STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mr. Kevan Kay
2447 Clear Brook Circle
Green Bay, WI 54313

Dear Mr. Kay:

Attorney General J.B. Van Hollen has asked me to respond to your letter of March 8, 2007, in which you allege a violation of the open meetings law by certain members of the Board of Trustees of the Village of Howard ("the Board").

According to your letter and accompanying materials, the Board has a total of nine members, with five being a sufficient number to constitute a quorum capable of conducting Board business. On January 19, 2007, four Board members (Cathy Hughes, Burt McIntyre, George Speaker, and Jim Widiger) signed a written form requesting the addition of two items to the agenda of an upcoming meeting that was scheduled for January 22, 2007. The two items were identified as relating, respectively, to the village administrator and the village president and as encompassing "[d]iscussion and action" on "[a] vote of confidence or no confidence . . ." for each of those officials. The form contained no further information or discussion about the proposed items and did not advocate a position for or against either vote. The form says that the request was being made "[p]er Village Ordinance . . . ," but neither the form nor your letter has specifically identified the governing ordinance. By inference, however, it appears that the formal completion of the request required delivery of the signed form to the village administrator.

That delivery was accomplished on January 19, 2007, when the signed form was forwarded as an email attachment to the village administrator by a fifth Board member (Kelly Crouch). In that email, Mr. Crouch told the village administrator that Ms. Hughes had asked him to scan and forward the amendment request because she did not have a scanner. Crouch also said that he would arrange to have the original delivered to the administrator, but the materials submitted to this office do not say whether that delivery subsequently took place.

Your letter points out that, under the above facts, a total of five members—enough to constitute a quorum—cooperated in submitting the amendment request, either by signing it or by assisting in its delivery. You allege that this aggregate cooperation constituted a "walking quorum," in violation of the open meetings law.

For purposes of the open meetings law, a "meeting" is defined as "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 such a meeting occurs whenever such a "convening of members" satisfies two requirements. First, there must be a purpose to engage in governmental business, which is broadly construed to refer to any formal or informal action, including discussion, deliberation, decision, or information gathering, on any matter within the scope of the governmental body's authority. Second, the number of members involved must be sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102-03, 398 N.W.2d 154 (1987).

The Attorney General has consistently taken the position that the phrase "convening of members" in section 19.82(2) of the Wisconsin Statutes is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a "convening of members" depends on the extent to which the communications in question resemble a face-to-face exchange. A telephone conference call, for example, is very similar to an in-person conversation and thus qualifies as a convening of members. Accordingly, if the number of members participating in such a conference call is sufficient to determine the body's course of action, then the call is a meeting of the body subject to the requirements of the open meetings law. 69 Op. Att'y Gen. 143, 144 (1980). Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a "convening of members" if the medium is used in a way that closely resembles an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members. As with a telephone conference, such an electronic conversation may constitute a meeting if it involves enough members to control an action by the body. *See* correspondence to Tom Krischan (October 3, 2000) (copy enclosed).

In contrast, the Attorney General has taken the position that the circulation of a paper or hard copy memorandum among the members of a body generally does not constitute a "convening of members" for purposes of the open meetings law, even where such a document expressly solicits member support for a particular course of action. This conclusion was based on the observation that the common and approved usage of the statutory terms "convening" and "gathering" do not typically include written communications. The Attorney General also reasoned that allowing such communications to take place outside the requirements of the open meetings law would not deprive the public of information about the workings of government because members of the public can seek disclosure of written documents under the public records law. *See* correspondence to Kenneth J. Merkel (March 11, 1993) (copy enclosed).

Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it is still unlikely that a Wisconsin court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

Under the facts alleged in your complaint, the transmission of the written agenda request more closely resembles the circulation of a hard-copy memorandum than a face-to-face discussion of Board business. Although Mr. Crouch conveyed the agenda request to the village administrator via email, this was done as a scanned attachment of the paper document, to be followed by the physical delivery of that document. There is no allegation that email was in any way used to conduct a back-and-forth exchange of views among members of the body about the two proposed agenda items or any other subject of Board business. Under these circumstances, a court would probably conclude that the communications at issue cannot be deemed a "convening" of the five members of the Board.

For similar reasons, the facts you have alleged also do not establish a "walking quorum," which has been defined as a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to determine the body's course of action. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). Whatever form those separate gatherings might take, the essential feature of a walking quorum is the element of agreement among the members on some uniform course of action. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

That element of agreement is missing when an individual member of a governmental body simply endorses a written document. Even if a quorum of members sign the document one after another, a walking quorum has not occurred unless the members have effectively engaged in discussion and debate outside the context of a properly noticed meeting, and have agreed with each other to act in some uniform fashion. Accordingly, this office has previously concluded that, where a set of resolutions was circulated to members of a body prior to a meeting and a majority of those members signed onto the circulated resolutions as co-sponsors, there was no "walking quorum" violation, as long as the contact among co-sponsors did not involve discussion or debate about the substance of the resolutions or agreements to later vote uniformly for or against them. *See* correspondence to Melanie Kirsch (July 28, 1998) (copy enclosed). Similarly, at least one court construing another state's open meetings law has found no walking quorum violation where members of a body who conferred by telephone had only discussed what they needed to put on the agenda for future meetings without discussing policy or substantive public business and without conducting a poll of members' positions on any issue. *Harris County Emergency Service Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 169 (Tex. App. 1999).

Applying these principles to the facts alleged in your complaint, it is clear that there was no walking quorum because the five Board members are not alleged to have reached any agreement to vote uniformly for or against the proposed no-confidence motions or to have engaged in any substantive discussion of those proposals. Similar to the co-sponsorship situation discussed above, the four Board members who signed the request form are not alleged to have engaged in any discussion beyond the bare indication of support for having the items placed on the future agenda. And the fifth member, Mr. Crouch, whose participation would be needed to establish a quorum, is not alleged to have communicated about the no-confidence motions with Ms. Hughes or any of the others who signed the form. Rather, based on Mr. Crouch's email to the village administrator, it appears that Ms. Hughes simply asked him to scan and forward the document because she did not possess a scanner. Nothing you have submitted suggests that Mr. Crouch ever discussed the contents of the document with any other Board members or reached any explicit or implicit agreement with them on any uniform course of future action. Under these circumstances, it is very unlikely that a court would find a walking quorum.

For all of the above reasons, it is the conclusion of this office that no open meetings law violation occurred in the circumstances you have alleged. It should be emphasized, nevertheless, that members of governmental bodies subject themselves to close scrutiny and possible prosecution whenever a majority of a body's total membership is involved in any interactions connected to government business that take place outside the context of a duly noticed meeting. For that reason, a better method for submitting agenda requests would be for a single member to send such a request to the village administrator, who would then provide all other members with written notice that they could independently communicate their support of that request directly to the office of the village administrator. Such a procedure would reduce any possible appearance of impropriety by minimizing inter-member communications.

I am providing a copy of this correspondence to the village clerk and village attorney with a request that copies be distributed to all members of the Board for their benefit.

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

Sincerely,

Thomas C. Bellavia

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Assistant Attorney General

TCB:rk

Enclosures

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