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May 4, 2009

Mr. Paul Penkalski
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Dear Mr. Penkalski:

You previously had an exchange of emails with Assistant Attorney General Alan Lee concerning the status under Wisconsin's open meetings law of the Wisconsin Hoofers, which is a group of outdoor recreation clubs affiliated with the Wisconsin Union at the University of Wisconsin-Madison. More specifically, you have asked whether the Hooper Council, which is the governing board of the Hoofers, is a governmental body subject to the requirements of the open meetings law. Due to Mr. Lee's retirement, I have been asked to respond to your inquiry.

In order to assist this office in responding, you have submitted a number of documents related to the governance of the Hoofers organization and its relationship with the Wisconsin Union. Those documents include: (1) a copy of the Hooper General Constitution; (2) a copy of Wisconsin Union Policy SE11-0, "Outdoor Program Office Purpose"; (3) a copy of Wisconsin Union Policy SE3-8, "Leadership of Union Committees and Clubs"; and (4) a copy of Wisconsin Union Policy SE5-7, "Guidelines on the Operation of Hoofers."

The open meetings law broadly defines a "governmental body" as "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Sec. 19.82(1), Wis. Stats. That definition plainly defines a "governmental body" primarily by the way in which the body has been *created*—i.e., whether it is "created by constitution, statute, ordinance, rule or order." Sec. 19.82(1), Wis. Stats.

The Wisconsin Department of Justice has long construed the words "constitution" and "statute," as used in section 19.82(1) of the Wisconsin Statutes, as being limited to the constitution and statutes of the State of Wisconsin. It is apparent, at the threshold of the present inquiry, that the Hooper Council is not created by the Wisconsin Constitution or by any provision in the Wisconsin Statutes. Nor is that entity created by any local ordinance or by any administrative rule promulgated by a government agency. It follows that the Hooper Council

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could be considered a “governmental body” subject to the open meetings law only if it was created by “order.”

The term “order,” as used in section 19.82(1), has been broadly construed by this office to include any directive, formal or informal, that creates a body and assigns it some governmental powers or duties. *See* 78 Op. Att’y Gen. 67, 68-69 (1989). This includes directives issued by governmental bodies, presiding officers of such bodies, or certain high-ranking government officials such as a county executive, a mayor, or a head of a state or local agency, department, or division. *See id.* at 69-70.

In order to ascertain whether the Hooper Council is a “governmental body,” therefore, it would be necessary to determine whether there exists any formal or informal governmental directive creating the Hooper Council and assigning it some governmental powers or duties. This is a factual and historical question. The Department of Justice, when responding to open meetings inquiries submitted by private parties pursuant to section 19.98, cannot conduct factual and historical investigations. All that this letter can do, therefore, is to address whether the documentary materials that you have submitted are sufficient to establish the existence of such a directive creating the Hooper Council and assigning it some governmental function.

The documents that you have submitted contain no evidence that either the Hoopers organization as a whole, or the Hooper Council in particular, has been created by any directive of the University of Wisconsin Board of Regents or any other University of Wisconsin official. Those documents do establish the existence of a relationship of affiliation or sponsorship between the Union Council, which is the governing body of the Wisconsin Union, and the Hoopers. The documents do not, however, establish that either the Hoopers organization or the Hooper Council has been created by any directive of the Union Council.

On the contrary, the very existence of an organizational charter such as the Hooper General Constitution, which you have provided, suggests that the Hoopers organization has been created not by any directive from the Union Council, but rather by the unilateral action of its own members. Likewise, the Hooper Council is created not by any directive of the Union Council, but rather by Article IV of the Hooper General Constitution—that is, by the organizational action of the Hooper members themselves. The purposes of the Hoopers, as enumerated in Article II of the Hooper General Constitution, are also those of a member-organized recreational and educational club.

It is true that Article VII, sec. 3 of the Hooper General Constitution requires that any amendment to that Constitution must be approved by the Union Council and Article IX recognizes the authority of the University of Wisconsin-Madison and the Union Council “to govern the Union buildings and the activities carried on by Hoopers.” These provisions, however, do not establish that the Hoopers or the Hooper Council have been *created* by any

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directive of the Union Council, but rather establish, at most, that the Hooper members, in organizing themselves and operating their organization, are subject to a degree of governance and oversight by the Union Council. The mere fact that an organization is subject to governmental regulation does not mean that the organization is *created* by a governmental directive and does not suffice to make that organization a governmental body. Otherwise, every student club and organization at the University of Wisconsin would be subject to the open meetings law, which clearly cannot be the case.

Nor can the Hoopers or the Hooper Council be considered a governmental body by virtue of Article III of the Hooper General Constitution which provides that only members of the Wisconsin Union are eligible for Hooper membership. Once again, the fact that the Hoopers have chosen to open their own membership to all Union members does not establish the existence of any directive from the Union Council creating the Hoopers or the Hooper Council.

The various Wisconsin Union Policies that you have submitted also do not establish the existence of any directive by the Union Council creating the Hooper Council and assigning it some governmental function.

Wisconsin Union Policy SE11-0, which sets out the purposes of the Wisconsin Union's Outdoor Program Office, indicates that the mission of that office includes "promot[ing] safe, responsible, educational, and enjoyable outdoor adventures via the Wisconsin Hoopers" and "provid[ing] quality advice to the Hooper leadership and membership in order to help them make the best choices for their clubs." The policy also states that "[t]he Wisconsin Union Outdoor Program Office and Wisconsin Hoopers will partner together to create and sustain one of the premier collegiate outdoor programs in the country."

These policy provisions demonstrate, at most, that the Wisconsin Union has goals in the area of outdoor recreational programming that overlap with the goals of the Hoopers and that the Wisconsin Union has, therefore, chosen to enter into a *partnership* relationship with the Hoopers in which the two entities will cooperate to advance their shared goals. A decision by the Union to enter into such a cooperative partnership with the Hoopers is not a directive creating the Hoopers or assigning it any governmental powers or duties. On the contrary, the use of the word "partner" suggests that the Union Council recognizes the autonomy of the Hoopers.

Likewise, the same Union Policy states that "[w]e value the long and rich histories of the Wisconsin Hoopers and the Wisconsin Union as organizations [that] have been innovators in their respective fields. We acknowledge the grassroots history of Hoopers as a member-driven program." This express acknowledgement by the Wisconsin Union that the Hoopers are a historically independent and member-driven organization strongly supports the conclusion that the Hoopers have not been created by any directive of the Union Council.

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You have also submitted a copy of Wisconsin Union Policy SE3-8, which governs "Leadership of Union Committees and Clubs." That policy encourages and affirms the importance of student leadership in Union-sponsored clubs, but also expressly recognizes that the election of club officers is governed by the clubs' own constitutions and not by the Union Council. This recognition of autonomous club governance, again, supports the conclusion that Union-sponsored clubs are not created by any directive of the Union Council.

The same Union Policy also requires that the governing boards of the Hooper Council and each of the component Hooper clubs must maintain a student majority. In addition, each semester, the president of each component Hooper club must document compliance with this requirement to the Union Council. As previously discussed, however, the fact that the Hooper Council and the Hooper clubs are subject to regulation by the Union Council does not mean that those organizations are created by any directive of the Union Council. This provision of Policy SE3-8 thus provides no evidence that the Hooper Council should be considered a governmental body.

Finally, you have submitted a copy of Wisconsin Union Policy SE5-7, which provides "Guidelines on the Operation of Hoopers." That policy contains a number of provisions setting forth a variety of interrelationships between the Union and the Hoopers. The provisions are too numerous to be discussed in their entirety, but for present purposes most of them can be considered under four main categories.

First, there are provisions imposing a variety of requirements on the Hoopers. For example: representatives of the individual Hooper clubs are required to inform an advisor from the Union staff about any issues affecting the Union; the Hoopers are required to recognize the Union's constitutional requirements governing the relationships between the Union and the clubs that it sponsors; the Hoopers are required to follow budget procedures established by the Union Council and Union Directorate and to submit their budgets for review by the Union Directorate; the constitutions of the Hoopers organization and of its component clubs may not conflict with the Union Constitution; individual club constitutions must be approved by the Union Council; and publicity for Hooper programs is required to recognize Hoopers as part of the Union.

These kinds of provisions are not directives creating the Hoopers or assigning the organization any governmental functions. They establish only that the Hoopers organization, the Hooper Council, and the individual Hooper clubs are subject to regulation by the Union Council. As has already been noted several times, the fact that an organization is subject to governmental regulation does not make it a governmental body.

Furthermore, insofar as can be ascertained from these Union Policy documents, it appears that the relationship between the Hoopers and the Wisconsin Union is one of voluntary affiliation in which the Hoopers have chosen to be subject to Union requirements as a condition of

eligibility for various benefits of Union affiliation, such as funding, resource support, or technical assistance. When the Union offers such support to student organizations on the condition that they comply with certain requirements, it is not thereby creating those student organizations or assigning them a governmental function.

Second, there are provisions in Wisconsin Union Policy SE5-7 that are basically advisory in character. For example: Hooper members are encouraged to provide a welcoming and encouraging atmosphere for students; the "Hooper Council is encouraged to provide educational programs and to support coalition building, and action in the field of conservation"; it is recommended that each Hooper club have one or more sponsors from the University faculty or academic staff to serve as resources for technical information and assistance; "the leadership of Hoopers should reflect a diversity of backgrounds and ideas"; and the Hoopers are "expected" to maintain adequate financial reserves in their treasuries for certain purposes and to use some of their funds to purchase equipment and to provide programs and services for students.

The repeated use of such terms as "encouraged," "recommended," "should," and "expected" makes it clear that these provisions are advisory in nature and hence are not mandatory directives from the Union Council to the Hoopers. Moreover, such language of encouragement and recommendation appears to constitute an implicit acknowledgement by the Union Council that the Hoopers are an autonomous organization and are not simply a creature of the Union. In any event, even if these provisions were directives, they still do not create the Hooper Council or assign it any governmental functions.

Third, there are several provisions in Wisconsin Union Policy SE5-7 that appear to expressly recognize the autonomous status of the Hoopers, of the Hooper General Constitution, and of the Hooper Council. For example, the policy provides that the Union Council strongly supports the Hooper mission as stated in the Hooper General Constitution; recognizes that the Hooper clubs are governed by the Hooper Council as provided in the Hooper General Constitution; and quotes the following language from Article IV, section 5 of the Wisconsin Union's Constitution: "Such clubs as may be sponsored by the Union Council may organize on a club basis, electing their officers as their own organizational articles may prescribe."

In these provisions, the Wisconsin Union recognizes that Union-sponsored clubs such as the Hoopers are not created by the Union, but rather are organized by their own members on a club basis pursuant to their own organizational charters. Once again, such express acknowledgement by the Wisconsin Union that the Hoopers are an independent and self-organized entity strongly supports the conclusion that the Hoopers have not been created by any directive of the Union Council and hence are not a governmental body.

Finally, Wisconsin Union Policy SE5-7 provides that the Hooper Council may allocate funds for certain educational programs related to Hooper activities and may request programming

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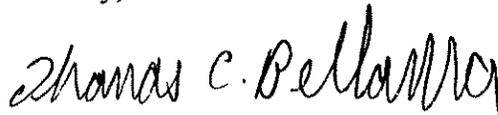
funds from the Union Council. The policy does not document the exact nature of the funding relationships between the Wisconsin Union and the Hoofers. However, the mere fact that the Hoofers may receive funding from the Union and that the Union's policies may prescribe guidelines for the use of such funding does not create the Hoofers, nor does it constitute a delegation of any governmental powers or duties to the Hoofers. Private entities that receive public funding for one purpose or another are frequently subject to guidelines and regulations that accompany that funding, without thereby being transformed from private entities into governmental bodies.

For all of the above reasons, it is my conclusion that the documents you have submitted do not establish that either the Hoofers organization as a whole, or the Hooper Council in particular, has been either created or assigned any governmental powers or duties by any governmental directive. Based on the available evidence, therefore, the Hooper Council appears not to be a "governmental body" subject to the open meetings law.

Of course, as previously noted, whether the Hooper Council is a "governmental body" is a factual and historical question that cannot be fully investigated in a letter of this nature. Accordingly, the conclusions reached in this letter are based only on the facts that can be derived from the limited materials you have submitted. If an open meetings law enforcement action were commenced, all of the parties would have an opportunity to develop a complete factual record regarding all of the legally relevant circumstances. Such a complete record might or might not support the conclusions reached in this letter.

I am sorry that it is not possible for the Department of Justice to provide a more definitive analysis of a question of this nature, but I hope that the discussion above is helpful to you and thank you for your interest in promoting compliance with the open meetings law.

Sincerely,



Thomas C. Bellavia
Assistant Attorney General

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