



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Bruce A. Olsen  
Assistant Attorney General  
608/266-2580  
olsenba@doj.state.wi.us  
FAX 608/267-2223

December 12, 2006

Mr. Philip Dziki  
29920 102nd Street  
Trevor, WI 53179

Dear Mr. Dziki:

Your October 4, 2006, letter to Attorney General Peggy A. Lautenschlager has been forwarded to me for response. You inquire whether the formally constituted subunits of the Salem Town Board ("Board"), created by Board rule or order, and designated as Board "Committees" or "Subsets," are governmental bodies subject to the Wisconsin open meetings law. The answer is "yes," notwithstanding the town attorney's opinion to the contrary. Because it appears that the Board's subunits may have been acting in reliance on mistaken legal advice, the Department of Justice will not commence an enforcement action at this time, if the Board agrees to provide this Department with (a) copies of the meeting notices for every Board Committee or Subset meeting that occurs between January 1, 2007 and April 30, 2007, within 24 hours after public notice is given, (b) copies of the approved minutes of each such meeting within 24 hours after the minutes have been approved and (c) demonstrates compliance during that time period.

Your letter encloses two verified complaints. One of the complaints alleges that the Board's two-member Personnel Committee/Subset, comprised of Supervisor Patrick O'Connell and Supervisor Joseph G. Meier, conducted two meetings in violation of the open meetings law sometime prior to February 13 and sometime prior to February 23, 2006. Your complaint is factually supported by entries in the Board's official minutes of its February 13 and February 23 meetings, which refer to prior meetings of the Personnel Committee/Subset regarding the position and duties of town employee Kris Schalck. In response to a public records request I made, the town clerk advised me that she has no records of meeting notices or minutes for Personnel Committee/Subset meetings held in January or February 2006.

The second complaint alleges that the Board's two-member Public Safety Officer & Water Patrol Liaisons Committee/Subset, comprised of Supervisor Dennis Farber and Supervisor Josephine Wiedman, conducted at least one meeting in violation of the open meetings law during the months of June and July 2006. Your complaint is factually supported by entries in the Board's official minutes of its July 10 and August 14, 2006, meetings, which refer to

Mr. Philip Dziki  
December 12, 2006  
Page 2

employment interviews conducted by the Public Safety Officer & Water Patrol Liaisons Committee/Subset.

On November 22, 2006, I sent a written public records request to the town clerk, asking for copies of (a) the meeting notices and minutes for Personnel Committee/Subset meetings held in January or February 2006 and (b) the meeting notices and minutes for Public Safety Officer & Water Patrol Liaison Committee/Subset meetings held in June, July or August 2006 (copy enclosed). On November 28, 2006, the clerk responded that the requested records do not exist (copy enclosed).

The open meetings law provides that “[e]very meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session.” Sec. 19.83(1), Wis. Stats.

“Governmental body” means “a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order,” and includes “a formally constituted subunit of any of the foregoing.” Sec. 19.82(1), Wis. Stats. A “formally constituted subunit” is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att’y Gen. 38, 40 (1985). The definition of “governmental body” focuses on the manner in which a body was created, rather than on the type of authority the body possesses. Thus, formally constituted subunits that have purely advisory powers but no power to bind the parent body, and that are created by constitution, statute, ordinance, rule or order are subject to the law. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979) (Annexation and Apportionment Committee created by La Crosse city council, consisting of five alderpersons and given authority to deal with annexation issues and to make recommendations to the city council, but not to bind the city council, is subject to the open meetings law). Similarly, bodies created by a parent body or public official that are comprised partially or exclusively of non-members of the parent body (*i.e.*, are not “formally constituted subunits”) and are given the responsibility to provide advice to the parent body or public official are subject to the open meetings law. 78 Op. Att’y Gen. 67 (1989).

A “meeting” is “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. The Wisconsin Supreme Court has held that the open meetings law applies 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). Thus, when both members of a two-person Committee or Subset of the Board are present and they engage in

Mr. Philip Dziki  
December 12, 2006  
Page 3

the Committee's or Subset's business, a meeting subject to the open meetings law occurs. If that meeting is not preceded by public notice, the meeting is in violation of the open meetings law.

The Board meeting minutes that refer to meetings of the two Committees/Subsets strongly supports the factual inference that those bodies met. The information I have received from the town clerk about the nonexistence of meeting notices for the Committees/Subsets for the meetings in question strongly supports the factual inference that those meetings were not preceded by public notice, as required by section 19.83(1) of the Wisconsin Statutes. Those two factual inferences support the legal conclusion that the Personnel Committee/Subset violated the open meetings law in February 2006 when it failed to provide advance public notice of its meetings. Those factual inferences also support the legal conclusion that the Public Safety Officer & Water Patrol Liaisons Committee/Subset violated the open meetings law in June and July 2006, when it failed to provide advance public notice of its meetings.

You initially submitted your verified complaints and supporting documents to the Kenosha County District Attorney, as required by section 19.97(1). The Assistant District Attorney ("ADA") to whom the matter was assigned declined to take action on the ground that his personal relationships and contacts with individuals mentioned in the complaints created a potential conflict of interest for him. Although the assigned ADA did not indicate that any or all of the other twelve ADAs in the office had the same or similar potential conflicts, the assigned ADA recommended that you pursue the matter with the Attorney General, and returned your original verified complaints and supporting documents.

The ADA's letter also enclosed a September 19, 2006, memorandum from the town's attorney. The attorney's memorandum took the position that a "gathering of two board members as a 'committee' or 'subset' to discuss a specific aspect of Town business, absent unusual circumstances, does not constitute a violation of the provisions of the Open Meetings Law" (Memorandum at 1, ¶ 1). The memorandum was based on the attorney's understanding that "these 'committees' or 'subsets' are created solely by rule or order of the Town Board, have no independent authority to bind the Town Board or take action with respect to town business and do not constitute a quorum of the Town Board" (Memorandum at 1, ¶ 4). The memorandum also expresses the attorney's understanding that "no 'committee' or 'subset' has the authority to block or otherwise control the Town Board's course of action on the particular issues addressed by the respective 'committees' or 'subsets'" (Memorandum at 1-2, ¶ 4).

The attorney's memorandum quotes the portion of section 19.82(1) that defines "governmental body" to include "formally constituted subunits" (Memorandum at 1, ¶ 2), and erroneously asserts that the statute "is somewhat ambiguous as to whether the provisions of the 'Open Meetings Law' apply to these types of 'committees' or 'subsets'" (Memorandum at 2, ¶ 1). Section 19.82(1) expressly and unambiguously includes "a formally constituted subunit" of a local board within the definition of a "governmental body." A 1985 Attorney General's

opinion clearly defined “formally constituted subunit” to encompass the two-member Committees and Subsets created by the rule or order of the Salem Town Board. The Attorney General stated: “Generally speaking, a subunit would be a separate body created by the parent body and composed of members who are also members of the parent body.” 74 Op. Att’y Gen. at 40. Moreover, the *Swanson* case clearly rejects the proposition that a local government subunit must have the authority to bind the municipal governing body in order to be subject to the open meetings law. The court stated, 92 Wis. 2d at 317:

The defendant argues that the Committee did not have authority to bind the city in any agreement with the town residents. The statute does not require or contemplate that committees must have such authority before they are subject to the provisions of the Open Meeting Law. The ultimate question is whether the members of a governmental body have convened for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body, sec. 19.82(2), Stats., and not whether the governmental body is empowered to exercise the final powers of its parent body. In this case the Committee’s actions were consistent with and in furtherance of its charge to “deal with firms, persons and corporations relative to annexation.”

Because the town attorney’s memorandum bears a date subsequent to the meetings you challenge, it is unclear whether the Committee or Subset members were acting in reliance on the attorney’s mistaken opinion, or whether they acted without the advice of counsel. That unresolved factual uncertainty is critically important in determining whether it would be appropriate to commence a forfeiture action against any of the members of the Committees or Subset for knowing attendance at an unlawful meeting. Sec. 19.96, Wis. Stats. Even if it could not be established that the members of the Committees and Subsets knowingly attended the meetings in question, however, the presiding officer of each subunit would be subject to forfeiture for failing to provide advance public notice of the meetings in question. Although commencement of a forfeiture action against some or all of the Board members might impress on them the importance of complying with the open meetings law, your letter indicates that your goals are broader than simply forcing a monetary penalty on Board members. You ask the Attorney General to:

[E]nd the back room, secretive operations of the government of the Town of Salem. . . . The residents of the Town of Salem, I being one of them, deserve the chance to witness and discuss the issues that touch their lives and are financed through their taxes.

Mr. Philip Dziki  
December 12, 2006  
Page 5

I have concluded that members of the Personnel Committee violated the open meetings law on at least two occasions in February 2006, and that members of the Public Safety Officer & Water Patrol Liaison Committee/Subset violated the open meetings law on at least one occasion in June or July 2006. Under separate cover, I am sending a copy of this letter to the town's attorney and the four Board members, offering to decline legal action against the town supervisors for the violations identified in this letter if the Board and its Committees and Subsets demonstrate future compliance with the open meetings law by providing the Department of Justice with copies of every body's meeting notices and meeting minutes for the months of January, February, March and April 2007. If the Board and its formally constituted subunits fail to comply with the open meetings law during that period, the Department of Justice will reconsider whether legal action is warranted. The letter to the Board members and the town's attorney will also advise them that any allegations that the Board has violated the open meetings law in the period after April 2007, will be reviewed with great scrutiny, since the town's attorney and its members have now been put on notice that their past practice was deficient, and have been advised to correct that practice.

Thank you for your interest in securing full compliance with the open meetings law.

Sincerely,



Bruce A. Olsen  
Assistant Attorney General

BAO:ajw

Enclosures

c: Joseph G. Meier  
Patrick O'Connell  
Dennis Faber  
Josephine Wiedman  
Richard Scholze

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STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
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P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Bruce A. Olsen  
Assistant Attorney General  
608/266-2580  
olsenba@doj.state.wi.us  
FAX 608/267-2223

November 22, 2006

Ms. Lynn Pepper  
Clerk  
Town of Salem  
Post Office Box 443  
Salem, WI 53168-0443

Dear Ms. Pepper:

I have been asked to conduct a preliminary inquiry into alleged open meetings violations by two Committees (now denominated "Subsets") of the Town of Salem Town Board. To assist my review of this matter, please provide me with copies of the following documents:

1. All public notices of meetings of the Town of Salem Personnel Committee for the months of January 2006 and February 2006.
2. Minutes for all January 2006 and February 2006 meetings of the Town of Salem Personnel Committee.
3. All public notices of meetings of the Town of Salem Public Safety Officer & Water Patrol Liaisons Committee (currently identified as the Public Safety Officer & Water Patrol Liaisons Subset), for the months of June 2006, July 2006 and August 2006.
4. Minutes for all June 2006, July 2006 and August 2006 meetings of the Town of Salem Public Safety Officer & Water Patrol Liaisons Committee (currently identified as the Public Safety Officer & Water Patrol Liaisons Subset).

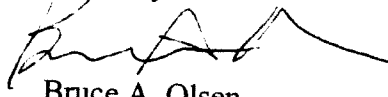
Please provide the requested documents as soon as practicable and without delay, as required by section 19.35(4)(a) of the Wisconsin Statutes. If any of the requested records do not exist, please state that fact in your written response to this written request, which section 19.35(4)(b) entitles me to. If the actual, necessary and direct cost of the copies and postage is more than \$5.00, please advise me of the cost, and I will see that it is pre-paid, pursuant to section 19.35(3)(b) and (d). If the total cost is less than \$5.00, please include your

Ms. Lynn Pepper  
November 22, 2006  
Page 2

invoice, and I will see that it is promptly paid, unless in your discretion you choose to provide the requested records for free or at a reduced cost, pursuant to section 19.35(3)(e).

If you have questions about the scope of this request, please contact me and I will attempt to provide whatever additional detail you might require. Thank you.

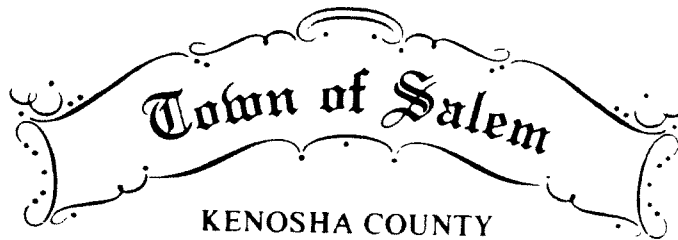
Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olsen", with a long horizontal flourish extending to the right.

Bruce A. Olsen  
Assistant Attorney General

BAO:ajw

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NOV 30 2006

P.O. BOX 443 • 9814 ANTIOCH ROAD (Hwy 83) • SALEM, WI 53168  
TELEPHONE (262) 843-2313 FAX (262) 843-4432

November 28, 2006

Mr. Bruce Olsen  
Assistant Attorney General  
17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857

Dear Mr. Olsen:

In response to your inquiry dated November 22, 2006, the documents your office has requested do not exist.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lynn M. Pepper".

Lynn M. Pepper  
Salem Town Clerk