STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

January 25, 2010

I—01—10

Ms. Stephanie Jones
The Journal Times
212 4th Street
Racine, WI 53405

Dear Ms. Jones:

You ask three questions regarding the meeting practices of a five-member governmental body created by the City of Racine to review loan applications submitted by city residents for improvements to properties located in the city, and to administer the loans made as a result of granted applications. The minutes of the body's meetings occasionally reflect that the body took action to confirm or to reaffirm the results of email votes of the body's members conducted outside the course of a regularly scheduled meeting. On at least one occasion, the body's reaffirmation of an email vote occurred under the subject heading "Old Business" in the body's meeting notice, without any additional description of the loan in question. Based on these facts, you ask three specific questions: first, whether the open meetings law allows governmental bodies to take action by email voting; second, whether the governmental body should provide advance public notice of its email votes; and third, whether a governmental body may reaffirm the results of an email vote conducted without prior public notice under the subject heading "Old Business."

Voting by email. The two most basic requirements of the open meetings law are that a governmental body must give advance public notice of each of its meetings and must conduct all of its business in open session unless a specific exemption applies. Sec. 19.83(1), Wis. Stats.

A "meeting" of a governmental body occurs when enough members of the body convene to determine the body's course of action and those members convene "for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Sec. 19.82, Wis. Stats.; *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). The "convening" of members of a governmental body is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Thus, the Department of Justice has advised that written communications transmitted by email may constitute the convening of members, depending on how the communications

medium is used. *See Wisconsin Open Meetings Law: A Compliance Guide* (August 2009), at 7-8 (*http://www.doj.state.wi.us/dls/OMPR/2009OMCG-PRO/2009_OML_Compliance_Guide.pdf*, last visited December 18, 2009).

The "convening" of members of a governmental body also extends to communications among separate groups of members of the body, each less than quorum size, where the members agree, tacitly or explicitly, to act uniformly in a number sufficient to reach a quorum. The courts have given the label "walking quorum" to these types of communications. *Showers*, 135 Wis. 2d at 92; *see also State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). The Department of Justice has advised that a walking quorum cannot be avoided by using an agent or surrogate to poll the members of a governmental body through a series of individual contacts. Such a scheme "almost certainly" violates the open meetings law. Clifford Correspondence, April 28, 1986 (individual, serial contacts of Investment Board members by board's legal counsel, for purpose of obtaining each member's vote, constituted an unlawful meeting) (copy enclosed). *See also* Herbst Correspondence, July 16, 2008 (use of administrative staff to individually poll a quorum of members regarding how they would vote on a proposed motion at a future meeting is a prohibited walking quorum) (copy enclosed).

Where the elements of a meeting are satisfied, the open meetings law requires that the meeting must have been preceded by public notice and must begin in open session. Sec. 19.83(1), Wis. Stats. The public notice must "set forth the time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. "Open session" is defined as a meeting "which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Sec. 19.82(3), Wis. Stats.

The email voting by members of the city governmental body in question amounted to the exercise of the body's responsibilities, authority, power or duties, and therefore was the conduct of governmental business. In addition, it appears that enough members participated in the voting to determine the course of the body's action. Moreover, it appears that the members voted with the understanding that the body's action would be determined by the number of votes in favor of or in opposition to the question that was the subject of the committee's vote. The members' apparent agreement to determine the body's course of action in this way fits the definition of a "walking quorum" type of "meeting" outlined in the *Showers* and *Conta* cases, to which the public notice and accessibility requirements of the open meetings law applied.

Public notice of email voting. There is no suggestion in the facts you have provided that the email votes occurred on a specific day, at a specific time, or in a specific place, or that any vote was preceded by a public notice that purported to identify the date, time, or place of the voting. In the absence of a meeting notice that provided time, date, and place information, members of the public could not have reasonable access to observe the body's exercise of its powers or responsibilities. Although it is not appropriate for me to speculate whether a

governmental body could create some type of email voting protocol and public notice that would satisfy the public notice and public accessibility requirements of the open meetings law, a governmental body almost certainly violates the open meetings law if it takes binding collective action by aggregating the email votes of its members in using a method that allows no opportunity for public observation of the process.

Use of "Old Business" subject designation. As noted, every meeting notice must give the "time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all. Heupel Correspondence, August 29, 2006 (copy enclosed). Measured against this standard, the meeting notice which merely identified "Old Business" as a subject did not reasonably apprise members of the public that the body would use that subject description to reaffirm an email vote conducted previously without any prior public notice of that email vote.

I hope the information in this letter is helpful to you and thank you for your interest in compliance with the Wisconsin open meetings law.

Sincerely,

J. B. Van Hollen
Attorney General

JBVH:BAO:ajw

Enclosures

c: Scott R. Letteney
Deputy City Attorney
City of Racine

The State of Wisconsin
Department of Justice

123 West Washington Avenue
Mailing Address: P.O. Box 7857
Madison, Wisconsin 53707-7857

April 28, 1986

Bronson C. La Follette
Attorney General

Gerald S. Wilcox
Deputy Attorney General

Ms. Linda M. Clifford
La Follette and Sinykin
Post Office Box 2719
Madison, Wisconsin 53701-2719

Dear Ms. Clifford:

As attorney for the Wisconsin Newspaper Association and Freedom of Information Council, you requested that this office investigate, and, if appropriate, bring an action under section 19.97, Stats., to enforce the alleged violation of the open meetings law by members of the State Investment Board.

You state:

> On Monday, March 10, 1986, the State Investment Board "voted" to request that Alcan Aluminum Ltd. withdraw its investments from South Africa. The vote did not take place at an open meeting properly noticed under § 19.84, Wis. Stats. The vote apparently was conducted by polling board members in individual telephone conversations initiated by board legal counsel and assistant secretary ....
>
> . . . .
>
> The Investment Board apparently denies that its phone calls constituted a "meeting" because, as its legal counsel stated, "We did not have a meeting as such because I talked to only one member at a time." See Milwaukee Sentinel. The board also denies it ever had a quorum because its members did not gather in one place at one time. That does not, however, remove the series of telephone calls from the definition of "meeting."
>
> ... All but one of the board's members was contacted and, together, they constituted a quorum, even though polled separately. ...
>
> . . . .
>
> Even though the board's phone calls were "one on one," the serialization and sum of the individual calls resulted in a "walking quorum" and a "meeting" within

the meaning of § 19.82(2). The sum of the members' votes became a binding action of the Investment Board, and the board's counsel apparently interpreted it as such. Indeed, from the statements of the board's legal counsel, it appears that the telephone calls were arranged with the intention of avoiding the notice and accessibility requirements of the Open Meetings Law.

From the newspaper account and from our limited investigation it appears that some person wanted action to be taken by the board on the proxy voting with accompanying statement on South Africa's policies without the necessity of formally having the members assemble in one place for a regularly noticed meeting, or without proceeding to arrange telephone facilities for public monitoring and giving the notice required for a telephone conference meeting as outlined in 69 Op. Att'y Gen. 143 (1980). Some person or persons must have considered that time restraints with respect to filing deadline justified resort to the unusual one-on-one procedure, even though at added travel and telephone expense and limited preparation, a duly noticed open session or noticed and accessible telephone conference session could have been scheduled. A member of the board's staff has advised a member of my staff that the polling procedure was undertaken in partial reliance upon a letter signed by me, dated March 29, 1977, directed to Senator Ronald G. Parys, a copy of which is enclosed. That letter states that it would be permissible to mail copies of bills to committee members with a request that they advise in writing how they would vote. When used on a limited basis and not to circumvent the open meetings law, such procedure is not in itself necessarily violative of the law. The letter possibly suggests by implication that the written response would constitute an actual vote of the member to form the basis for formal action by the committee. To the extent that any such implication can be drawn, I retract any statement or suggestion that a governmental body can take action or otherwise conduct business as a body by mail or in any manner other than when duly convened on such notice as is required by law.

The staff member further advised that the voting of the proxy with political policy statement would be placed on the agenda for an upcoming regular meeting of the board for ratification. The board, however, has already acted, although its action is probably voidable. The political statement has been made and widely reported in the media. It would be almost impossible to recall the proxy which may have been submitted and counted at the corporate level.

The Wisconsin Investment Board is created by section 15.76 and consists of eight members. Its procedures are in part governed by section 15.07, which in material part, provides:

> (3) FREQUENCY OF MEETINGS. (a) If a department or independent agency is under the direction and supervision of a board, the board shall meet quarterly and may meet at other times on the call of the chairman or a majority of its members.
>
> (4) QUORUM. A majority of the membership of a board constitutes a quorum to do business and, unless a more restrictive provision is adopted by the board, a majority of a quorum may act in any matter within the jurisdiction of the board.

The board has the program responsibilities set forth in section 15.761. Specific powers of the board are set forth in chapter 25. Although section 25.16(6) provides that the executive director of the board shall execute "[a]ll documents which must be executed by or on behalf of the board ...." Subsection (1) provides that executive and administrative functions are subject to the board's policies, principles and directives. Sections 25.15, 25.156 and 25.17 empower the board with the primary duty of investment and collection of the stated funds and with making policy decisions with respect to such investments. The power to determine the manner in which stock proxies are to be voted is with the board but may be delegated to the executive director if reasonable standards are established. See sec. 25.156(1), Stats. Section IB 2.02(1), Wis. Adm. Code, allows the board to delegate to staff certain functions including the voting of proxies.

Section 990.001(8) provides: "JOINT AUTHORITY, HOW EXERCISED. All words purporting to give a joint authority to 3 or more public officers or other persons shall be construed as giving such authority to a majority ...."

A governmental body can only take formal action at a duly convened meeting and, except as may be otherwise provided by statute, members cannot vote by written or telephone proxy or through a non-member who appears at a meeting as a substitute. The statutes do not provide for voting by proxy or for delegation or substitution. The board and its members have only those powers which are expressly given by statute or necessarily implied. Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 329 N.W.2d 143 (1983); School Dist. v. Callahan, 237 Wis. 560, 297 N.W. 407 (1941). In 73 C.J.S. Public Administrative Law

& Procedure § 21 (1983), it is stated: "Ordinarily, membership on an administrative body carries with it the right to vote, and a restriction thereon will not be extended beyond the limitation clearly intended to be imposed." Members of the board have the right to vote, but such right is contingent upon their qualification and presence at a duly convened meeting.

Before one gets to the subject of the "anti-secrecy" law, a preliminary and more basic question is whether a public board can take any formal action other than at a meeting.

The general rule on this subject is expressed in 2 Am. Jur. 2d Administrative Law § 227 (1962, 1985 Supp.) as:

> The powers and duties of boards and commissions may not be exercised by the individual members separately although there are exceptions to this rule. Their acts, and, specifically, acts involving discretion and judgment, particularly acts in a judicial or quasi-judicial capacity, are official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum or the number designated by statute. However, "constructive" sessions are sometimes authorized.

4 McQuillin Municipal Corporations § 13.30 (3rd ed. 1979), expresses the same rule, but makes a distinction between ministerial acts and those requiring the exercise of discretion and judgment. It states:

> [I]f the act is one which requires the exercise of discretion and judgment ... unless provision is otherwise made by law, the persons to whom the authority is given must meet and confer and be present when the act is performed, in which case a majority of them, but no less, may perform the act; or, after all of them have been notified to meet, a majority having met will constitute a quorum of sufficient number to perform the act by a majority of the quorum, in the absence of a contrary provision by law. This is the common-law rule.

This is the general rule in Wisconsin and a number of cases, mostly involving actions by members of school boards, so hold. For example, in McNolty v. Board of School Directors of the Town of Morse, 102 Wis. 261, 263-64, 78 N.W. 439 (1899), our court wrote:

> It is familiar law that when a board of public officers is about to perform an act requiring the exercise of discretion and judgment the members must all meet and confer together, or must all be properly notified of such meeting, in order to make the action binding. Individual and independent action, even by a majority of the members of the board, will not suffice. Martin v. Lemon, 26 Conn. 192; School Dist. v. Baier, 98 Wis. 22.

A more recent case with a similar type of holding is State ex rel. Mayer v. Schuffenhauer, 213 Wis. 29, 33, 250 N.W. 767 (1933). In that case, the court stated:

> Where authority to do an act of public nature is given by law to more persons than one, or a majority of them, if the act is one which requires the exercise of discretion and judgment, unless the law provides for some exception, the members of the board to whom the authority is given must meet and confer when the act is performed.

(Emphasis added.)

The power of a board member to vote involves the exercise of discretion, is personal to the officer and is contingent upon attendance at a duly convened meeting of which he or she has notice. Absent statute, it cannot be delegated or exercised by proxy, by telephone or by mail.

All meetings of a governmental body, whether held in open session or reconvened into closed session for proper purpose must be preceded by notice. Secs. 19.83, 19.84 and 19.85(1), Stats.

Sections 19.81-19.98 are concerned with meetings of a governmental body. The board is clearly a "governmental body" within the meaning of the definition of that term in section 19.82(1). A material question is whether the procedure followed constituted a "meeting" within the definition of section 19.82(2), which provides:

> "Meeting" means the 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.

The procedure utilized by board staff, with at least the tacit consent of the members of the board who were polled, is contrary to the spirit if not the letter of the open meetings law. It is in circumvention of the law and a court might hold that it was in violation of the law. The participating board members or staff are in a "catch 22" situation. Claim is made that there was no convening of members in one place and hence no meeting, however claim is also made that the assembled votes constituted action of the board. The proxies were apparently executed, mailed and voted at the stockholders meeting of the corporation involved. Even if we assume that no board member talked to another board member or was in the same place as another board member, and that a staff member telephoned each of the eight members, a court might hold that the procedure did result in a "conference" intended to avoid the open meetings law and thereby constituted a "meeting" within the definition of section 19.82(2), and that sections 19.83 and 19.84 required such meeting to be preceded by notice and held in open session except as provided in section 19.85. The factual situation, however, is one or more steps removed from the factual situations discussed in State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976) ("negative quorum"), and in the recently decided case State of Wisconsin ex rel. Newspapers, Inc. v. Showers, 128 Wis. 2d 152, 382 N.W.2d 60 (1985). There the court held that a gathering of four members of an eleven member commission, after the conclusion of the public meeting, did not constitute a "meeting" under section 19.82(2). Even the "walking quorum" case cited in Showers, Brown v. East Baton Rouge Parish School Bd., 405 So. 2d 1148, 1155-56 (La.App. 1981), involved gatherings of a number of members of the given body in the same room at the same time.

You request possible prosecution without suggesting any desired procedure. If it could be proved that a meeting was held, prosecution for forfeiture under section 19.96 would lie against the chief presiding officer for failing to give the notice required by sections 19.83 and 19.84. To impose a forfeiture against the seven members who were polled and thereby allegedly "attended the meeting," the prosecutor or complainant would have to prove scienter, that the member "knowingly" attended "a meeting held in violation of this subchapter." Sec. 19.96, Stats. Proof of specific "intent" is not required. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979). Difficulty

might result from the fact that members of the board were apparently acting in a manner approved by staff counsel. See State v. Davis, 63 Wis. 2d 75, 216 N.W.2d 31 (1974). With respect to a forfeiture action proper venue poses a problem. The telephone calls were initiated in Dane County by a person who was not a member of the board. In a number of cases the member receiving the call was located in a different county. Venue would be in the county where the claim arose (violation occurred), where the defendant resides, or if the state officer is being proceeded against in an official capacity, in Dane County. Sec. 801.50(2)(a) and (c) and (3), Stats.

No purpose would be served by bringing an action in the nature of mandamus, injunction or declaratory relief as permitted by section 19.97(2) or to attempt to void the action taken by the board, since the proxies have been executed, mailed and presumably voted. We deem that this letter, a copy of which will be mailed to the board, will adequately advise the responsible officials and staff that the procedures followed in the March 10, 1986, polling of members by telephone without formally convening at a given place, without notice to the public and without providing a place where the public and media could access the proceedings was almost certainly in violation of the open meetings law, could not result in legal formal action of the board, and should not be repeated.

As a state public body, the board should be aware that section 19.82(3) requires that open sessions be held in a building and room thereof which enables access by persons with functional limitations, as defined in section 101.13(1). Also note that at open sessions "the body shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting." Sec. 19.90, Stats.

Sincerely yours,

Bronson C. La Follette
Attorney General

BCL:nls

Enclosure

cc: Edward E. Hales
Chairman
State Investment Board

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Thomas C. Bellavia
Assistant Attorney General
608/266-8690
bellaviatc@doj.state.wi.us
FAX 608/267-2223

July 16, 2008

Mr. Wayne L. Herbst
School Board Member
Park Falls School Board
N15879 Old 182 Road
Park Falls, WI 54552-8028

Dear Mr. Herbst:

This letter is in response to your May 29, 2008, letter to Attorney General J.B. Van Hollen in which you request advice regarding the application of Wisconsin's open meetings law to certain activities of the Park Falls School Board and the Glidden School Board.

You first ask whether adequate public notice was given for a joint meeting of the two school boards that took place on May 12, 2008. According to your letter and accompanying materials, the published notice for that meeting included the following agenda item: "Develop agreement on items to be included in board resolution to consolidate Park Falls and Glidden School Districts." Under that agenda item, according to the minutes of the meeting, the two school boards considered and voted in favor of five motions: a motion establishing an interim name for the consolidated school district and setting up a committee to develop a permanent name; a motion regarding the use of the Park Falls and Glidden school buildings for different grade levels; and three motions related to the size and composition of the school board for the consolidated district. Your letter asks whether the agenda item was sufficiently specific to apprise members of the public that the two school boards would take final action on the issues embodied in those five motions.

The open meetings law provides, in pertinent part, that the public notice of a meeting of a governmental body must "set forth the . . . subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. This statutory language requires a case-specific balancing analysis for the purpose of determining whether the notice reasonably informs the public of the subject in question under the particular factual circumstances of the case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 22 and 27, 301 Wis. 2d 178, 732 N.W.2d 804. The reasonableness standard does not invariably require a public notice to enumerate every specific issue or sub-issue that may be discussed at a meeting. *Id.*, ¶ 33. Rather, particular issues may be discussed under more general

subject headings if the general heading has reasonably apprised the public of the subject matter of the meeting. *Id.*

The factors to be considered in determining whether a subject description is reasonable under the circumstances include: (1) the burden on the body of providing a more detailed description; (2) whether the subject is of particular public interest, based on the numbers of people interested and the intensity of their interest; and (3) whether the subject involves non-routine action that the public would be unlikely to anticipate from a less detailed description. *Id.*, ¶ 28. Where adequate notice has been given for a particular subject, the governmental body is free to discuss any aspect of that subject, "as well as issues that are reasonably related to it." *Id.*, ¶ 34.

In addition, the Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken." *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that "adequate notice [...] may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 573-74 and 577-78, 494 N.W.2d 408 (1993)—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Buswell*, 301 Wis. 2d 178, ¶ 26; *Olson*, 252 Wis. 2d 628, ¶ 15. The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting.

The key issues raised by your first question thus are: (1) whether, under all the relevant factual circumstances, the specific subjects of the five motions passed on May 12, 2008, are reasonably related to the general subject of the proposed consolidation of the Park Falls and Glidden School Districts; and (2) whether, under all the relevant factual circumstances, the notice that the two school boards were planning to develop an agreement on items to be included in a board resolution to consolidate the districts reasonably alerted the public that the two boards might do something as important as taking formal action on the five motions passed on May 12, 2008.

Both of those issues, however, are fact-specific matters that can only be fully addressed in the context of an open meetings law enforcement action in which all parties would have an opportunity to develop a complete factual record regarding all the circumstances that might be related to the reasonableness questions and to any other legally material issues. The Attorney

General's Office, when responding to inquiries about the applicability of the open meetings law, can neither resolve nor speculate about such fact-dependent disputes. Accordingly, I have explained how the open meetings law applies to the type of situation you have described, but I can offer no opinion as to whether the notice for the May 12, 2008, meeting actually was or was not reasonable, under all the relevant circumstances.

You also ask whether it was permissible, under the open meetings law, for the secretary of the superintendent of the Park Falls School District to poll individual members of the Park Falls School Board about an item of business outside a duly noticed board meeting. According to your letter, at a meeting of the Park Falls School Board occurring after the joint meeting of May 12, 2008, you asked that one of the motions that had been passed at that joint meeting be taken up again and reconsidered at an upcoming special meeting. You indicate that there was general agreement to your request. You further state, however, that prior to the scheduled date of the special meeting, the superintendent directed his secretary to call all five of the board members who originally voted in favor of the motion to be reconsidered and to ask if they would change their votes and all five apparently replied in the negative. The superintendent conveyed the results of that poll to the president of the Park Falls School Board, who then decided that the reconsideration issue you had requested would not be on the agenda for the upcoming meeting. You ask whether this pre-meeting polling of board members violated the open meetings law.

Whether the circumstances described above set out a violation of the open meetings law is a fact-specific question that cannot be definitively answered in an inquiry of this nature. When responding to questions about the applicability of the open meetings law, the Department of Justice cannot conduct factual investigations to determine the accuracy and completeness of the information that has been provided. My opinion on this question is thus based solely on the facts as you have alleged them in your letter. I caution, therefore, that if an enforcement action alleging violations of the open meetings law were commenced, the parties would have an opportunity to develop a more complete factual record related to the issues and that record might or might not support my opinion on this question.

Subject to that qualification, I note that a meeting under the open meetings law is defined as "the 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." Sec. 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that 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; and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987).

The open meetings law also applies to a series of gatherings among 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 determine the body's course of action. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976). Although none of these smaller gatherings, considered individually, includes enough members to constitute a "meeting," in the aggregate they effectively determine the body's course of action outside of the public's view. The open meetings law prohibits such serial or "walking" quorums, in order to ensure that the discussion and debate that influences a governmental body's decision is open to public scrutiny.

According to the facts alleged in your letter, five of the nine members of the Park Falls School Board, through a series of one-on-one conversations with the superintendent's secretary, collectively agreed that they would uniformly vote against your proposed reconsideration motion, if it were raised at the upcoming meeting. Such use of an agent or surrogate to poll a quorum of the members of a body through a series of individual contacts is a prohibited walking quorum. Therefore, limited to the facts you have alleged, I believe a court could reasonably find that the polling in question violated the open meetings law.

You also ask two other questions: (1) whether votes cast at the May 12, 2008, meeting by school board members who also occupy other incompatible offices are valid votes; and (2) whether section 120.11(2) of the Wisconsin Statutes requires a special school board meeting to be held upon the written request of any school board member, with or without the agreement of other board members. Unfortunately the Attorney General's Office cannot advise you about those questions. Except in the areas of the open meetings law (located at sections 19.81 to 19.98) and the public records law (located at sections 19.31 to 19.39), the Attorney General is precluded from giving legal opinions or advice to persons or entities other than state officers and agencies, the two branches of the Legislature, the Governor, county corporation counsel, and district attorneys. Although your last two questions may be related to school board meetings, they are outside the scope of the open meetings law. This office cannot assist you with such matters. You may wish to consult with your school board's legal counsel or a private attorney.

I hope this information is helpful to you and thank you for your interest in compliance with the open meetings law. Please note that the opinions contained in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1).

Sincerely,

Thomas C. Bellavia

Thomas C. Bellavia
Assistant Attorney General

TCB:rk

bellaviatc\open meetings\cor\herbst\herbst resp ltr 07 16 08.doc
080606030

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Bruce A. Olsen
Assistant Attorney General
608/266-2580
olsenba@doj.state.wi.us
FAX 608/267-2223

August 29, 2006

Ms. Shannon Heupel
200 Haven Lane
Luxemburg, WI 54217

Dear Ms. Heupel:

You have requested an interpretation of Wisconsin's open meetings law as it applies to gatherings of members of the Village of Luxemburg ("Village") Streets Committee and a meeting notice for the August 1, 2006, meeting of the Village Board. Except as noted, the interpretations provided in this letter are based solely on the assumed truth of the information you provided to me, and have not been confirmed by my independent inquiry. If further inquiry were to reveal that the facts are not as you have described them, the conclusions stated in this letter may not be valid. At your request, I am providing a copy of this letter to Attorney Dennis Abts who you have represented is the attorney for the Village.

Streets Committee. You state that you live on a residential street that had a sign, erected by the Village, that stated "No Trucks." The Streets & Sidewalks Committee ("Committee") has jurisdiction over the placement and removal of such signs. You noticed one day that the sign had been removed, and that trucks were now traveling the street. You asked the Village Clerk for the minutes of the Committee meeting that reflected its decision to remove the sign. The clerk advised you that the Committee did not as a regular practice provide notice of its meetings, and that notice was not required because the Committee only made recommendations to the full Village Board, and did not make final decisions. Subsequently, you contacted the chairperson of the three-member Committee about the removal of the sign. The chairperson told you that he and one of the other members of the Committee discussed the removal of the sign with the Village President, that the three of them determined that the sign should be removed, and directed that the sign be removed. On the basis of the assumed truth of these facts, you ask: (1) whether the Committee is subject to the open meetings law; (2) if so, whether it must provide advance public notice of its meetings and must keep a record of its recommendations or decisions; and (3) whether the removal of the "No Trucks" sign was lawful.

1. The Village website, *http://luxemburgusa.com/committees* identifies seven members of the Village Board, and identifies three Village Board members as the members of the Committee. The Committee is therefore a "formally constituted subunit" of the Village Board;

i.e., a separate smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att'y Gen. 38, 40 (1985) (copy enclosed). Formally constituted subunits of local boards are "governmental bodies" as defined by section 19.82(1) of the Wisconsin Statutes. Thus, the Committee is a "governmental body" subject to the requirements of the open meetings law. Section 19.83(1) provides that "[e]very meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session." "Open session" is defined as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Sec. 19.82(3), Wis. Stats. Meetings that are held without advance public notice, and meetings that do not begin in open session are unlawful under the open meetings law.

The open meetings law defines "meeting" broadly as "the 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." Sec. 19.82(2), Wis. Stats. If 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; *i.e.*, the purpose of conducting governmental business. Sec. 19.82(2), Wis. Stats.; *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102-03, 398 N.W.2d 154 (1987). Because the Committee consists of three members, any gathering of two or more members is rebuttably presumed to be for the purpose of conducting the Committee's business. It does not matter that the Committee's authority may be limited to making recommendations to the Village Board. Even purely advisory bodies created by ordinance or order are subject to the law. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979). Moreover, the *Showers* case defined "governmental business" broadly, to include any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body's realm of authority. *Showers*, 135 Wis. 2d at 102-03.

It is therefore my opinion that the Committee is a governmental body subject to the open meetings law.

2. Governmental bodies must provide the public with advance notice of their meetings. Sec. 19.83(1), Wis. Stats. Because a "meeting" subject to the open meetings law occurs when two Committee members gather to discuss or decide or gather information about a subject within the realm of the Committee's business, those gatherings must be preceded by public notice if they are to be lawful under the open meetings law.

The open meetings law provides that every governmental body must give advance notice of its meetings to: (1) the public, (2) any members of the news media who have submitted a written request for notice and (3) the official newspaper, designated pursuant to state statute, or if none exists, to a news medium likely to give notice in the area. Sec. 19.84(1), Wis. Stats. The chief presiding officer of the body may give notice of a meeting to the public by posting the

notice in one or more places likely to be seen by the general public. 66 Op. Att'y Gen. 93, 95 (1977) (copy enclosed). Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdiction area the body serves. 63 Op. Att'y Gen. 509, 510-11 (1974) (copy enclosed). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. As a general rule, a body must give at least 24 hours advance public notice of its meetings, whether that notice is posted or given through paid publication. Sec. 19.84(3), Wis. Stats. Unless a parent body directs a subunit to publish its meeting notices, nothing in the open meetings law prevents a subunit from giving notice of its meetings through posting, even if the parent body uses paid publication as its method for giving public notice of the parent body's meetings.

The open meetings law requires a governmental body to keep a record of the motions and roll call votes at each meeting of the body. Sec. 19.88(3), Wis. Stats.. Meeting minutes are the most common method bodies use to comply with the recordkeeping requirement, but that requirement can also be satisfied if the motions and roll-call votes are recorded and preserved on a tape recording. I-95-89, November 13, 1989 (copy enclosed). The open meetings law does not expressly require that bodies keep records of votes on motions determined in ways other than roll-call votes; *e.g.*, calling for the ayes and nays. Prudent bodies keep records of the outcomes of motions as well as the motions themselves, as a way of demonstrating that the body authorized the action that was taken or declined as a result of the motion.

Thus, it is my opinion that the open meetings law requires the Committee to provide advance public notice of its meetings, to keep records of the motions or other proposals it considers at its meetings and to keep records of any roll-call votes it conducts with respect to those motions and other proposals. The Committee's obligation to keep a record of motions and other proposals includes the obligation to keep a record of the recommendations it makes to the Village Board.

3. If the chairperson of the Committee discussed the "No Trucks" sign with another Committee member, and if the erection and removal of such signs was within the realm of the Committee's authority, the two members held a meeting covered by the open meetings law when they discussed the removal of the sign. That meeting would be unlawful if it were not preceded by advance public notice of the meeting that indicated that the subject would be addressed. If the discussion was whether to recommend to the Village President that the sign be removed, the Committee was obligated to keep a record of that motion. If the discussion was whether the Committee should direct that the sign be removed, the Committee was obligated to keep a record of that motion. If the Committee failed to keep a record of whatever motion or proposal precipitated the removal of the sign, it committed that additional violation of the open meetings law.

Meeting notice. You provided me with a copy of the meeting notice for the Village Board's August 1, 2006, meeting, published in a local paper. I enclose with this letter a copy of the notice you sent. I confirmed with the Village Clerk that the Village Board gives public notice of its meetings through paid publication, and does not post its meeting notices.

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. The notice need not contain a detailed agenda, but because the public is entitled to the fullest and most complete information compatible with the conduct of governmental business, the notice should be specific. The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att'y Gen. 68, 70 (1977) (copy enclosed). In an informal opinion, the Attorney General opined that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with section 19.84(2). Correspondence, October 17, 2001 (copy enclosed).

Governmental bodies may not use general subject matter designations such as "miscellaneous business," or "agenda revisions" or "such other matters as are authorized by law" as a justification to raise any subject, since those designations, standing alone, identify no subjects. *Wisconsin Open Meetings Law: A Compliance Guide* (2005), at 9; *see also* Correspondence, November 30, 2004 (copy enclosed). The Attorney General advised in an informal opinion that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. I-05-93, April 26, 1993 (copy enclosed). Moreover, the Attorney General has advised in informal opinions that the practice of elected officials and public administrators to use agenda items designated "mayor comments," or "alderman comments" or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful." Correspondence, March 5, 2004 (copy enclosed).

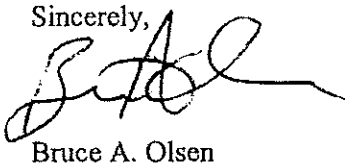
Measured against these standards, agenda items 7 ("Village Engineer"), 9 ("Other New Business") and 11 ("Old Business") are legally deficient. Item 7 identifies the speaker, but none of the subjects that will be addressed. Items 9 and 11 likewise identify no subjects. Items 4 ("Update Report from Street & Utility Dept. on July Work Projects") and 10 ("Committee Reports") are probably also legally deficient. Item 4 identifies generally the subject of an update on July's work projects, but again does not identify which work projects will be reported on. Item 10 does not identify the Committees that will make reports, and does not identify the

subjects that will be reported on. As noted in the paragraphs above, the description of the subjects need not be lengthy—just informative. For example, "sealcoating" or "water main flushing" are adequate descriptions of projects that might be the subject of a Street and Utility Department report.

You have asked me to provide the Village's attorney with a copy of this letter. Based on the facts as you have described them, and based on my review of the meeting notice for the August 1, 2006, meeting, it is possible that the Village's open meetings law noncompliance may be the result of misunderstanding by some Village officials about what the law requires. If so, additional training and guidance may bring about the compliance you seek. In my judgment, the Village attorney is likely in the best position to provide any needed education or oversight. If in the future you come to believe that the Village's governmental bodies continue to be in noncompliance, or if you come to believe that violations are intentional rather than inadvertent, you have the right to file a complaint about those violations with the Kewaunee County District Attorney. A complaint form is included in the 2005 Open Meetings Law Compliance Guide, which you already have.

Thank you for your interest in the Village's compliance with the open meetings law.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

BAO:cla

Enclosures

c: Dennis Abts
Village Attorney
Village of Luxemburg

olsenba\misc\060814050-let-heupel.doc