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Mr. Dennis C. Schuh
District Attorney
Juneau County
220 East State Street
Mauston, WI 53948-0105

Dear Mr. Schuh:

Attorney General James E. Doyle has asked me to respond to your request for an opinion on an aspect of the open meetings law. Wisconsin Stat. § 19.83(1) provides that every meeting of a governmental body must be preceded by public notice as provided in Wis. Stat. § 19.84. Wisconsin Stat. § 19.84(2) requires that every public notice of a meeting set forth the time, date, place and subject matter of the meeting. Wisconsin Stat. § 19.84(1)(b) provides that the public notice of all meetings be given "[b]y communication from the chief presiding officer of a governmental body or such person's designee . . ." to the public and the news media. Wisconsin Stat. § 19.96 authorizes the imposition of a forfeiture penalty against "[a]ny member of a governmental body . . ." who knowingly attends a meeting of the body held in violation of the open meetings law, or who otherwise violates the open meetings law. You inquire:

> Where the chief presiding officer of the governmental body designates a non-member (school board president designating school district administrator) as the public notice designee, how can the open meetings law be effectively enforced when complaints about open meetings law violations are deflected by pointing to the designee who is not legally culpable?

As your letter points out, liability for violations of the open meetings law attaches only to members of the governmental body, and does not extend to non-members of the body. Wis. Stat. § 19.96. Thus, for example, the members of the governmental body are liable if there is a substantive defect in the contents of the meeting notice, or if the meeting location is not reasonably accessible, or if the body fails to keep a record of its motions and votes, or if the body fails to engage in the proper procedure before convening in closed session, or if the body enters into a closed session not justified by one of the exceptions in Wis. Stat. § 19.85(1), and so forth. Wisconsin Stat. § 19.84(1)(b) is the only portion of the open meetings law which would even potentially allow a member of a governmental body to assert, as a defense to a charge of failing

to adequately communicate notice of the meeting, that a designee of the body's presiding officer was responsible for the failure to communicate public notice of the meeting to the public or the news media.

Although the potential defense relates to a very narrow aspect of the open meetings law, that aspect is of enormous public policy importance. It is the policy of the state of Wisconsin that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). If notice of a meeting is not properly communicated to the public and the news media, the public is deprived of the opportunity to become informed about the affairs of government.

Wisconsin Stat. § 19.84(1)(b) places on the presiding officer of the governmental body the duty to communicate public notice of the body's meetings to the public and the news media. That subsection allows the presiding officer to designate another person to act in his or her stead to perform the actual acts of communication; *e.g.*, posting the notice around the community, mailing it to the news media. The subsection does not specifically allow the presiding officer to shift to another his or her duty to comply with the requirements of the law. In my opinion, a court presented with the question would conclude that members of a governmental body cannot avoid liability under the open meetings law by delegating their statutory responsibilities to others.

In *Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994), the school board refused to provide access to a "Memorandum of Understanding" on the ground that it was not a "record" within the public records law. The memorandum was created by the school district's lawyers, and kept in the lawyers' files. The court stated that the issue was "whether a public body may avoid the public access mandated by the public-records law by delegating both the record's creation and custody to an agent," and concluded that "[p]osing this question provides its answer: it may not." 186 Wis. 2d at 452-53.

The general law of agency is in accord. In agency situations involving employment, a principal (who is an employer) has no defense to an action brought by a third party based on the conduct of an agent (who is an employee) because of the fact that the agent has immunity from civil liability as to the act. *See Maynard v. City of Madison*, 101 Wis. 2d 273, 283, 304 N.W.2d 163 (Ct. App. 1981), *citing Hallmark Ins. Co. v. Crary Enterprises, Inc.*, 72 Wis. 2d 472, 475, 241 N.W.2d 171 (1976), *and quoting* Restatement (Second) of Agency § 217 (1958) at 468-69.

The legal principle reflected in these sources, applied in the open meetings context, strongly suggests that a court would reject a presiding officer's argument that he/she could not be found liable for a violation of the open meetings law because a designee performed the act or omission on which liability is predicated.

Sincerely,

Bruce A. Olsen
Assistant Attorney General

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