



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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February 13, 2007

Mr. Mark Anderson  
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Dear Mr. Anderson:

Attorney General J.B. Van Hollen has asked me to respond to your January 7, 2007, letter. I regret that I was not able to provide you with this written response by January 26, as you had requested. We were able to discuss the issues you raised by that date, however. The substance of our discussion is memorialized in this letter.

The Executive Committee of the Marinette County Board ("Executive Committee" or "Board") posted a meeting notice in advance of its December 4, 2006, meeting. Item 5 of that notice provided:

5. Discuss/consider entering into closed session per Wisconsin Statute 19.85(1)(e) deliberating 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, action if any

The minutes of the December 4, 2006, Executive Committee meeting provide, in relevant part:

5. Closed Session

Motion (Seefeldt/Just) to enter closed session at 1:38 p.m. per Wisconsin Statute 19.85(1)(e) deliberating 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. Motion carried. Roll Call Vote – All Supervisors voting yes.

On December 19, 2006, Board Chair George Bousley distributed a memo addressed to county board supervisors. Apparently referring to the December 4, 2006, Executive Committee

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meeting, the memo stated: "Earlier this month the Executive Committee met and authorized our Administrator to pursue the feasibility of the sale of the hospital property."

You inquire whether the meeting notice is legally sufficient; *i.e.*, whether it sets 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. You also inquire whether the Board Chair's description of the subject of the December 4 closed session adequately justifies the subject of the closed session he described in his December 19 memo. In addition, you inquire whether the Executive Committee's decision to authorize the county administrator to pursue the feasibility of the sale of the hospital property required a motion and whether such a motion could be made in closed session. Finally, you inquire whether the minutes of the December 4 Executive Committee meeting reflect that the presiding officer of the Executive Committee complied with the procedures required by section 19.85(1) of the Wisconsin Statutes for convening in closed session. In summary, it is my opinion that the meeting notice for the December 4 Executive Committee meeting did not satisfy the requirements of section 19.84(2), and that the Executive Committee failed to follow the proper procedure before convening in closed session on December 4. However, because the materials you provided with your letter do not describe the substance of the December 4 closed session with any specificity, I cannot conclusively determine at this time whether the discussion that authorized the county administrator to pursue the feasibility of the sale of the hospital property was appropriate for a closed session. There is at least some information in the materials you provided to suggest that that subject did not require a closed session discussion in order to protect the county's competitive or bargaining interests. Finally, although it is my opinion that the Executive Committee's December 4 action required a motion, I am unable to conclusively determine whether that motion could have been made in open session., because I have only limited information about the exact nature of the December 4 closed session discussion.

The open meetings law provides that every meeting of a governmental body must be preceded by public notice in the form required by section 19.84(2). Sec. 19.83(1), Wis. Stats. The December 4 meeting notice identifies at least three very general content areas—purchase of public property, investment of public funds and other specified business—but the meeting notice that only repeats the language of the statute verbatim was not in a form that was "reasonably likely to apprise members of the public and the news media," sec. 19.84(2), Wis. Stats., that the closed session was either for the purpose of considering the feasibility of selling the hospital property or was for the purpose of authorizing the county administrator to pursue the feasibility of that sale.

The legal insufficiency of the meeting notice was compounded by the Executive Committee's failure to comply with the procedural requirements for convening into closed session during the December 4 meeting. Section 19.85(1) 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.

Before convening in closed session, the governmental body must follow the procedure set forth in section 19.85(1), which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. 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 (1977) (copy enclosed). Stating the statute section number of the applicable exemption is not sufficient because most exemptions contain a number of subjects within the exemption. 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 (copy enclosed). The June 29, 1977, letter states, in relevant part:

"Under 19.85(1), is the verbal quotation of the statutory language or relevant parts thereof, and the statute number of a 'specific exception' sufficient for compliance with the 'nature of the business' clause in the chief presiding officer's required announcement to 'those present at the meeting at which the motion is made', before a motion to convene in closed session is adopted?"

The answer is "no." Section 19.85(1), Stats., requires announcement of "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." Just as reasons justifying a closed session will vary depending upon the circumstances, the announcement of the "nature of

the business to be considered” will vary. The announcement should be tailored to the special circumstances. . . . Recitation of the statutory language is appropriate to aid in identifying the specific exemption, however, most of the exemptions deal with a number of subjects and the body would not in most cases be concerned with all subjects within the exemption. A degree of specificity is necessary so that the members of the body can intelligently vote on the motion to go into closed session and to inform the members of the public and the news media present of the claimed reason for closure. The stated policy of the 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.”

Because section 19.85(1) requires that the presiding officer’s announcement of the nature of the business to be considered at the closed session “become part of the record of the meeting,” and because the minutes of the December 4 meeting purport to be that record, I presume that the announcement reflected in the minutes was the announcement made by the Executive Committee’s presiding officer. Assuming that to be so, the announcement contained only the two elements deemed legally insufficient in 1977—*i.e.*, the statute number and the verbal quotation of the statutory language—and none of the specificity that is necessary for the Executive Committee members to cast intelligent votes in favor of closure, and that is necessary to inform the public of the claimed reasons for closure. As with the legally deficient meeting notice, the presiding officer’s announcement identified none of the business that would be considered by the Executive Committee.

It is more difficult to determine whether the subject apparently discussed at the December 4 Executive Committee meeting—authorization of the county administrator to pursue the feasibility of the sale of the hospital property—could have been properly discussed in closed session if the meeting notice and closed session motion had complied with the law. If the closed session was for the purpose of developing the county’s strategies for negotiating with other interested parties, and/or for the purpose of communicating to the county administrator the parameters of his authority and the county’s priorities for the maximization of its interests, the discussion may have been appropriate for closure if the subject had been properly noticed and if the closure motion had been properly made. *See* 66 Op. Att’y Gen. at 96. On the other hand, the meeting notice for the January 12, 2007, Executive Committee meeting identifies an open session discussion relating to the possible sale of the hospital property in terms nearly identical to the Board Chair’s December 19 description of the subject of the December 4 closed session: “4. Discuss/consider viable options, including sale, relating to Bay Area Medical Center real property, action if any.” That open session discussion raises the possibility that the county’s competitive or bargaining interests may not have required the December 4 discussion to take place in open session.

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The Marinette County Ordinances listed on the Marinette County Website provide that the Board and its committees use Robert's Rules of Order as its rules of order. Marinette County Ordinances, § 2.05(6). Typically under those rules of order, the body exercises its collective authority by adopting a motion on the subject that is being discussed. Although the Wisconsin Supreme Court has concluded that a governmental body may make and vote on a motion in closed session in circumstances where "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process." *State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 539, 124 N.W.2d 809 (1963), the Attorney General recommends that motions and votes take place in open session, unless doing so would compromise the need for the closed session. If the Executive Committee made a motion in closed session that involved highly specific details about the parameters within which the county administrator was authorized to explore the feasibility of the sale of the hospital property, that motion would probably have been appropriately made in closed session. On the other hand, it is frequently possible for bodies to reconvene to open session after their closed session discussion of negotiation strategy, and to make a motion that refers to but does not disclose the instructions that were given to a person authorized to act on the body's behalf. For example, it probably would have been possible for the Executive Committee to have made a motion in open session to authorize the county administrator to pursue the feasibility of the sale of the hospital property within the parameters discussed in closed session. Whatever the form that the closed session motion took, section 19.88(3) requires the Executive Committee to record and preserve it, and to disclose it in response to a public records request for it, at such time as the justification for continuing nondisclosure no longer exists.

I hope the information in this letter is useful to you. Please contact this office if you believe we can be of further assistance to you with your questions about the open meetings law.

Sincerely,



Bruce A. Olsen  
Assistant Attorney General

BAO:ajw

Enclosures