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December 13, 2005

Ms. Paula Brisco
137 Lynne Trail
Oregon, WI 53575-3421

Dear Ms. Brisco:

I am writing in response to your October 25, 2005, inquiry about the conduct of a closed meeting by the Village of Oregon Board ("the Board") on October 3, 2005. According to the agenda and draft minutes you provided for that meeting, the Board relied on subsections (c), (e) and (g) of section 19.85(1) of the Wisconsin Statutes, to authorize closed session discussions of nine listed subjects. Your letter expresses concern that three of those subjects—"Fire/EMS District Joint Agreements with Towns," "intergovernmental agreement with the Town of Oregon" and "Negotiation of Development Agreement with Lycon"—are contentious community issues that you believe should be discussed in open, rather than closed, session. You also question what you allege to be the Board's practice of routinely discussing and possibly voting on such politically sensitive agenda items in closed sessions.

Your letter indicates that you were allowed to appear and address the Board about your concerns immediately prior to the October 3, 2005, meeting. According to the draft minutes, the Village Attorney Dick Yde ("Village Attorney") responded to your concerns by expressing his opinion that all of the subjects listed for the closed session involved negotiations that could lawfully be discussed in closed session in order to avoid disclosing the village's negotiating positions or strategies. The draft minutes indicate that there was then discussion of the issues you had raised, followed by a motion to go into closed session, which passed by a 6-0 vote.

The basic policy of the open meetings law is 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." Sec. 19.81(1), Wis. Stats. Where the conduct of governmental business is not compatible with full public access, however, the Legislature has authorized closed sessions from which the public may be excluded. The purposes for which closed sessions are permitted are listed in section 19.85(1)(a)-(j). A closed session may be held only for one or more of those purposes.

Under one of those provisions, section 19.85(1)(e), a governmental body may convene in closed session in order to consider the purchase or lease of public property or the investment of public funds. The same provision also permits closed sessions for conducting other public business, "whenever competitive or bargaining reasons require a closed session." For example, a governmental body's discussion and formulation of negotiation strategies relative to a proposed contract may fall within this exception. The obvious purpose of this provision, as your Village Attorney correctly noted, is to permit a governmental body to meet in closed session whenever an open discussion would compromise the government's bargaining position by revealing its negotiating strategy. *See* 81 Op. Att'y Gen. 139, 140 (1994).

Like all statutory exceptions to the general open meetings requirements, section 19.85(1)(e) is to be interpreted restrictively, rather than expansively, and it applies only when the competitive or bargaining reasons in question *require* a closed session. By using the word "require," the Legislature limited the application of this exception to circumstances where the discussion will directly and substantially affect negotiations, but not where the discussion might be just one of several factors that could indirectly influence their outcome. Likewise, mere inconvenience, delay, embarrassment, frustration or even speculation as to the probability of success are not a sufficient basis to close a meeting. *See* Wisconsin Department of Justice, *"Wisconsin Open Meetings Law: A Compliance Guide"* (2005) at 15.

The use of the word "require" also means that, if a governmental body's decision to close a meeting for bargaining reasons were ever challenged in an open meetings law enforcement action, the governmental body would have the burden of demonstrating that the closed session really was necessary for bargaining reasons. It is thus advisable for a governmental body to itself make a good faith determination of such necessity—and to make a record of that determination—before it closes the meeting. The less detailed the record that has been made, the more difficult it may be for the body to later defend its decision to go into closed session.

In the case of the October 3, 2005, meeting about which you inquire, it appears that, after you addressed the Board, the members had an open discussion of the issues you raised and made a determination that it would be necessary to go into closed session in order to avoid disclosing the village's negotiating position or strategy regarding each of the subjects about which you had expressed concern. The open meetings law gives the members of the Board the power to themselves to make that determination, in the first instance. Whether their determination was legally correct is a question that cannot be answered based only on the agenda and other materials you have provided because it requires more detailed factual information about the particular bargaining contexts at issue and the particular negotiating positions or strategies that the Board planned to discuss. Unless such evidence is found to contradict the Board's determination of bargaining necessity, the law presumes that the Board members made that determination in good faith. *See State ex rel. Wasilewski v. Bd. School Directors*,

14 Wis. 2d 243, 266, 111 N.W.2d 198 (1961) (Absent evidence to the contrary, the law presumes that public officials act in good faith.).

In addition to going into closed session only for a proper reason, a governmental body also must limit its discussion in closed session to the specific business related to that reason and may not take up other matters during the closed session. *See "Wisconsin Open Meetings Law: A Compliance Guide"* at 13; Melanie R. Swank (ed.), Wisconsin Public Records and Open Meetings Handbook, sec. 15.3 (2004). Matters that are directly related to devising competitive or bargaining strategies thus may be discussed in closed session. It is possible, however, that other issues that are only indirectly related to the negotiations could be discussed in public without harming the village's competitive or bargaining position. This could include, for example, general public policy issues connected with each of the projects in question, the social or economic impact of the projects, technical or administrative problems, etc. Under the open meetings law, such matters should, to the greatest extent possible, be discussed in open session, separately from any competitive or bargaining considerations. Only where such separation is impossible will competitive or bargaining reasons require that those kinds of matters be discussed in closed session.

It appears from your letter that you may believe that the Board's discussions in the October 3, 2005, closed session were not properly limited to the specific bargaining considerations justifying the closure. Once again, however, it is not possible to answer that question without information about the content of the closed discussion that is not contained in the written materials you have provided.

Any other record of the closed session that may exist, however, may be open to public inspection to the extent prescribed in the state public records law. Because there is no specific exemption for records created during a closed session, the custodian must release the record unless he or she concludes that the harm to the public from its release would outweigh the benefit to the public. There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, the custodian may be able to justify not disclosing the information which requires confidentiality. However, the custodian must separate information which can be made public from that which cannot be and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them. *See* 67 Op. Att'y Gen. 117, 119 (1978).

If such records of the closed session either do not exist or remain confidential, however, then it is impossible to speculate as to the content of the closed discussions. Once again, the law gives the Board members the power to determine, in the first instance, the permissible scope of

their own discussions and, absent evidence to the contrary, presumes that they have acted in good faith.

For similar reasons, I also cannot speculate regarding your allegation that the Board routinely closes sessions in which it plans to discuss or vote on politically sensitive issues. Obviously, it follows from what has been said above that the Board may hold a closed session only for one or more of the reasons listed in section 19.85(1)(a)-(j) and may not close its discussion of an issue just because of anticipated controversy. Nothing in the open meetings law, however, precludes the Board from going into closed session frequently, as long as each closed session is properly authorized under one or more of those statutory exceptions. Because your letter and the attachments do not provide details about any meetings other than the one on October 3, 2005, it is impossible to make any broad inferences about the Board's routine practices. I note, however, that the informational items about the Fire/EMS project from the village's public website that you enclosed with your letter suggest that discussions of that project have not been conducted entirely behind closed doors.

In addition to the questions raised in your letter, my review of the agenda of the October 3, 2005, meeting also gave rise to another issue worth noting. Item 3 on that agenda stated that the Board would adjourn into closed session pursuant to section 19.85(1)(c), (e) and (g) for the purpose of discussing nine specific subjects that are thereafter listed in that item. In my opinion, that agenda item fails to give the public a sufficiently clear description of the specific reasons justifying the closed session.

The Attorney General's Office has consistently advised that the public is entitled to the best notice of a meeting's subject matter that can be given at the time the notice is prepared. *See* 66 Op. Att'y Gen. 143, 144 (1977). In stating the subjects to be discussed at a closed session, therefore, both the published notice and the announcement and motion made before closure should be as specific as possible without violating the purpose for which the meeting is to be closed. A degree of specificity is necessary both to inform the members of the public and news media present of the claimed reasons for closure and to enable the members of the body to intelligently vote on the motion to close the meeting.

Here, both the agenda item and the motion refer to three separate statutory provisions and nine separate subjects of discussion without specifying which of those provisions apply to which of those subjects. The only thing that appears with certainty is that, after you addressed the Board, the members determined that the bargaining exception of section 19.85(1)(e) applied to all nine of the listed subjects. The applicability of the other two statutory subsections to some or all of those subjects, however, cannot be determined.

Adding to this lack of clarity is the fact that the agenda item and the motion only cite the statutory exceptions by statute number, without describing the specific statutory text relied on.

Some of the subsections of section 19.85(1), including subsection (c), contain more than one possible basis for closing a meeting. Unless reference is specifically made to the applicable portion of the statutory text, it may be impossible for either the public or the members of the body to fully and intelligently evaluate the purported reasons for closing the meeting.

Although the closed session notice in this instance was not as clear as this office advises, however, I do not think it is likely that a court would find that it violated the open meetings law. The Wisconsin Court of Appeals has held that a mistake in a notice does not constitute a violation if the notice still provides "enough information to alert any interested individual who might have been confused by the notice to find out more." *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 17, 252 Wis. 2d 628, 643 N.W.2d 796. Here, both the agenda item and the motion, while insufficient standing alone, did provide enough information to alert interested persons to request any additional clarification they might desire. In the future, however, the Board would be well advised to cross-reference the statutory subsections and individual subjects with specificity and to include reference to the applicable statutory text, as well as statute numbers. In order to convey this concern, a copy of this letter is being sent to the Village Attorney.

I hope you find this discussion helpful. I am sorry that a more complete response is not possible based on the available information. Thank you for your interest in compliance with the open meetings law. Please contact this office if we can be of further assistance to you.

Sincerely,

Thomas C. Bellavia

Thomas C. Bellavia
Assistant Attorney General

TCB:df

c: Richard Yde

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