



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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James B. Henderson, Ph.D.  
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Dear Dr. Henderson:

In April 1991, Dennis McHugh wrote to my office seeking an opinion on whether the open meetings law permits a governmental body to meet in closed session under section 19.83(1)(c) of the Wisconsin Statutes, to discuss what salary matrix to apply to a position of employment. By letter dated June 25, 1991, my office advised Mr. McHugh that section 19.83(1)(c) only authorizes a closed session to consider employment, promotion, compensation or performance evaluation data of a specific employe or employes; it does not authorize a closed session to consider what compensation or other policies to apply to a position of employment in general. Shortly thereafter, you wrote a letter seeking clarification of that opinion. At approximately the same time, my office received a request for a formal opinion interpreting section 19.85(1)(c). We felt that opinion would be responsive, at least in part, to your request. My office informed you that we would forward a copy of the opinion to you and then respond to any questions in your request that are not addressed in the formal opinion.

On February 25, 1992, I issued the enclosed formal opinion concluding that section 19.85(1)(c) is limited to consideration of employment, compensation, promotion and performance evaluations of a specific employe or employes, and does not encompass consideration of employment policies to apply to a position of employment in general. You have three questions about the identical conclusion that my office reached in its June 25, 1991, letter to Mr. McHugh.

Your first question is how that conclusion can be reconciled with 67 Op. Att'y Gen. 117 (1978). In that opinion, my predecessor concluded that it was permissible for a local commission to vote on salary increases for non-union personnel in a closed session conducted under section 19.83(1)(c). Although the opinion itself does not so specify, the commission was meeting for the purpose of setting the annual salary for eleven individual employes and was,

therefore, properly convened in closed session under section 19.83(1)(c). The opinion was limited to addressing the question of whether a governmental body that is properly convened in closed session under section 19.83(1)(c) to consider the compensation for individual employees may vote on that matter in closed session.

Your second question is whether section 111.70(4)(g)(7) provides justification for a governmental body to meet in closed session under section 19.85(1)(c) or (e) to discuss the compensation of non-union employees. I assume that you are referring to section 111.70(4)(cm)7.e., which provides that an arbitrator in a wage arbitration procedure shall give weight to a comparison of the wages, hours and conditions of employment of the employees involved in the arbitration with the wages, hours and conditions of employment of other public employees in comparable communities. You are concerned that, in light of that provision, the school board may jeopardize its bargaining position with respect to union employees if it discusses the compensation of non-union employees in open session.

Section 19.85(1)(c) makes no reference to competitive or bargaining concerns as a justification for convening in closed session under that section. The existence of such concerns does not, therefore, make it permissible to meet in closed session under that section.

Section 19.85(1)(e) authorizes a closed session for "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Although I recognize that discussions regarding the compensation of non-union employees may influence the outcome of negotiations with union employees, I am of the opinion that such a concern does not fit within the bargaining reasons exemption in section 19.85(1)(e).

I reach that conclusion for two reasons. First, the existence of section 111.70(4)(cm)7.e. indicates that the Legislature has determined that it is in the public interest for a labor arbitrator to compare the wages of employees involved in arbitration with the wages of other public employees in comparable communities. For that reason, it is ironic and unconvincing to rely on the existence of section 111.70(4)(cm)7.e., as justification for meeting in closed session for the purpose of concealing such information.

Second, the purpose of the open meetings law is to ensure that the public has the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Sec. 19.81(1), Stats. The provisions of the law must be liberally construed to ensure the public's right to

such information. Sec. 19.81(4), Stats. Thus, any doubt as to whether closure is justified under an exemption must be resolved in favor of openness. See sec. 19.81(4), Stats.

As I indicated in the enclosed formal opinion, the public undoubtedly has a right to information about the compensation levels a governmental body establishes for positions of public employment. Convening in closed session to discuss compensation levels for non-union employes would deprive the public of the "fullest and most complete information" about such matters.

Section 19.85(1)(e) only authorizes a closure where "competitive or bargaining reasons require a closed session." The use of the word "require" indicates that the Legislature intended to narrowly limit the "competitive or bargaining reason" exemption to situations in which the discussion will directly and substantially affect negotiations with a party.

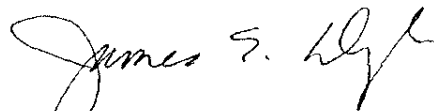
The compensation level for a group of non-union employes is merely one of many factors that may indirectly influence the outcome of collective bargaining. Moreover, the compensation levels for non-union employes are readily ascertainable once they are put into effect. Thus, even if one assumes a public interest in limiting the extent to which the compensation levels for non-union employes influence the outcome of collective bargaining, convening in closed session to discuss those compensation levels will, at best, merely delay the impact they may have on the compensation for union employes. I, therefore, must conclude that a general concern that compensation levels for non-union employes may influence the outcome of collective bargaining with union employes does not fit within the "whenever competitive or bargaining reasons require a closed session" language in section 19.85(1)(e). To conclude otherwise would turn section 19.85(1)(e) into an expansive exemption permitting a governmental body to convene in closed session whenever it discusses a matter that may in some way indirectly influence the outcome of negotiations with a third party. In my opinion, the Legislature did not intend such a result.

Your final question is how probable must it be that a governmental body will discuss an individual employe's performance in order for the body properly to convene in closed session. Section 19.83(1)(c) permits a governmental body to convene in closed session for the purpose of considering the performance of a specific public employe or employes. As I have already indicated, that section does not permit a governmental body to convene in closed session to discuss performance evaluation or other policies to apply to positions of employment in general. As a result, a governmental body must be certain that it will discuss the employment, promotion, compensation, or performance of an

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individual employe or employes before convening in closed session under section 19.83(1)(c). Where a governmental body discusses both compensation and performance policies to apply to a position of employment in general and the compensation and performance of a specific employe, the governmental body may convene in closed session only during that portion of the discussion involving the specific employe.

Sincerely,



James E. Doyle  
Attorney General

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Enclosure

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