The State of Wisconsin
Department of Justice

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Ms. Linda M. Clifford
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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 ....
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> . . . .
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> 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."
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> ... All but one of the board's members was contacted and, together, they constituted a quorum, even though polled separately. ...
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> . . . .
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> 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.
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> (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