



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 29, 2006

Mr. Peter Weinschenk
TP Printing Company, Inc.
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Dear Mr. Weinschenk:

You inquire whether the Marathon School Board gives legally sufficient notice of its closed sessions. In my informal opinion, it is likely that a reviewing court would determine that the school board's meeting notices have been legally deficient because they do not identify the subjects of the anticipated closed sessions with sufficient specificity. It is also my informal opinion that a reviewing court would likely determine that the school board has not followed the required statutory procedure for conducting a portion of its meetings in closed session.

Your letter enclosed three meeting notices of the Marathon City School District Board of Education. The notices are for the May 10, August 9 and September 13, 2006, regular meetings of the school board. Each meeting notice contains an agenda item described as follows:

CLOSED SESSION:

THE BOARD OF EDUCATION RESERVES¹ THE RIGHT TO DECLARE A CLOSED SESSION PURSUANT TO STATE STATUTE 19.85(1)(c) AND (e). ANY BUSINESS CONDUCTED IN CLOSED SESSION OR SUBSEQUENT OPEN SESSION SHALL CONFORM WITH THE STATED AGENDA.

Considering employment, promotion, compensation, or performance of any public employee over which the governmental body has jurisdiction or exercises responsibility; and deliberating and conducting other specified public business whenever competitive or bargaining reasons require a closed session.

I have also reviewed the minutes of the ten board meetings held between April 12 and September 13, 2006. See <http://www.marathon.k12.wi.us/School%20Board%20Minutes.htm>

¹The August 9 meeting notice used "reserved" instead of "reserves."

(last visited October 19, 2006). The minutes of each of those meetings contains an entry in the following form:

Motion by [member name], 2nd by [member name], to go into closed session per Wisconsin Statute 19.85(1)(c) and (e). Any business conducted in closed session or subsequent open session shall conform to the stated agenda. Considering employment, promotion, compensation or performance of any public employee over which the governmental body has jurisdiction or exercises responsibility; and deliberating and conducting other specified public business whenever competitive bargaining reasons require a closed session. Yes – [names of all board members in attendance]. Motion carried. The board went into closed session at [hour and minute stated].

The closed session motions were sometimes made by the school board president, and sometimes made by other members of the school board. The minutes reflect that four of the ten closed sessions lasted between 30 and 60 minutes; two lasted between one and two hours; three lasted between two and three hours; and one lasted more than three hours.

The school board's policies, as posted on its website, provide that meeting notices are to be published in the newspaper and are to be posted at each school in the district. The policies further provide that public notice of school board meetings must be given at least 24 hours in advance of the meeting, except where good cause exists to reduce the notice period to two hours. The policies further provide that any board member, staff member or district resident who wants an item placed on the agenda should submit the item to the district administrator at least five days before the meeting. Finally, the policies provide that "[a]t least 48 hours prior to each regular Board meeting, the District Administrator shall send to each Board member a tentative agenda and a brief explanation of agenda items." District policy 171.2. *See also* District policy 171.1. *See* <http://www.marathon.k12.wi.us/District/Policies/100%20Manual%20Index.htm> (last visited October 19, 2006).

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. The notice need not contain a detailed agenda, but because the public is entitled to the fullest and most complete information compatible with the conduct of governmental business, sec. 19.81(1), Wis. Stats., the notice should be specific. This requires that when a member of the governmental body knows in advance of the time notice is given that a matter may come before the body, that matter must be described in the meeting notice. 66 Op. Att'y Gen. 143, 144 (1977). The notice provision in section 19.84(2) of the Wisconsin Statutes requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. The notice must contain the specific nature of

the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att'y Gen. 93, 98 (1977).

Section 19.85(1) prescribes the procedure every governmental body must follow prior to convening in closed session. The statute provides, in relevant part:

Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session.

The 2005 Wisconsin Department of Justice publication *Wisconsin Open Meetings Law: A Compliance Guide*² at 12-13, further describes the procedural requirements for convening in closed session:

Every meeting of a governmental body must initially be convened in open session. Wis. Stat. §§ 19.83 and 19.85(1). Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. [*State ex rel. Schaeve [v. Van Lare]*, 125 Wis. 2d [40] at 51[, 370 N.W.2d 271 (Ct. App. 1985)]. Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. 66 Op. Att'y Gen. 93, 97-98. Stating the statute section number of the applicable exemption is not sufficient because most exemptions contain a number of subjects within the exemption. For example, Wis. Stat. § 19.85(1)(c) authorizes governmental bodies to use closed sessions to interview candidates for positions of employment, to consider promotions of particular employees, to

²The 2005 *Compliance Guide* is available for download electronically on the Department of Justice website, <http://www.doj.state.wi.us/AWP/OpenMeetings/2005-OML-GUIDE.pdf> (last visited October 19, 2006). The on-line version of the *Compliance Guide* contains links to electronic copies of the Attorney General opinions and correspondence referred to in the publication's text.

consider the compensation of particular employees, and to conduct employee evaluations—each of which is a different subject matter that should be identified in the meeting notice and in the motion to convene into closed session. Correspondence, October 23, 2003. Some specificity is needed in describing the subject matter of the contemplated closed meeting so that the members of the governmental body can intelligently vote on the motion to close the meeting. Correspondence, June 29, 1977. The governmental body must limit its discussion in closed session to the business specified in the announcement.

None of the ten meeting notices between April 12 and September 13, 2006, identifies with reasonable specificity any subject matter that might be taken up by the school board in any of those closed sessions. The district's policy requires the district administrator to send each school board member a "brief explanation of the agenda items" at least 24 hours prior to the deadline for posting a meeting notice, District policy 171.2. If the district administrator is able to provide a brief written explanation of every agenda item to every school board member, the administrator is able to create a public meeting notice that gives the public a reasonably specific description of every subject matter the board may take up at the meeting. Under those circumstances, a reviewing court would likely determine that the school board violated the open meetings law by failing to "set forth the . . . subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats.

In addition, section 19.85(1) requires the presiding officer of the body to "announce[] to those present at the meeting . . . the nature of the business to be considered at such closed session" as well as "the specific exemption or exemptions . . . by which such closed session is claimed to be authorized." The presiding officer's announcement "shall become part of the record of the meeting." The closed session may not take up any business "except that which relates to matters contained in the chief presiding officer's announcement of the closed session."

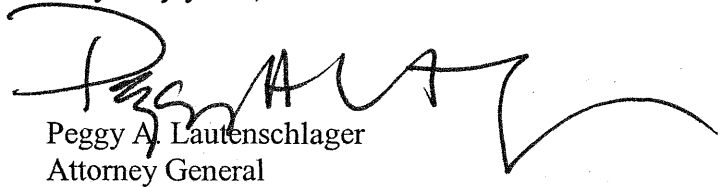
None of the records of the ten meetings between April 12 and September 13, 2006, indicate that the presiding officer made any announcement about the nature of the business to be conducted at any of the ten closed sessions, at any time prior to the adoption of the motion. Since such announcements must become part of the meeting record, the absence of any indication in any of the minutes that such an announcement was made strongly supports the inference that the presiding officer did not make the required announcements. Moreover, because section 19.85(1) limits the permissible subjects of closed session discussion to the subjects identified in the chief presiding officer's announcement, the presiding officer's failure in each instance to announce the nature of the business to be considered in closed session means that every subject considered by the board during each of the ten closed sessions was beyond the scope of the missing required announcement, and was therefore unlawfully considered.

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As unambiguously stated in section 19.85(1) and the 2005 *Compliance Guide*, a governmental body that entertains a motion to convene to closed session must announce to those in attendance at the meeting both “the nature of the business to be considered at such closed session, *and* the specific exemption or exemptions . . . by which such closed session is claimed to be authorized.” Sec. 19.85(1), Wis. Stats. Thus, it is very likely that a reviewing court would determine that the recitation in each closed session motion of the general multi-subject exemption claimed to justify the closed session was not legally sufficient to satisfy the statute’s independent requirement that the presiding officer identify the “nature of the business to be considered.”

Because I have concluded that it is highly likely that a reviewing court would find violations of the open meetings law by the school board of the City of Marathon School District, I am providing a copy of this letter to the school district administrator and to the Marathon County District Attorney for consideration of further formal or informal action designed to improve the school district’s public notice and closed session motion practices.

Very truly yours,



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Attorney General

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