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June 8, 2005

Mr. Joe Tylka  
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Dear Mr. Tylka:

I have been asked to respond to your February 21, 2005, inquiry about the applicability of Wisconsin's open meetings law to certain meetings between the Superintendent ("the Superintendent") of the Stevens Point Area Public School District ("the District") and the District's Management Team ("the Management Team").

According to your letter, at some point prior to the meetings in question, the District's School Board ("the Board") had directed the Superintendent to formulate and submit to the Board recommendations for addressing the District's budget deficit. You state that, as a result of that directive, the Superintendent held two meetings with the Management Team, on February 9 and 10, 2005. The Management Team, you further state, is a group of District administrative staff, headed by the Superintendent, that was formed about two years ago and regularly meets at roughly bi-weekly intervals. You have provided no additional details on how the Management Team operates or what subject matters it ordinarily considers, but you do not believe that it normally makes recommendations directly to the Board. You state that no public notice was given of the meetings on February 9 and 10, 2005.

At those two meetings, the Management Team developed detailed budget recommendations, which were embodied in an eight-page written memorandum, dated February 14, 2005, from the Management Team to the Board and its Business Services Committee. The Management Team's recommendations were subsequently considered and adopted by the Board. Although your letter is not specific, I assume that this action took place at a meeting of the Board held in conformity with the open meetings law.

The question presented, then, is whether the February 9 and 10, 2005, meetings of the Management Team were "meetings" of a "governmental body" within the meaning of the open meetings law. To answer that question, two determinations must be made.

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First, the group in question must constitute a collective body, rather than a mere assemblage of individuals. A “governmental body” is broadly defined 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. The use of the terms “board,” “commission,” “committee,” “council,” “department,” and “body corporate and politic” all suggest multi-member groups that act together as a unit to perform some common purpose. Sec. 19.82(1), Wis. Stats. In addition, a “meeting” is statutorily 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. This definition, too, suggests that a meeting subject to the open meetings law must involve a group of persons that has been vested, as a collective unit, with identifiable governmental powers and duties. *See also* 57 Op. Att’y Gen. 213, 217-18 (1968) (earlier version of open meetings law applied to a group that has powers or duties vested in it by law, or delegated to it by law, when it acts formally as a body).

Likewise, the Wisconsin Supreme Court has held that a meeting subject to the open meetings law takes place only if there are a sufficient number of members present to determine the governmental body’s course of action. *See State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). That number can only be calculated, however, if the membership of the body is numerically definable and the body is of a type that exercises collective power pursuant to some definition of when that power rightly exists. The open meetings law thus applies only to a meeting of a multi-member body that has a definable membership and is authorized, pursuant to law, to collectively exercise power or provide advice on specific matters entrusted to it, acting as a body through some mechanism of collective decision making. *See* September 24, 1998, correspondence #980714031 to James G. Godlewski (open meetings law not applicable to a loosely constituted group of citizens and local officials established by a mayor to consider issues related to a dam closure because no rule or order defined the group’s membership and no provision existed for the group to exercise collective power).

Second, there must be a directive creating the group in question. The statutory definition of a “governmental body” applies only to entities that are “created by constitution, statute, ordinance, rule or order.” Sec. 19.82(1), Wis. Stats. This phrase plainly includes not only state or local bodies created by the constitution or statutes of the State of Wisconsin, but also bodies created by “rule or order.” *Id.* The term “rule or order” has been broadly construed by this office to include any directive, formal or informal, that creates a body and assigns it 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 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. It may also include directives from lower level executive officials or employees to whom the governmental function in question has been delegated or re-delegated. *See id.* The open meetings law does not

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apply, however, to meetings of groups of government officials and employees that are not established pursuant to some such formal or informal directive, but that simply meet together on an *ad hoc* basis in the interest of governmental efficiency or good staff work.

Applying these principles to your situation, the first question is whether the Management Team, at the meetings on February 9 and 10, 2005, acted as the type of collective body to which the open meetings law applies. Your letter does not say whether the Management Team has a numerically identifiable membership, whether it acts through voting or any other mechanism of collective decision making, or whether a minimum number of team members must be present at a meeting before a valid action of the team can be taken. According to the Superintendent, the Management Team does have a numerically identifiable membership—consisting of the Superintendent, Assistant Superintendent, and the principals of the various schools in the District—but it does not ordinarily take collective action as a separate body and operates on a consensus basis, with no quorum requirements and no voting or other formal mechanism of collective decision making. For these reasons, it is the Superintendent's position that Management Team meetings are not meetings of a separate governmental body, but rather are meetings of administrative staff that should not be subject to the open meetings law.

It is true that meetings between an individual government department head and his or her staff, or even meetings of the entire staff of a department, may not be covered by the open meetings law when the staff does not engage in collective action as a separate governmental body. But it does not follow that a group composed of government staff personnel can *never* be subject to the open meetings law. In the situation at issue here, it is clear that the Management Team engaged in an advisory process that resulted in a written memorandum that plainly speaks in the collective voice of the Management Team as a whole and that expressly addresses that team's collective recommendations regarding the District's budget deficit directly to the Board and its Business Services Committee. The Management Team thus did not merely consult with the Superintendent as staff to assist him in preparing his own budget recommendations for presentation to the Board, but rather acted as a body to collectively formulate the team's budget recommendations and to present them to the Board from the Management Team as a whole. The inescapable inference is that, at least on this occasion, the Management Team must have engaged, either formally or informally, in some form of *de facto* collective decision making on behalf of its membership. Although the question is a close one, I think it is more likely than not that a court would find that, in these limited circumstances, the Management Team effectively acted not just as staff, but as a separate, collective, advisory body to the Board.

The second question is whether there was any formal or informal directive convening the Management Team for the purpose of developing and submitting budget recommendations to the Board. According to your letter, the Board directed the Superintendent to provide it with budget recommendations and the Superintendent, in turn, delegated that responsibility to the Management Team and twice convened meetings of that team for the purpose of carrying out

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those duties. When an individual government official, acting within the scope of properly delegated authority, creates an advisory body, that body is treated as if it had been created directly by the governmental body with authority over that official. *See* 78 Op. Att’y Gen. at 70 (state agency managers); February 10, 1981, correspondence #28155 to Virgil Staples (school superintendent); March 17, 1983 correspondence C830211801 to Nicholas O. Funkhouser (mayor); October 20, 1986, informal opinion I86071004 to Dale W. Arenz (town chairperson); November 4, 1986, informal opinion I86072104 to Mary L. Martin (county executive). Even more specifically on point, this office has previously concluded that, where a school superintendent delegates to members of the school district’s administrative staff advisory functions with which the superintendent has been lawfully charged by the school board, those staff members, for purposes of the open meetings law, are to be treated as if they had been directly charged by the school board to carry out those functions. *See* June 8, 2001, correspondence #010131009 to Joseph F. Paulus. If it is true that, in your situation, there was a directive issued by the Board to the Superintendent and then delegated to the Management Team, then a court would probably find that the specific Management Team meetings in question were held pursuant to a “rule or order” and thus were subject to the open meetings law.

The Superintendent has informed me, however, that there was no such directive to him from the Board and also no directive from him to the Management Team. The Superintendent maintains, rather, that the initiative to develop the budget recommendations and submit them to the Board originated with the members of the Management Team themselves. If that is true, then, a court would probably conclude that the meetings in question were not held pursuant to a “rule or order” and thus were not subject to the open meetings law. Because this office cannot resolve factual disputes, it is impossible to provide a more definite opinion on this question.

Furthermore, even if a court were to find that the February 9 and 10, 2005, meetings were subject to the open meetings law, it still would not follow that *other* meetings of the Management Team must also be subject to that law. When the Management Team is not delegated specific responsibilities or does not effectively act as a collective unit, but rather meets only in order to assist the Superintendent in conducting his own responsibilities on behalf of the school district, then it may very well function as administrative staff that is not subject to the open meetings law, rather than as a separate governmental body.

Finally, your letter states that, in addition to the meetings of February 9 and 10, 2005, the Management Team met again, on February 15, 2005, “to discuss more specific recommendations for the School Board.” You state that no public notice of this third meeting was given and that it was not open to the public. Your letter does not say, however, whether the Management Team had made, or expects to make, any additional collective recommendations directly to the Board as a result of that meeting. Nor does your letter state whether that meeting was held pursuant to a particular directive from the Board or whether the more specific recommendations allegedly discussed at that meeting also dealt with the District’s budget deficit, or with some other

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subjects. In the absence of any evidence either of clear collective action or of a clear directive, it is impossible to determine whether the February 15, 2005, meeting was subject to the open meetings law.

I hope this discussion is useful to you and thank you for your interest in compliance with the open meetings law.

Sincerely,

  
Thomas C. Bellavia  
Assistant Attorney General

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