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January 20, 2006

Ms. Alyce C. Katayama
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Dear Ms. Katayama:

In March 2004, you and representatives of the University of Wisconsin Medical School ("UWMS") began informal conversations with attorneys in the Department of Justice ("DOJ") about the application of the open meetings and public records laws to the Medical College of Wisconsin ("MCW") Consortium on Public and Community Health ("Consortium") and its UWMS counterpart, the Oversight and Advisory Committee ("OAC"). Over the ensuing months DOJ's attorneys counseled attorneys for the OAC and the Consortium as those bodies attempted to establish a grant process that I believed conformed with the state's open meetings law. In December 2004, before we reached agreement, the OAC awarded 33 grants and the Consortium awarded 23 grants, each using a process based on the advice of their respective legal counsel. This office then received complaints from both the Insurance Commissioner and Freedom of Information Council that the grants awarded in December 2004 violated the open meetings law. Prior to initiation of investigation of those complaints, the OAC and UWMS agreed to discuss modifying its grant-awarding process to take into consideration not only the concerns of the complainants, but also those previously expressed by this office. In consultation with attorneys from this office, the OAC revised its decision-making process for its next cycle of grant funding. On August 4, 2005, I advised the OAC that its proposed process was consistent with the requirements of the open meetings law. I enclose a copy of that letter for your reference.

On September 23, 2005, the Consortium issued a Request for Proposals for its next cycle of grant funding. Proposals were due December 16, 2005. The materials you have provided to this office and the minutes posted on the Consortium's website reflect that the Consortium plans to use essentially the same decision-making process it used last year. In my informal opinion, the Consortium must increase the openness of its decision-making process this year in order to be consistent with the open meetings law.

By way of background, the Consortium was created to satisfy a requirement of the March 2000 order of the Wisconsin Insurance Commissioner pertaining to the conversion of Blue Cross & Blue Shield United of Wisconsin ("BCBSUW") from a tax-exempt to a for-profit corporation. The Insurance Commissioner's order permitted the conversion, subject to various

conditions. Among other terms, the March 2000 order directed that the Wisconsin United for Health Foundation ("WUHF"), after selling the BCBSUW stock, distribute the proceeds of the stock sales in equal amounts to the UWMS and MCW to be utilized to promote public health initiatives in communities around Wisconsin. The order directed the governing bodies of the two medical schools to form oversight committees with diverse membership to oversee the expenditure of the 35% of the funds received from the stock sale for these public health initiatives. Section 2(17) of the order provided that the oversight committees had to be provided adequate staffing and budget for their operation, and authorized the two medical schools to provide staffing and administration for the committees. To ensure that the two medical schools were publicly accountable for the expenditure of the public health initiative funds, section 2(2) of the March 2000 order provided that the oversight committees had authority over the application of the funds allocated for public health purposes, and specifically required that the committees "shall conduct themselves in accordance with standards consistent with the Wisconsin public meeting and public record laws."

The MCW has created The Healthier Wisconsin Partnership Program ("HWPP") to administer grants that are designed to support Wisconsin-based projects that develop community-academic partnerships specifically focused on health promotion, disease prevention, health policy and health disparities by addressing the State of Wisconsin's health plan and the HWPP's mission, vision and guiding principles. The HWPP solicits requests for innovative grant proposals from various public or community health groups. In 2004, two types of competitive grants were awarded: planning project grants and implementation project grants. Planning grants were limited to $25,000. Implementation grants were limited to $150,000 per year for up to three years. Both grant types required the public or community health group seeking funding to partner with an MCW faculty member.

The Consortium is the MCW's oversight committee called for in the March 2000 order of the Insurance Commissioner. Pursuant to the March 2000 order, the Consortium consists of four community members, four MCW members and one member appointed by the Insurance Commissioner. The Consortium directs and approves funds for public health initiatives in collaboration with the MCW. Consortium members also review, monitor and report on funds committed for medical education and research.

In the 2004 grant funding cycle, the Consortium reviewed grant applications using a multi-stage process of technical and merit reviews. During the technical review stage, HWPP program staff determined whether each grant proposal met the basic eligibility requirements. In the "Level 1" merit review, each eligible proposal was evaluated by paid consultants from outside the State of Wisconsin. In the "Level 2" merit review, high ranking proposals were evaluated by the Consortium, which then made recommendations to the MCW Board of Trustees. In the "Level 3" merit review, the MCW Board of Trustees determined which of the recommended proposals would receive funding. Using this process in 2004, the consultants evaluated nearly 200 proposals from community and public health organizations. The MCW

Board of Trustees awarded fifteen planning grants and eight implementation grants, totaling nearly $4 million.

To understand my concerns about the open meetings compliance aspects of this process, it is necessary to go into greater detail about the Level 1 and Level 2 reviews.

The Consortium's meeting minutes reflect that the Consortium began to discuss the method for reviewing grant proposals in July 2003. After receiving public comments on the proposed Request for Proposals, the Consortium adopted a resolution at its September 18, 2003, meeting favoring a review panel of 15-20 participants plus alternates. At its March 18, 2004, meeting, the Consortium adopted a resolution to support the appointment of paid, out of state, review panelists to provide merit reviews of proposals to the HWPP. Minutes of the April 15, 2004, Consortium meeting reflect that the Consortium received legal advice from its counsel to the effect that gatherings of merit reviewers would not be subject to the open meetings law if the reviewers were selected by MCW, made no decisions and forwarded all proposals to the Consortium. Consortium members discussed the method of appointing review panel members and discussed confidentiality issues in its May 20, 2004, meeting, but made no decisions at that meeting. At that meeting, the Consortium authorized MCW to contract with Community-Campus Partnerships for Health ("CCPH"), to conduct a recruitment for reviewers and to coordinate the merit review panel process.

On June 15, 2004, the Consortium met in closed session to confer with its legal counsel about open meetings and public records issues relating to the merit review process, and reached a consensus to request that MCW engage appropriate consultants to perform the level one reviews of grant proposals. Minutes of the Consortium's August 19, 2004, meeting reflect that the Consortium approved a slate of 36 reviewers recommended by CCPH, and authorized CCPH to select twenty reviewers and four or five alternate reviewers. Also on August 19, 2004, the Consortium determined that each proposal would be reviewed by two reviewers with extensive community experience and two reviewers with academic credentials. The Consortium discussed other aspects of the merit review process, but deferred decision until after it had received CCPH's recommendations. On September 16, 2004, the Consortium determined that all twenty merit reviewers would gather at an in-person meeting to discuss the implementation grant proposals initially reviewed by the four reviewers assigned to each proposal, that the original reviewers would be given the opportunity to revise their scores based on the discussion among the entire group of reviewers and that the other reviewers present at the discussion would also score the proposal following the discussion. The Consortium's minutes from November 18, 2004, reflect that the Level 1 reviewers who attended the in-person meeting to discuss implementation grants reviewed two categories of implementation grant proposals: those ranked as "outstanding" by a review panel and those which had notably divergent scores and an "outstanding" rank by at least two reviewers. The reviewers present at the in-person meeting were instructed not to engage in collective decision-making. Their post-discussion individual scores for each proposal were compiled by CCPH to derive a single score for the proposals

discussed. It does not appear from the Consortium's minutes that it re-evaluated the application of the open meetings law to the Level 1 review of implementation grant proposals, in light of the increasing details of that review between June 15 and November 18, 2004.

Further details of the Level 1 and Level 2 merit reviews were provided as an enclosure to your May 12, 2005, letter. Pages 10-11 of that enclosure provide, in relevant part:

- Proposals were ranked by average individual reviewer scores (original group of four reviewers).
- All . . . implementation proposals that received a ranking of outstanding were reviewed and discussed by all twenty of the merit reviewers at the in-person meeting.
- . . . [I]mplementation proposals receiving at least two outstanding scores plus one or more divergent scores or characterized by some other notable exception were also discussed.
- The . . . proposal summary description and a summary of the original four reviewers' comments of these proposals were sent to all reviewers to be read prior to the meeting.
- During the in-person meeting, the original four reviewers made a presentation on those proposals to be considered.
- After each presentation, all reviewers discussed the strengths and weaknesses of the proposals.
- After discussion of each proposal, the four reviewers restated their original scores or offered new scores based on the discussion.
- The other 16 reviewers also each noted their own individual score for the proposal within the range of the final scores offered by the four original reviewers.
- After all proposals were scored, CCPH calculated the final average score for all 20 reviewers.
- The proposals were then ranked in numerical order based on the final average scores.
- The final scores and proposal ranking were provided to the MCW Consortium on Public and Community Health for review.

The Consortium used the Level 1 merit review output as part of its consideration of the projects. The Consortium also considered the relevance of each proposal to the priorities reflected in the HWPP's strategic plan. On December 1, 2004, the Consortium unanimously voted to convene in closed session pursuant to Wis. Stat. § 19.85(1)(e) to conduct its review of the planning and implementation grants, and to develop its list of proposals to be recommended

to the MCW Board of Trustees. The minutes of the December 1 meeting reflect the following justification for convening in closed session:

> [The Board Chairperson] discussed the competitive interests of the Consortium. These are: to receive the best possible proposals to advance public health in Wisconsin; to select from among those proposals the most appropriate for funding; and, to encourage re-submission of proposals which have promise but are not initially presented in an approvable fashion.
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> [The Board Chairperson] stressed that in order to advance these goals, it would be necessary to deliberate on the merits of the competing proposals in a closed session. He noted that this would accomplish several important things. These include to: promote the submission of innovative proposals as applicants will rely on this aspect of the process; protect the proprietary information submitted by applicants, including the creative and intellectual property of the authors; promote a fair and frank evaluation of proposals; and, increase the likelihood that good proposals which are not funded will be resubmitted.

Based on the above description of the establishment of the decision-making process used in 2004 and on your representation that the Consortium proposes to use the same process for the current grant funding cycle, I will now discuss the applicability of the open meetings law to that process. This requires consideration of three questions. The first question is whether either the four-person panels of initial reviewers or the collective group of twenty Level 1 reviewers comprise governmental bodies within the meaning of the open meetings law. If either is a governmental body, the second question is whether any of their functions are performed in a meeting, as defined by the open meetings law. If either group performs any of its functions in a meeting, the third question is whether the open meetings law allows any portion of such a meeting to be held in closed session.

With regard to the first question, I conclude that both the four-person panels and the group of twenty Level 1 reviewers are governmental bodies. The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). This definition focuses on the manner in which a body was created, rather than on the type of authority the body possesses. The term "rule or order" has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Att'y Gen. 67, 68-69 (1989). This includes directives issued by another governmental body, by the presiding officer of such a body or by 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 an individual or entity to whom the governmental function in question has been delegated or re-delegated. *See id.*

Here, the Consortium itself was created by the March 2000 order of the Insurance Commissioner, and it is, therefore, a "governmental body" subject to the open meetings law. Section 2(2) of the March 2000 order reinforces this conclusion. The Consortium, in turn, has created the four-person review panels and has assigned them the duty of scoring the grant proposals in order to assist the Consortium in making its own recommendations about the funding of those proposals. In addition, the Consortium has defined the general qualifications of membership on the panels; *i.e.*, two members with community experience and two members with academic credentials, has approved the slate of reviewer candidates from which the final group of twenty-four or twenty-five will be chosen, has directed MCW to enter into consulting contracts with the reviewers and has delegated to CCPH the limited responsibilities of proposing a slate of recommended reviewers, selecting the final group of reviewers from the approved slate, facilitating the in-person meeting and compiling the results of the reviewers' scores. The review panels are thus governmental bodies because they have been created and assigned their duties by a directive of the Consortium.

Similarly, the collective group of all twenty Level 1 reviewers is also a governmental body, since it too has been created by the Consortium, and has been charged with responsibility to advise the Consortium about which grant proposals to recommend for funding.

The fact that the individual Level 1 reviewers are proposed and ultimately chosen by CCPH, rather than by the Consortium, does not change the above conclusions. What matters, for open meetings law purposes, is how the groups of reviewers are initially established and assigned their duties, not how they are subsequently populated with individual persons. In addition, as already noted, it is the Consortium itself that has delegated to CCPH the duty to appoint individual reviewers. If the Consortium were to delegate that duty to one of its own members, there would be no question that the resulting review panels would be governmental bodies. *See* 78 Op. Att'y Gen. 67 (advisory committees created by district managers of the Department of Natural Resources, under authority delegated from the Natural Resources Board through the Secretary of the Department of Natural Resources, are governmental bodies). In my opinion, the same reasoning applies where such power has been delegated to a private entity like CCPH. A governmental body should not be permitted to circumvent the open meetings law by delegating to a private entity the power to make appointments to advisory committees the body has created and defined.

Because both the review panels and the assemblage of reviewers are governmental bodies, the second question to consider is whether any of their functions are performed in a meeting, as defined by the open meetings law. Such a "meeting" occurs whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). "Governmental business" has been broadly defined to refer to any

formal or informal action, including discussion, decision or information gathering, on matters within the governmental body's realm of authority. *Showers*, 135 Wis. 2d at 102-03.

Applying the above definition to the information that has been provided to me, it does not appear that the members of the four-person review panels will conduct any part of their initial evaluations of proposals in a group setting that would subject that initial evaluation process to the open meetings law. If my information is incomplete, however, and two or more members of any review panel in the current cycle were to gather and discuss the merits of a proposal assigned to the panel, it is my opinion that the discussion would be a panel meeting subject to the open meetings law.

In contrast to the initial review process by the four-person panels, the in-person gathering of the entire group of Level 1 reviewers scheduled for February 2006 will constitute the kind of collective setting that comprises a meeting subject to the open meetings law. That gathering will provide each reviewer with the benefit of a group discussion of the merits of each implementation grant proposal before each of them scores the proposal. Even if the reviewers present at the in-person gathering of all reviewers are instructed not to engage in collective decision-making during that meeting, each individual reviewer's evaluation of the proposals will still necessarily be informed by the information the reviewer has received during the group's collective discussion of each proposal's strengths and weaknesses. The collective nature of the decision-making will be further reflected when the reviewers' individual scores are combined and averaged into a single score assigned to each proposal, and the highest scoring proposals are recommended to the Consortium for action. Such tabulation of individual evaluations amounts to collective action, just as does the typical tabulation of individual votes for or against a motion. Under these circumstances, I conclude that the in-person meeting of all Level 1 reviewers will be a meeting of a governmental body subject to the requirements of the open meetings law. Similarly, open meeting requirements will also apply to the subsequent collective discussion of the scores and proposal rankings by the Consortium itself.

The third and remaining question, then, is whether any portion either of the meeting of all Level 1 reviewers or of the Consortium's discussion of the planning and implementation grant proposals before it, can be conducted in closed session. In my opinion, both the grant reviewers and the Consortium, like the OAC, must meet in open session to discuss the grant applications HWPP has received, subject to two exceptions. First, the grant reviewers and the Consortium may conduct limited portions of their meetings in closed session for the purpose of discussing trade secret or proprietary information that may be contained in the proposals under review. Second, the Consortium may conduct limited portions of its grant evaluation meetings in closed session for the purpose of discussing the performance of MCW faculty partners affiliated with particular proposals where the faculty member's performance may be an issue.

Wisconsin Stat. § 19.85(1)(e) allows governmental bodies to convene in closed session for the purpose of "[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." The members of governmental bodies must keep in mind that this exemption applies only when "competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). The exemption is restrictive rather than expansive. Mere inconvenience, delay, embarrassment, frustration or even speculation as to the probability of success would be an insufficient basis to close a meeting. By using the word "require," the Legislature placed a strong burden on a governmental body considering whether to close a meeting. Correspondence MT23085 to Henry A. Gempeler, February 12, 1979.

The Consortium has strong, legitimate interests in obtaining the highest quality innovative grant proposals. The HWPP's emphasis on soliciting innovative proposals necessarily means that it seeks proposals that contain original ideas. Grant proposals submitted to the HWPP will often contain the MCW faculty partner's secret research design, financial information of the partnering community group, privileged information, proprietary information protected by a nondisclosure agreement and proprietary information that belongs to an organization that is partnering with the grant applicant. The HWPP instructs grant applicants to identify those portions of the grant proposal that contain such trade secrets, financial information and proprietary information. The reviewer group's and Consortium's evaluation of the merits of competing grant proposals will likely involve a discussion of information that the grant applicant has good reason to keep confidential because of its value to others who are also competing for grant funds. Moreover, because the Consortium invites unsuccessful grant applicants to reapply during a subsequent grant cycle after considering the reviewers' critical comments, unsuccessful grant applications continue to have competitive value to the applicants even after a particular grant cycle is completed. If an unsuccessful grant applicant's original ideas, trade secrets and proprietary information were disclosed to the public as part of the reviewer group's and Consortium's evaluation process, however, a competing MCW faculty member or partnering community organization could simply copy the original idea and resubmit it during a subsequent funding cycle. Without an assurance by the reviewer group and the Consortium that they will keep confidential the portion of their evaluations that consider the original ideas, trade secrets and proprietary information designated by the grant applicant, organizations whose proposals contain these features might decline to submit their proposals to the Consortium.

It is my informal opinion that the competitive interests of the reviewer group and the Consortium in maintaining the fairness of the grant proposal evaluation process and in receiving the highest quality proposals, are sufficiently strong that the exemption of Wis. Stat. § 19.85(1)(e) authorizes the reviewer group and the Consortium to evaluate in closed session the limited portions of a grant application relating to the applicant's original ideas, trade secrets or proprietary information. This conclusion is also supported by legislative policy in related areas. For example, Wis. Stat. § 16.75(2m)(f) provides that "[i]n opening, discussing and negotiating proposals, the department [of administration] may not disclose any information that would reveal the terms of a competing proposal." Similarly, regulations of the National Institutes of Health provide for closing the meetings of peer review groups that review grant applications and

contract proposals. 69 Fed. Reg., no. 2 at 277-78 (Jan. 5, 2004), creating 42 C.F.R. § 52h.6(b). To ensure that the public is not deprived of information it is entitled to receive about the evaluation of grant proposals, the presiding officers of the reviewer group and the Consortium, with the assistance of legal counsel, must be diligent about confining the Wis. Stat. § 19.85(1)(e) closed session to a discussion of only those grant proposals that contain trade secrets or proprietary information, and must not allow the discussion to include any aspects of the grant proposal which were or should have been discussed in open session.

It is possible that one or more of the currently pending grant applications may require a discussion of negative performance-related or discipline-related information about the applicant's MCW faculty partner. If a Consortium member has specific negative information about an MCW faculty member's employment problems or has negative information about the faculty partner's disciplinary history, if the member reasonably believes that the information is relevant to the issue whether the grant should be recommended for funding and if the member reasonably believes that the information is likely to have a substantial adverse effect on the reputation of the faculty member if discussed in public, it is my opinion that the Consortium may consider in closed session that limited portion of the particular grant proposal. 74 Op. Att'y Gen. 70 (1985). Wisconsin Stat. § 19.85(1)(f) authorizes a closed session for "[c]onsidering . . . disciplinary data of specific persons, [or] preliminary consideration of specific personnel problems . . . which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such . . . data, or involved in such problems . . . ."

The exemption of Wis. Stat. § 19.85(1)(f) is not limited to considerations involving public employees, unlike Wis. Stat. § 19.85(1)(c). By partnering with a community organization to compete for grant funds, the faculty member has submitted himself/herself to the Consortium's jurisdiction, though they are not public employees. Four members of the MCW serve on the Consortium. In rare cases, those members may have relevant negative reputationally sensitive performance-related or discipline-related knowledge about the faculty partner that would be an important factor in the Consortium's deliberations about whether to award a grant to the faculty member partnered with the grant applicant. In those unusual cases, Wis. Stat. § 19.85(1)(f) allows the Consortium to convene in closed session for the limited purpose of considering that information. As is the case with closed session discussion of trade secret and proprietary information, the Consortium's presiding officer and legal counsel must take steps to ensure that closed session discussion is limited to the subjects for which the closed session was called.

I hope the interpretations of the open meetings law in this letter are helpful to the HWPP and the Consortium as they continue to solicit, evaluate and fund grant proposals designed to promote public health, in a manner that complies with the Insurance Commissioner's directive to operate in accordance with the standards of the open meetings law.

Very truly yours,

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Enclosure