It's time to reform Wisconsin's outdated open government laws

By Richard Moore
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Over the past several decades, the open government movement has become a powerful force in Wisconsin. Every public official, both right and left, is committed to "letting the sun shine in."

They don't hesitate to announce it in press releases, either, especially during the annual celebration of open government known as Sunshine Week.

The truth is, though, the open government movement is in serious trouble. In fact, this is one of the darkest moments in "letting the sun shine in" that we have endured since the movement itself became a popular force in the 1970s, all those press releases notwithstanding.

That's true in the United States, and it's true in Wisconsin. Especially in the past decade, government officials at all levels have more and more masked our ability to see into certain areas of government activity.

There has always been a natural tension between transparency and secrecy. But in recent years that tension has given way to aggressive new threats against openness as those in power seek not merely to bend and exploit the law where they can but to rewrite and repeal the law altogether.

That one distinctive change in strategy makes reforming our state's open government laws an imperative, and an urgent one at that.

Not that there haven't been some notable achievements. Among other things, most records are presumed to be accessible, and records requesters don't have to reveal their identities or reasons for seeking records. In sum, the state's open meetings and open records laws presume openness, and its codified requirements have been considered foundational.

But there have been colossal setbacks. For one thing, our open government statutes are outdated and vague. Once it was enough to say that records must be released "as soon as practicable and without delay." These days that could be a year or more.

Government business was also one understood by everyone to mean "discussion, decision or information gathering" about a matter over which the government had jurisdiction. Last year, a judge took it upon himself to rewrite the definition of government business to mean "discussion, decision or information gathering" — and here's his freelance addition — that ultimately requires a formal vote of the governmental body.

That's right, the judge ruled that, as long you don't take a vote, a government body just getting together to discuss government "topics" within its jurisdiction isn't government business at all and doesn't have to be noticed to the public. That case is under appeal.

In a stunning 2014 decision, a state appeals court ruled when government officials say a record is exempt from release, we must take their word for it. Period. No judicial review. No questions allowed. No matter whether they are authentic or forged, records are exempt from release anytime a government official says they are.

All totaled, the state's judiciary has stacked so many bad decisions upon bad decisions that case law resembles a Dagwood sandwich, and it has rendered the state's open government statutes, which were too vague to begin with, virtually unrecognizable.

The Legislature and the governor are no better. The Legislature exempts itself from records retention laws, and, in 2015, the previous governor and the entire Legislature tried to effectively repeal the open records statutes.

Attempts to absurdly expand legislative immunity from civil lawsuits for the entire length of a term, efforts to conceal identities of those whom lawmakers are communicating with, initiatives to close off work records to foreclose public knowledge of special interests involved in drafting legislation — those are just the tip of the iceberg, the more complex machinations of a secrecy-obsessed Legislature.

As for the current governor, Tony Evers has already been sued three times for open government violations, once in a case in which he aggressively tried to rewrite the records statute to redefine "or" to mean "and" and in the process make broad public oversight impossible.

When both the state's legislative and executive branches are so entrenched in hole-and-corner conduct, two nightmarish scenarios are likely to play out.

First, sooner or later, they will gut the open government laws completely. Their failure to do so in 2015 has not stopped them from trying; now the Legislature and the governor simply chip away here and there, trying to deliver death by a thousand cuts.

The second ramification is the bad message it sends to local officials. If the Legislature isn't going to follow the law, if the governor isn't going to follow the law, why should anyone else?

Perhaps the most important threat to open government is the lack of consequences for breaking existing transparency laws. Right now, an open meetings or open records violation will incur a small forfeiture or, more often, nothing more than a scolding. When a prosecutor announces that he or she doesn't consider open government violations serious enough to cite or to impose even the statutory penalty, he or she is announcing that it is OK for others to break that law.

None of this is to argue there is no hope. Just the opposite. Important institutions have emerged to fight secrecy, new entities such as the Wisconsin Transparency Project along with age-old allies of openness such as the Wisconsin Freedom of Information Council. Organizations such as the Wisconsin Institute for Law & Liberty and the MacIver Institute have also taken up the fight.

In the past several years, too, citizens in small towns, such as in Boulder Junction, have fought against government secrecy and won. These average citizens point to a path for victory, but all of us must listen to what they have to say, for our most basic freedoms are on the line.

It is said free speech is the key to all our other civil liberties, including open government. Without it, indeed, transparency fails for lack of voice and standing. Similarly, government transparency — open government, open records, open meetings — is the functional imperative of free speech.

For without full access to information regarding the functioning of government, citizens have no meaningful way to judge and debate government actions, or to hold officials accountable. Without transparency, no cause — liberal or conservative — no cause at all can truly be authenticated and debated and decided in the public square, for the public square will not be in the arena of decision-making.

Now is the time to focus our attention on openness as a foundational principle to be fought for in every political campaign and in every advocacy movement. Now is the time for stakeholders to come together to seriously contest a growing Dark State.

In 2010, in his first campaign for governor, Scott Walker promised to convene a committee of stakeholders to reform open government laws. It never happened. More calls for reform came after the 2015 effort to kill the laws completely, but again no action was taken, mainly because many stakeholders believed, correctly, that "reform" might make the laws even weaker.

Now, however, that is happening anyway. Transparency advocates can ill afford to wait any longer. Now is the time to come together and demand reform.

In an 1804 letter to John Tyler, Thomas Jefferson opined that the young nation's "first object" should be "to leave open to (citizens) all the avenues to truth." It will take Republicans and Democrats working together to keep those avenues brightly lit in an age of growing darkness.

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