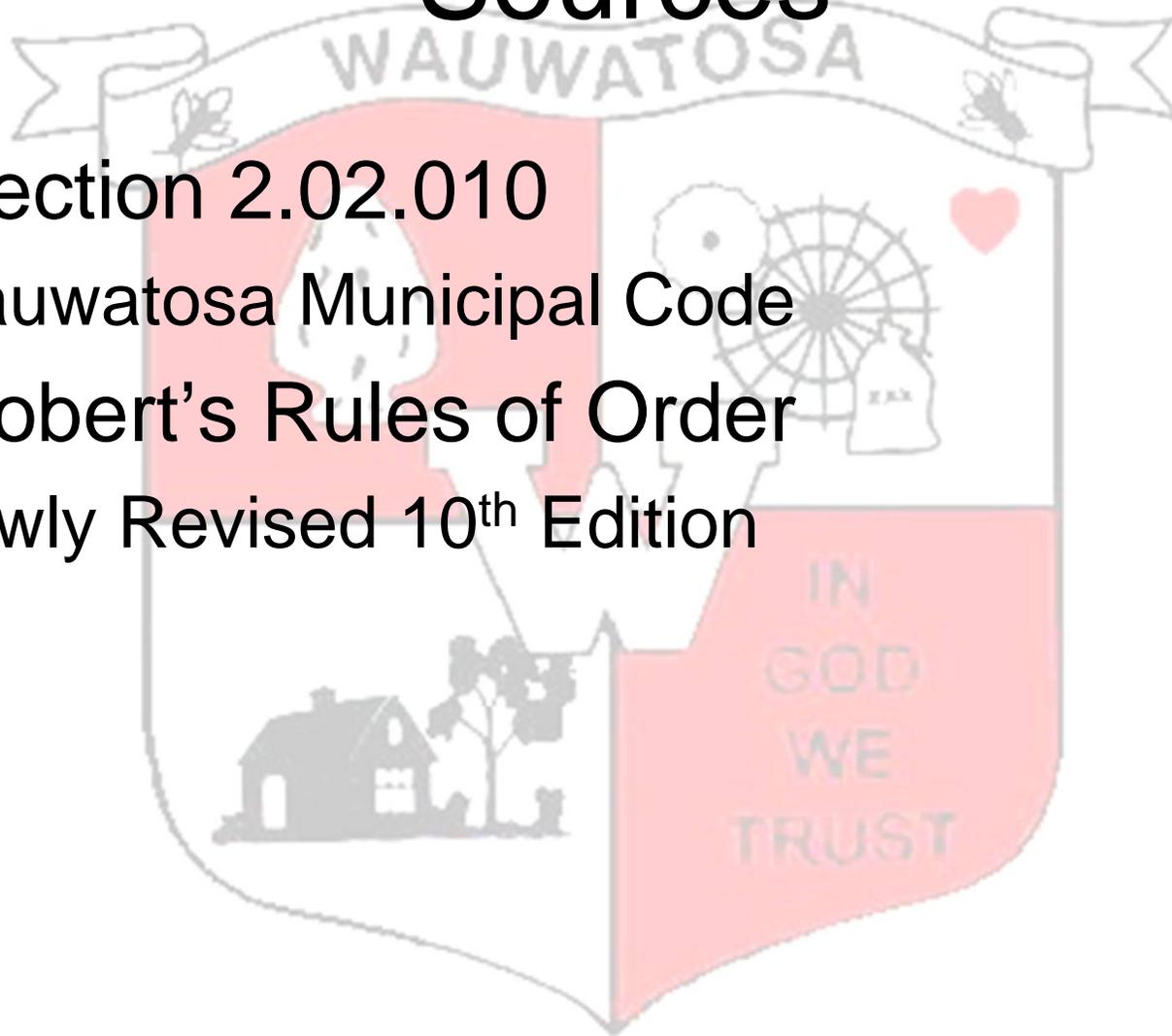


Meeting Procedure

Alan Kesner
Wauwatosa City Attorney
May 6, 2014

Sources

1. Section 2.02.010
Wauwatosa Municipal Code
2. Robert's Rules of Order
Newly Revised 10th Edition

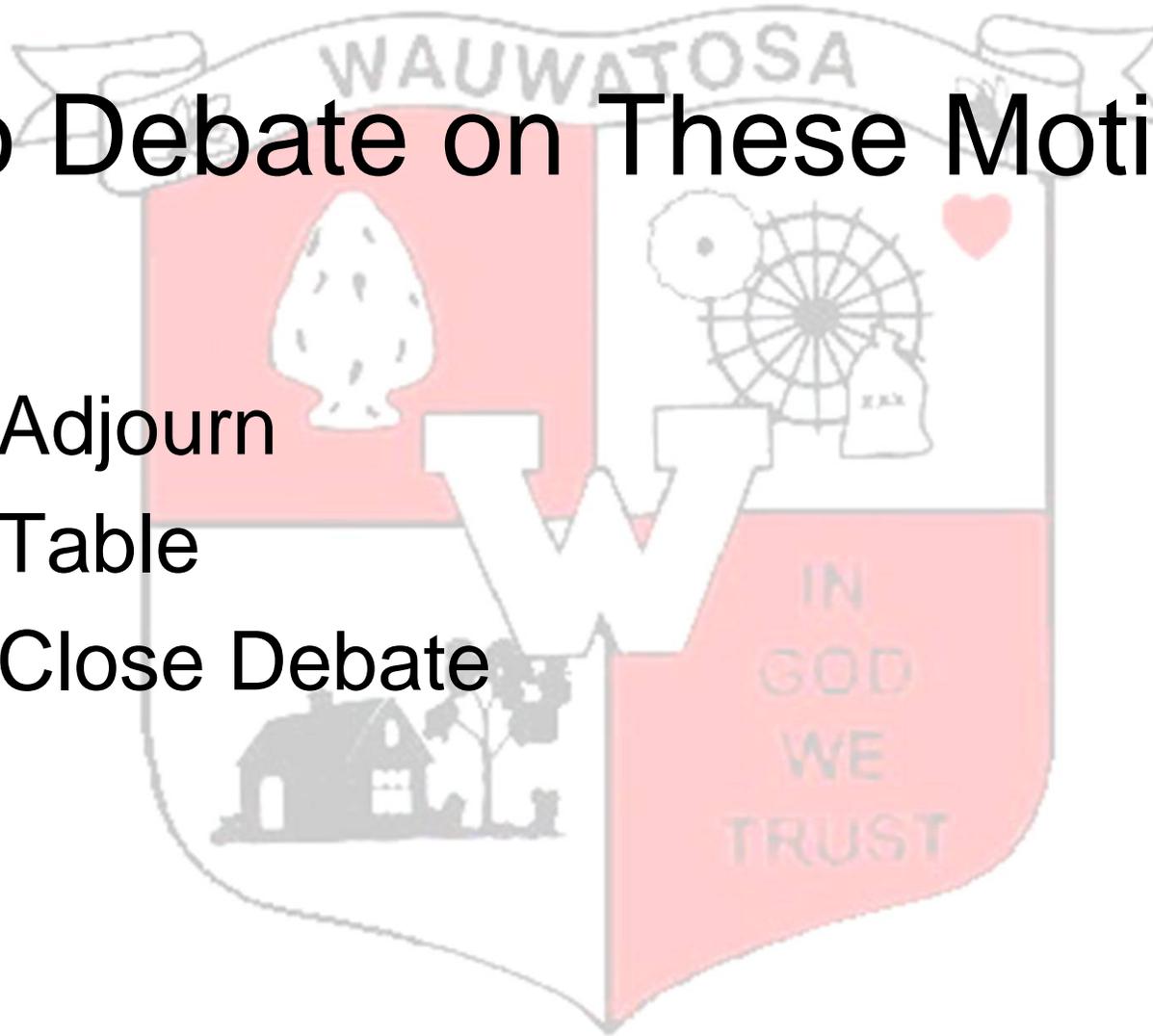


Order of Precedence of Motions

1. To adjourn;
2. To table;
3. To close debate;
4. To postpone to a certain day (“hold”);
5. To refer to a standing committee;
6. To refer to a special committee;
7. To amend;
8. To postpone indefinitely (“place on file”)

No Debate on These Motions

- To Adjourn
- To Table
- To Close Debate



To Speak on a Matter

- gain recognition from the presiding officer
 - When two or more members request the floor at the same time, the presiding officer shall determine who is first to speak
- avoid personalities
- confine remarks to the question under debate
- no member shall speak more than twice on any question

Abstentions (“Present”)

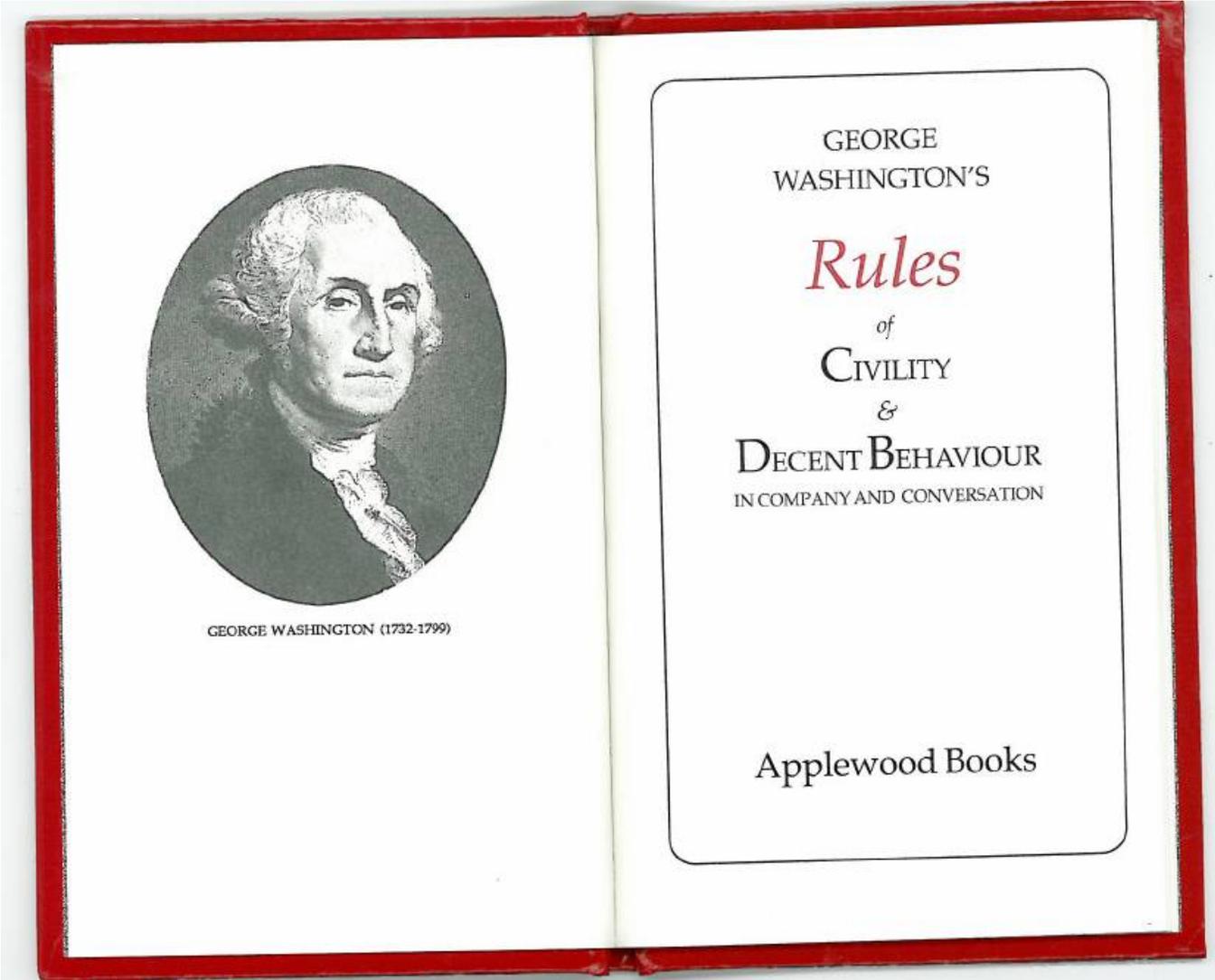
- Every member expected to vote “aye” or “no”
- If a member abstains, it is expected that the member will state reasons for abstaining
- Any member may request the cause for the abstention by the nonvoting member
- A nonvoting member need not respond to such request, but such refusal shall be noted in the minutes

Reconsideration

- Any member who voted with the prevailing side on a question may move for reconsideration of the vote:
 - At any time during the same meeting
 - At the next succeeding regular meeting of the council (if the member had announced his intention to move for reconsideration at the prior meeting)

Odds and Ends

- Any member desiring to change vote on any question must do so before the presiding officer announces the result of the vote.
- On all questions it shall be in order for any member to demand a roll call vote.
- Additional Detail from Roberts Rules.



Washington's Rules of Civility and Decent Behavior (highlights)

1st EVERY action done in company ought to be with some sign of respect to those that are present.

35th LET your discourse with [others] of business be short and comprehensive.

49th USE no reproachful language against any one; neither curse nor revile.

50th BE not hasty to believe flying reports to the disparagement of any.

Washington's Rules of Civility and Decent Behavior (cont'd)

- 58th LET conversation be without malice or envy, for it is a sign of a tractable and commendable nature; and in all cases of passion admit reason to govern.
- 67th DETRACT not from others; neither be excessive in commanding.
- 77th TREAT with [others] at fit times about business; and whisper not in the company of others.
- 88th BE not tedious in discourse, make not many digressions, nor repeat often the same manner of discourse.

Washington's Rules of Civility and Decent Behavior (110th and final rule)

*“Labour to keep alive in your
breast that little celestial fire
called conscience.”*

