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October 31, 2006

Mr. Thomas A. Maroney
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Dear Mr. Maroney:

I am writing in response to your letter of August 8, 2006, in which you ask two questions related to the application of Wisconsin's open meetings law to the interpretation and application of a resolution of the Weyauwega-Fremont School Board ("the Board") that governs certain conduct of Board members in closed session meetings.

The resolution in question, a copy of which was included with your letter, prohibits all persons—including Board members—from "record[ing]" a closed session meeting of the Board "in any manner," unless such recording is expressly authorized by a majority of the Board. The phrase "in any manner" is not defined, but the resolution repeatedly lists tape recording and videotaping as examples of recording "in any manner." The resolution also provides that any person—including a Board member—who records or attempts to record a closed session in violation of the resolution shall be excluded from that closed session and from future closed sessions until the individual surrenders all existing copies of such recordings and agrees not to engage in any further recording of closed sessions.

According to your letter, the Board president has taken the position that personal note taking by a Board member during a closed session constitutes a "manner" of recording the session and thus is prohibited by the above resolution. You further state that the Board president ejected Mr. Barry Hoerz—a member of the Board whom you represent—from a closed session on July 24, 2006, because Mr. Hoerz refused to stop taking notes during that session. In addition, according to your letter, the Board president has also banned Mr. Hoerz from attending

future closed sessions until he turns over his notes and promises not to take notes during future closed meetings.[1]

(1) Your first question asks whether a governmental body has the authority to prohibit note taking by a Board member at closed sessions.

Before addressing this question, I observe, as a threshold matter, that the Board president may have erred in construing the resolution at issue as prohibiting note taking in closed sessions. The plain language of that resolution provides, in pertinent part, that "no one . . . shall be permitted to *record* in any manner (e.g., tape record or videotape) a closed session meeting[.]" (Emphasis added). According to Webster's Third New International Dictionary 1898 (1986), one of the definitions of the verb "record" is "to make an objective lasting indication of in some mechanical or automatic way : register permanently by mechanical means." The reference to tape recording and videotaping, which is repeated several times in the Board's resolution, strongly suggests that the resolution uses the above definition of "record" and is thus intended to prohibit only the *mechanical or automatic* recording of a closed session, not the taking of personal notes *by hand*.

In addition, even if the verb "record" is construed to include some hand written note taking, it still does not follow that *all* personal note taking in a closed session would amount to "recording" that session. The primary definition of the verb "record," according to Webster's Third New International Dictionary 1898 (1986), is "to set down in writing : make a written account or note of : furnish written evidence of : put into written form." Under that definition, note taking can constitute "recording" of a meeting only if the notes put the substance of that meeting into written form or provide a written account or evidence of that substance. In contrast, notes that set forth matters other than the contents of the meeting—including, but not limited to, the note taker's own thoughts—would not constitute a "recording" of the meeting and would not have the same potential to threaten its confidentiality. Contrary to the Board president's

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[1]The language of the resolution provides that the decision to allow or prohibit recording on any given occasion may be determined "by a majority of the members of the governmental body[.]" Your letter does not say, however, whether the Board president's interpretation of the resolution or his actions thereunder were specifically authorized or ratified by a majority of the Board. Nor is it clear whether your client has attempted to appeal any of the president's actions to the Board, as is generally permitted by standard rules of parliamentary procedure. Because the use of such internal procedures for vindicating a member's rights could resolve the problems at issue, it is generally advisable to exhaust them before seeking relief in the courts. *See* Alice Sturgis, *Standard Code of Parliamentary Procedure* 222 (2001).

interpretation, therefore, it appears unlikely that the Board resolution was meant to prohibit all personal note taking by Board members at closed sessions.[2]

Proceeding to the substance of your first question, it is my opinion that Wisconsin's open meetings statutes do not govern whether a governmental body has the authority to prohibit its members from taking notes in closed sessions. As a general matter, whatever powers a governmental body may have to determine its own procedures and to regulate the conduct of its members do not originate in the open meetings law. Such powers originate, rather, in the constitutional provisions, statutes, ordinances and charters that generally assign such a body its powers and duties or they are inherent powers of public deliberative assemblies as traditionally recognized under the common parliamentary law. *See* Paul Mason, *Mason's Manual of Legislative Procedure* § 4.1-4.2 (2000). The open meetings statutes impose certain *restrictions* and *limitations* on the powers that a governmental body derives from these other sources, but those statutes generally are not themselves an independent source of particular powers.

With regard to public school boards, article X of the Wisconsin Constitution requires the establishment of district schools and authorizes the Legislature to prescribe the qualifications, powers, duties and compensation of officials charged with supervising public education in the state. *See* Wis. Const. art. X, §§ 1 and 3. Pursuant to that authorization, the Legislature has enacted Wis. Stat. ch. 120, which provides for the government of school districts by elected school boards. In particular, Wis. Stat. § 120.13 generally empowers school boards to "do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils[.]" That statute further enumerates a large number of specific powers of school boards related to various aspects of school district activities. Neither the constitution nor the statutes, however, specify the powers of a school board to govern its own procedures or to regulate the conduct of its members.

In the absence of any controlling constitutional or statutory provisions, it is my opinion that a court would be likely to seek guidance regarding such procedural powers in the recognized principles of the common parliamentary law. *See Mason's Manual of Legislative Procedure* §§ 2.5 and 37.1. Under those principles, a governmental body is generally held to have the inherent power to regulate its own procedures in any way that is reasonable and necessary for the proper exercise of the body's authorized functions. *See Mason's Manual of Legislative Procedure* §§ 2.1, 2.6, 19.1, and 37.2. This includes the inherent power of the body to protect itself, to maintain its own order and dignity, to enforce its procedural rules, to discipline its members, and to restrain any individual to the extent necessary to enable the body to perform its

[2]Although it is not the Attorney General's role to construe the intended meaning of a school board's resolution, I offer my opinion on this point because the resolution raises fewer problems under the open meetings law, if it is construed in accordance with these common meanings of the word "record."

public duties. *See Mason's Manual of Legislative Procedure* §§ 805-807; *Standard Code of Parliamentary Procedure* 222-23.

Under the above principles, a court would likely conclude that, where confidentiality is reasonably necessary for the proper exercise of a school board's legally authorized functions, the Board has the inherent power to hold a closed meeting or to limit the recording of such a meeting, subject to any restrictions imposed by a higher controlling authority such as an applicable open meetings statute. Wisconsin's open meetings statutes, for example, prohibit all closed meetings except those held for one or more of the specific purposes enumerated in Wis. Stat. § 19.85. Where none of those enumerated reasons is present, a meeting must be open to the public and the governmental body cannot prohibit recording of the meeting. Wis. Stat. §§ 19.83(1) and 19.90. Even where one of the purposes justifying closure does exist, the body must follow specific notice and motion procedures before going into closed session. Wis. Stat. § 19.85(1). Once an authorized closed session has been properly convened in accordance with those procedures, however, the open meetings statutes place no further limitations on the inherent power of a governmental body to protect the confidentiality of that session by, for example, restricting or prohibiting any recording of the proceedings.

It does not follow, however, that a governmental body's power to protect the confidentiality of a closed session is not subject to restrictions derived from some source other than the open meetings statutes. Parliamentary law recognizes not only the powers of governmental bodies to regulate their own proceedings, but also the rights of the members of such bodies to effectively participate in the body's activities. *See Standard Code of Parliamentary Procedure* 221-22. The powers of the body and the rights of its members must be considered in relation to each other. Individual members, in exercising their own participatory rights, have a duty not to interfere with the concomitant rights of other members or of the body as a whole and, accordingly, must generally obey the procedural rules of the body. Conversely, the body, in regulating its collective proceedings, should not interfere with the participatory rights of an individual member any more than is necessary to protect the coordinate rights of other members and the ability of the body to carry out its public functions. *See Standard Code of Parliamentary Procedure* 221-24; Henry M. Robert, *Parliamentary Law* 344 (1923).

If a court were to apply the above principles to the situation about which you inquire, it would be likely to find significant interests on both sides of the balance. As your letter indicates, the ability of a member of a governmental body to effectively discharge his or her official duties may require the taking of personal notes in order to occasionally refresh the member's memory, to assist in effectively gathering information, or to record the member's own thoughts about matters needing further investigation. On the other hand, as discussed above, the governmental body also has a substantial and legitimate interest in restricting the creation of any tangible, lasting record that might threaten the confidentiality of a lawfully closed meeting.

The outcome of the balancing of the above interests, however, is a matter of general parliamentary law that is outside the scope of the open meetings statutes. With regard to such matters, the Attorney General is legally precluded from giving legal opinions or advice to persons or entities other than state officers and agencies, the two branches of the Legislature, the Governor, county corporation counsel and district attorneys. I cannot speculate, therefore, as to whether a court would be likely to find, in your situation, that the Board (or its president) has gone too far in prohibiting Mr. Hoerz from taking notes at closed sessions. In addition, your letter suggests that you may be planning to commence litigation on this issue and it would be inappropriate for the Attorney General to speculate on the probable outcome of such an action.

I am aware, of course, that an Attorney General opinion published in 1977 commented that members of a governmental body do not have a right to tape record closed session meetings of the body. *See* 66 Op. Att'y Gen. 318, 325 (1977). That comment, however, was part of a discussion that primarily focused on the right to record *open* sessions and it did not purport to exhaustively analyze the issues connected with the recording of closed sessions.[3] Accordingly, the comments in the 1977 opinion should be read only as saying that the open meetings statutes do not themselves give the members of a governmental body any statutory right to record a closed meeting. That opinion does not, however, address the question of the extent, if any, to which a governmental body's power to regulate the recording of closed meetings might nonetheless be limited by the inherent rights of individual members to effectively participate in meetings. Once again, it is my opinion that the latter question is not controlled by the open meetings statutes.

(2) Your second question asks whether the president of the Board violated Wis. Stat. § 19.89 when he excluded your client from the closed meeting on July 24, 2006, for violating the Board's prohibition on note taking.

This question, of course, turns in part on the answer to your first question—*i.e.*, on the legal validity or invalidity of the underlying prohibition on note taking. It goes without saying that the Board could not legitimately penalize a member for violating a procedural rule, if that rule were itself unlawful. In order to meaningfully address your second question, therefore, it is necessary to assume—for the sake of the discussion—that a prohibition on note taking is legally valid.

Proceeding to the substance of your question, I begin by noting, once more, that the constitutional and statutory provisions governing school boards do not specify their powers to

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[3]The 1977 opinion predated the 1978 enactment of Wis. Stat. § 19.90, which requires a governmental body to allow recording of open sessions as long as it does not disrupt the meeting. That statute, however, does not affect my opinion on this point, because it applies only to open sessions and, as already noted, it does not itself limit a body's power to protect the confidentiality of a closed session.

penalize their members for violating their procedural rules. Guidance may again be sought, therefore, in the principles of the common parliamentary law which, as already noted, generally recognize the inherent power of public bodies to enforce their procedural rules and to discipline their members. The forms of discipline that a body generally may impose include such techniques as reprimand or censure, pecuniary penalties, and suspension or expulsion of the offending member. *See Mason's Manual of Legislative Procedure* §§ 561-62 and 805.4; *Robert's Rules of Order* § 624-25 (10th ed. 2000); *Standard Code of Parliamentary Procedure* 223-24.

The exercise of the above common-law powers however, is subject to any restrictions imposed by a higher controlling legal authority, including Wisconsin's open meetings statutes. As your letter points out, one of those statutes, Wis. Stat. § 19.89, expressly provides that "[n]o duly elected or appointed member of a governmental body may be excluded from any meeting of such body." The plain language of that statute appears to override, at least in part, any inherent power that a school board might otherwise have to eject a member from a meeting for violating a procedural rule like the prohibition on note taking at issue here. It is thus possible that the Board president may have violated Wis. Stat. § 19.89 when he ejected Mr. Hoerz from the meeting in question.

I am reluctant to conclude, however, that Wis. Stat. § 19.89 categorically prohibits a governmental body from *ever* expelling a member from a meeting. In addition to the general common-law power to enforce its own procedural rules, a governmental body also has the more particular power to preserve necessary order and decorum and to restrain its members to the extent required to enable the body to effectively perform its public functions. *See Mason's Manual of Legislative Procedure* §§ 575 and 806-07; *Robert's Rules of Order* § 61. Where the violation of a procedural rule does not seriously threaten or impede the body's ability to accomplish its lawful purposes, enforcement may be a routine matter that can be effectively accomplished by disciplinary methods other than expulsion. In such circumstances, a court would probably conclude that Wis. Stat. § 19.89 precludes the use of expulsion to punish a member for such an offense.

In contrast, where a member's conduct directly disrupts or impedes the body's ability to do business, meaningful and effective enforcement may be impossible without the power to eject the offending member. Most obviously, a member who interrupts and obstructs a meeting through disorderly and unruly outbursts may have to be removed from the hall before the

meeting can continue. There may also be situations in which a member engages in some other form of conduct which—while not outwardly disruptive—nonetheless effectively blocks the body's ability to do business.[4] To interpret Wis. Stat. § 19.89 as prohibiting expulsion even in these kinds of circumstances would lead to the absurd result of leaving a governmental body without the power to effectively protect its own ability to carry out its legally prescribed duties. It is unlikely that Wis. Stat. § 19.89 was intended to handcuff governmental bodies to that extent.

In my opinion, therefore, a court construing Wis. Stat. § 19.89 would probably conclude that where the ejection of a member for cause is necessary to protect a governmental body's ability to do its business, that member is not "excluded from any meeting of such body" within the meaning of Wis. Stat. § 19.89. Any such "necessity" exception to the general prohibition on exclusion, however, would undoubtedly be narrowly construed and applied, so as not to undermine the statutory purpose of preventing the implementation of exclusionary attendance policies.

Based on the limited facts provided in your letter, it is unclear whether the ejection of Mr. Hoerz from the July 24, 2006, meeting could be justified under the above analysis. As a general matter, it seems unlikely that the unauthorized taking of personal notes during a closed session, without more, would seriously disrupt or impede the Board's ability to conduct its lawful business. Therefore, even if the courts were to recognize a narrow "necessity" exception to Wis. Stat. § 19.89, such note taking still probably would not warrant the ejection of a member from a meeting in most circumstances. It is nevertheless possible that there could be some exceptional situations in which a member's refusal to comply with a rule against note taking in closed session would effectively block the Board's ability to conduct its scheduled business, thereby potentially justifying the member's ejection. Without a more complete development of the facts, however, it is impossible to determine with certainty whether the specific conduct of Mr. Hoerz, viewed in its factual context, rose to this level of interference with the Board's business.

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[4]For example, a member who is involved in adversarial litigation against a body should not be allowed to attend a closed session at which the body will consult with legal counsel about its litigation strategy. In this kind of situation, courts and attorneys general in other states have concluded that the body may deny admission to the adversary member. *See* Tex. Op. Atty. Gen. JM-1004 (Jan. 10, 1989); *Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen*, 598 A.2d 1232 (N.J. Super. 1991); Ky. Op. Atty. Gen. 84-234 (June 26, 1984).

Finally, even if Mr. Hoerz's ejection from the July 24, 2006, meeting were found to be justified, I think it is likely that his continued exclusion from future closed session meetings nonetheless runs afoul of Wis. Stat. § 19.89. The mere fact that Mr. Hoerz has refused either to turn over his notes or to promise not to take notes at future closed sessions does not itself obstruct the Board's ability to conduct those sessions. Such a context-specific determination cannot be made prospectively, but must be judged in relation to the particular facts of an actual closed session meeting. A blanket policy of excluding from future closed sessions any member who does not promise to comply with the no-recording resolution thus is not necessary to protect the Board's ability to do business and appears to violate Wis. Stat. § 19.89. A non-compliant member may, of course, be disciplined by other methods that do not involve exclusion from meetings.

Sincerely,

Thomas C. Bellavia

Thomas C. Bellavia
Assistant Attorney General

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