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May 4, 2007

Mr. Marshall Linde
2430 Mulberry Circle
Wisconsin Rapids, WI 54494

Dear Mr. Linde:

I am writing in response to your letter of March 14, 2007, in which you allege that the Board of Education ("the Board") of the Wisconsin Rapids Public Schools ("the School District") violated Wisconsin's open meetings law in connection with two meetings on January 24 and January 29, 2007, at which the Board discussed and ultimately acted on the hiring of a new superintendent of schools for the School District.

Your letter was accompanied by supporting documentation, including: several newspaper articles; copies of two Board meeting agendas for the week of January 29, 2007; published open session minutes and closed session minutes of the Board's meetings on January 24 and January 29; and a page of the School District's administrative policies setting forth position descriptions for the superintendent and other administrative positions.

You also enclosed a copy of an open meetings law complaint concerning the same meetings that was filed on February 6, 2007, with Wood County District Attorney Todd Wolf ("District Attorney") by Allen Hicks ("Hicks"), Managing Editor of the Wisconsin Rapids Daily Tribune ("Daily Tribune"). That complaint was also accompanied by supporting documentation that included: a Board meeting agenda for the week of January 22, which included the meeting on January 24; a Board meeting agenda for the week of January 29, which included the meeting on January 29; a revised agenda for the Board meeting on January 29; and several newspaper articles.

Also enclosed with your letter were: a letter to the District Attorney from attorney Robert W. Burns ("Burns") stating the School District's position regarding the Hicks complaint; the District Attorney's letter stating his conclusions regarding that complaint and his decision not to file an open meetings law enforcement action; and a cover letter to you from the District Attorney concerning your request to him for certain documents.

After carefully reviewing all of the above materials, I have reached the following understanding of the pertinent facts.

Facts

Some time prior to January 24, 2007, the Board published a meeting agenda for the week of January 22, 2007, that included a scheduled closed session meeting of the Board on January 24, 2007, "pursuant to Wis. Stats. § 19.85(1)(c) for the purpose of considering administrator contracts." The agenda further provided that, immediately following the closed session, the Board "may meet in open session to act on administrator contracts." The submitted materials do not specify the exact date or method of publication for this agenda. By inference, however, it appears to have been posted or otherwise published some time prior to the week of January 22, 2007.

On January 24, 2007, a Board meeting took place. According to the published minutes, that meeting went into closed session pursuant to a motion under section 19.85(1)(c) of the Wisconsin Statutes "for the purpose of considering 2007-2008 administrator contracts." According to the closed session minutes, the closed session included discussion and action on a variety of general salary, benefit and contract requests made to the Board by the School District administration, as well as discussion of performance evaluation and contract length issues related to the contracts of some individual administrators employed by the School District. Following those discussions, the Board then invited the School District's Human Resource Director, Dr. Robert Crist ("Dr. Crist"), into the closed session and he was asked if he would be interested in the School District superintendent position. Dr. Crist said that he would be interested and a discussion ensued. Following the conclusion of that discussion, the Board returned into open session and approved several general proposals related to administrator contracts and passed a motion affecting certain provisions in the contracts of several individual administrators.

On January 25, 2007, the Board published a meeting agenda for the week of January 29, 2007, that included a scheduled closed session meeting of the Board on January 29, 2007, "pursuant to Wis. Stats 19.85(1)(c) for the purpose of discussing the District Superintendent position." According to your annotations, this agenda was posted on a bulletin board at the School District's central office by 8:13 a.m. A revised version of the same agenda was then posted by 8:36 a.m. That version of the agenda contained the same closed session notice as above and additionally provided that "[t]he Board may go into open session following the closed session to act on the District Superintendent Contract."

On January 26, 2007, the Daily Tribune published an article about the School District's search for a new superintendent. In that article, Board President Wayne Pankratz ("Pankratz") told the newspaper that the meeting scheduled for January 29 would involve consideration of "'what kind of process we want to use and how we'll approach the situation.'" Pankratz also

told the newspaper that the Board would be looking at a variety of candidates for the superintendent position and both Pankratz and interim superintendent Bob Cavanaugh said that the Board did not have an official candidate list.

On January 27, 2007, the Daily Tribune published another article which stated that the closed session of the Board scheduled for January 29 would *not* involve consideration of the superintendent position. According to that article, Board President Pankratz told the newspaper that the previous agenda published on January 25 was incorrect and that the planned closed session did not relate to the superintendent position, but rather related to a different district administrator who was already an employee of the district. Pankratz also told the newspaper that the Board would talk in open session about the process for filling the superintendent position, but would not talk about that process in closed session.

On the morning of January 29, 2007, the Board issued a revised agenda for the meeting scheduled for that evening. All specific references to the superintendent position were removed from this revised agenda. Instead, the revised agenda provided for a "closed session pursuant to Wis. Statute 19.85(1)(c) for the purpose of discussing administrator contracts and benefits." The revised agenda further provided that the Board might also return to open session "to act on administrator contracts and benefits." The materials submitted do not specify exactly how or when this revised agenda was published. For purposes of this discussion, I will assume that it, too, was posted at the School District's central office. On the same morning, according to a later newspaper article, Pankratz also telephoned Dr. Crist and again asked him about his interest in the superintendent position.

On the evening of January 29, 2007, a Board meeting took place. According to the published minutes, that meeting went into closed session pursuant to a motion under section 19.85(1)(c) "for the purpose [of] discussing administrator contracts and benefits." According to the closed session minutes, the closed session included discussion of numerous general issues related to administrator contracts and benefits, as well as some issues related to the contract of an individual administrator. Following those discussions, the Board also discussed the superintendent position and Dr. Crist's candidacy for that position. According to the minutes, this portion of the closed session included both consideration of Dr. Crist's individual qualifications for the job—*i.e.*, "the qualifications and leadership skills of this candidate"—and discussion of the general process for filling the superintendent position—*i.e.*, "having a full superintendent search, candidate pool, past practice in filling this position, and other avenues that could be explored to fill this position." The Board also contacted Dr. Crist during the closed session and discussed with him the terms of his possible hiring.

According to the published minutes, the Board returned to open session after the closed session and approved several proposals related to general administrator contract issues, and several proposals related to individual administrator contracts. In addition, while in this open

session, the Board also voted 5-1 to approve the hiring of Dr. Crist for the superintendent position.

On February 6, 2007, Hicks filed a written complaint with the District Attorney, recounting a shorter version of the above facts and alleging that the hiring of the new superintendent on January 29, 2007, was done without proper public notice in violation of the open meetings law. On February 14, 2007, the District Attorney conferred by telephone with Hicks about the intended scope of the complaint and, following that discussion, construed the complaint as only alleging that the notice published on January 25 had failed to adequately apprise the public of the discussions and actions related to the superintendent position at the meeting on January 29.

On February 15, 2007, attorney Burns sent a letter to the District Attorney presenting the School District's views regarding the Hicks complaint. That letter argued that the description of the subject matter of "administrator contracts" in the meeting notice of the January 24 Board meeting and the revised notice for the January 29 meeting was sufficiently specific under the legal standard established in *State ex rel. H.D. Enterprises II v. City of Stoughton*, 230 Wis. 2d 480, 486-87, 602 N.W.2d 72 (Ct. App. 1999), which held that the subject matter of a meeting need not be described in specific detail and that notice of the general topic of items to be discussed is sufficient.

On February 23, 2007, the District Attorney issued a letter concluding that, under *H.D. Enterprises* and *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (1985), the meeting notice published on January 25—which was the one that described the subject of "discussing the District Superintendent position"—was sufficiently specific to allow the Board both to discuss and take formal action on the hiring of a new superintendent. As previously noted, the District Attorney did not address the sufficiency of the notices that described the subject as "administrator contracts" and did not address whether the adequacy of the public notice given for the January 29 meeting would be affected by the statements made by Board President Pankratz in the newspaper on January 27 or by the Board's action in issuing a revised agenda on the morning of January 29.

Discussion

1. Public notice of Board meeting on January 24, 2007.

The first claim in your letter is that the public notice of the Board meeting on January 24, 2007—which provided for a closed session "pursuant to Wis. Stats. § 19.85(1)(c) for the purpose of considering administrator contracts"—did not adequately apprise the public that the subject matter of the closed session would include discussion of the superintendent position. You also allege, as a corollary claim, that the Board's motion to go into closed session

on January 24—which indicated "the purpose of considering 2007-2008 administrator contracts"—likewise did not adequately specify that the subject matter of the closed session would include discussion of the superintendent position.

In my opinion, under the existing case law, a court would be likely to conclude that the subject of "administrator contracts" as specified in both the public notice of the January 24 meeting and the closed session motion at that meeting was sufficiently specific to allow the Board to discuss the hiring of a new superintendent. As noted in attorney Burns's letter of February 15, 2007, the employment contract of the superintendent is an "administrator contract" within the meaning of section 118.24. The School District's administrative policy that you submitted similarly lists the superintendent under the general heading of "Administrative Staff," alongside a number of other district administrator positions. That policy thus supports a conclusion that members of the public could reasonably have expected a discussion of "administrator contracts" at the January 24 meeting to include consideration of the superintendent position, as well as other administrator positions in the School District.

While it is true that the Attorney General's Office would discourage the use of a single general heading as broad as "administrator contracts" to cover the multiple contract-related issues, both general and individual, that were discussed in the closed session on January 29, that level of generality is not prohibited under the existing legal standard established in the *H.D. Enterprises* and *Schaeve* decisions. Accordingly, until such time, if any, as the Wisconsin Supreme Court may revise that standard, a court would probably conclude that the Board was not required to specify the subject of the January 24 meeting with greater particularity.

2. Public notice of Board meeting on January 29, 2007.

The second claim in your letter is that the public notice of the Board meeting of January 29, 2007, did not adequately apprise the public either that the subject matter of the closed session would include discussion of the superintendent position or that the Board would consider or act on the superintendent hiring in open session. You also allege, as a corollary claim, that the Board's motion to go into closed session on January 29 likewise did not adequately specify that the subject matter of the closed session would include discussion of the superintendent position.

The analysis of the notice issues in relation to the January 29 meeting is complicated by the fact that the Board issued two different public notices for that meeting. The first notice, posted on January 25, identified "the purpose of discussing the District Superintendent position" and indicated that the Board "may go into open session following the closed session to act on the District Superintendent Contract." The second notice, issued on the morning of January 29, removed the specific references to the superintendent position and instead provided for a "closed session pursuant to Wis. Statute 19.85(1)(c) for the purpose of discussing administrator contracts

and benefits," to be followed by a possible open session "to act on administrator contracts and benefits." Also complicating the situation is the fact that, on January 27, 2007, the Daily Tribune published an article in which Board President Pankratz, is alleged to have said that the agenda published on January 25 was incorrect and that the closed session planned for January 29 did not relate to the superintendent position. According to the article, Pankratz also indicated that the Board would talk in open session about the process for filling the superintendent position, but would not talk about that process in closed session. For the sake of analytical clarity and completeness, I will consider each of these factors separately.

The first question to consider is whether the original notice posted on January 25, standing alone, adequately apprised the public that the Board meeting on January 29 would include closed session discussion and/or open session action on the superintendent position. This is the issue that the District Attorney addressed in his letter of February 23, 2007, and I agree with his conclusions on this point. There can be no serious doubt that a notice that specifically referred both to closed discussion of "the district superintendent position" and to possible open session action "on the district superintendent contract" exceeded the degree of specificity required under *H.D. Enterprises* and *Schaeve*.

The second question to consider is whether the revised notice posted on the morning of January 29, standing alone, adequately apprised the public that the Board meeting on January 29 would include closed session discussion and/or open session action on the superintendent position. The District Attorney was not asked to address this question. The revised notice of January 29—which referred to discussion and possible action on the general subject of "administrator contracts and benefits"—is essentially equivalent to the notice of the January 24 meeting, discussed in the preceding section—which referred to the general subject of "administrator contracts." I conclude, therefore, that the revised notice of January 29—considered standing alone—was sufficient under the existing case law, for the same reasons already given with regard to the notice of the January 24 meeting.

The third question is whether either of the two written notices that the Board issued for the January 29 meeting can be considered adequate under the open meetings law, when those notices are considered not standing alone, but in the context of the public statements that Board President Pankratz made to the Daily Tribune on January 27. Once again, the District Attorney was not asked to address this question.

Under section 19.84(2), the public notice of a meeting must "reasonably apprise" the public of the meeting's subject matter. Whether such a notice is reasonable, in any given case, necessarily depends in part on the surrounding circumstances. A notice that, standing alone, would reasonably apprise the public that a meeting would include discussion of a particular subject, may no longer provide such reasonable notice if it is accompanied by other public statements expressly indicating that the meeting in question will *not* include that very subject.

Otherwise, a governmental body that wished to evade the requirements of the open meetings law could have a positive incentive to spread misinformation prior to its meetings.

Here, the Board initially posted a notice on January 25 which specifically indicated that the January 29 meeting would include consideration and possible action on the superintendent position. Then, on January 27, the local newspaper reported that Board President Pankratz had said that the originally posted notice was incorrect and that the closed session planned for January 29 did not relate to the superintendent position. In my opinion, it is quite possible that a court could find that those statements would be reasonably likely to affirmatively mislead members of the public into believing that the subject of the superintendent hiring had been specifically excluded from the January 29 closed session and that any consideration of the superintendent position in open session would only involve discussion of the process for filling that position, and would not involve the candidacy of any particular individuals.

Furthermore, the impression that the subject of the superintendent hiring had been specifically excluded from the January 29 closed session was confirmed and strengthened on the morning of January 29, when the Board issued a revised agenda from which all specific references to the superintendent position had been removed. In context, the action of issuing that revised agenda strongly suggests that the previous agenda was being amended to agree with the Board President's statements in the newspaper article. These circumstances tend to support a conclusion that, even if the revised agenda—standing alone—would reasonably have apprised the public that the superintendent position might be discussed, it did not provide reasonable notice of that subject in the context of the Board President's statements.

Of course, a determination of reasonableness by a court would have to consider all relevant circumstances and the parties in an enforcement action would have an opportunity to develop a more complete factual record than has been submitted to this office. With that caveat, however, it is my opinion that the facts that have been provided could support a conclusion that the Board failed to give adequate notice that the subject matter of the January 29 meeting would include the superintendent position.

Such a conclusion, under these circumstances, would be consistent with the legal standard for subject-matter notice established in the *H.D. Enterprises* and *Schaeve* decisions. For in those cases, unlike here, there were no statements by the presiding officer of the governmental body specifically indicating that the meeting in question would not include the particular subject at issue. Nor did the governmental body, in those cases, revise its meeting agenda shortly before the meeting in such a way as to suggest that the subject in question was being specifically excluded from the meeting. Had such events occurred in either of those cases, it seems unlikely that a court would have concluded that the public had been reasonably apprised of the subject of the meeting in question.

3. Scope of closed session discussion on January 29, 2007.

The third claim in your letter is that the Board erred by allowing a discussion that had been closed under section 19.85(1)(c) to include not only consideration of the personal qualifications of one or more individual candidates for the superintendent position, such as Dr. Crist, but also a broader policy discussion of the general plan or process for filling that position. This is another issue that the District Attorney was not asked to address.

Section 19.85(1)(c) allows a governmental body to conduct a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." The language of this exemption refers to a "public employee," rather than to positions of employment in general. The exemption thus appears to be intended to protect individual employees from having their personal actions and abilities discussed in public and to protect governmental bodies from potential claims that could arise from the public discussion of personal information. *See Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). Its purpose is not, however, to protect a governmental body when it discusses general policies that do not involve identifying individual employees. *See* 80 Op. Att'y Gen. 176, 177-78 (1992). Accordingly, the Attorney General has concluded that section 19.85(1)(c) may authorize a closed discussion of the qualifications of and salary to offer a specific job applicant, but does not authorize a closed discussion of the qualifications and salary range for the position in general. *See* 80 Op. Att'y Gen. 176, 178-82 (1992).

Applying the same reasoning here leads to the conclusion that the closed session that the Board held on January 29 pursuant to section 19.85(1)(c), could not properly include discussion of general policies related to the process for filling the superintendent position, except to the extent that such discussion would also involve the discussion of the personal actions or characteristics of one or more identifiable individuals. Although, once again, a firm conclusion cannot be reached without a fully developed factual record, the facts that have been submitted suggest that the Board's closed discussion of "having a full superintendent search, candidate pool, past practice in filling this position, and other avenues that could be explored to fill this position" may have exceeded the scope of what could properly be discussed in closed session under section 19.85(1)(c).

Conclusions

For the reasons noted above, it is the conclusion of this office that no open meetings law violation occurred with regard to either the public notice or the closed session motion for the Board meeting on January 24, 2007. Contingent upon the development of a complete factual record, however, your letter and supporting materials could support claims of two possible violations related to the meeting on January 29, 2007. First, it is possible that the statements

made by the Board President in the newspaper on January 27 and the revised agenda posted on the morning of January 29 could be found sufficient to affirmatively mislead the public into believing that the subject of the superintendent hiring had been specifically excluded from the January 29 meeting. Absent other controverting evidence, a court might infer from those facts that the written agendas issued by the Board failed to reasonably apprise the public that the meeting would include that subject, in violation of section 19.84(2). Second, it is possible that any discussion, during the closed session on January 29, of general policies related to the process for filling the superintendent position could be found to have exceeded the permissible scope of a closed discussion under section 19.85(1)(c), except to the extent that such discussion would also involve the discussion of the personal actions or characteristics of one or more identifiable individuals.

Both of these potential claims, however, involve questions of predominantly local, rather than statewide, concern. Enforcement actions raising such claims are more appropriately handled by a local District Attorney, rather than by the Attorney General's Office. Here, as previously noted it appears that the District Attorney was not asked to examine either of the above possible violations when he considered the open meetings law complaint filed on February 6, 2007, by Hicks. In addition, it does not appear that you have filed your own open meetings law complaint with the District Attorney, asking him to specifically consider those alleged violations. You should be aware that the decision to seek a forfeiture penalty against conduct believed to be an open meetings violation is one entrusted to the broad discretion of the prosecutor. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). Factors to consider include the availability of prosecutorial resources, the expense of litigation, the likelihood of success, the priority that can be given to a particular type of prosecution in light of the overall mission of the office, the nature and extent of the harm resulting from the violation and the extent to which a similar result might be obtained without litigation. You should also be aware that district attorneys also have the option of addressing violations of the public meetings law through more informal means such as warning letters. If you file a complaint and the District Attorney declines to commence an enforcement action within 20 days, then you can

initiate your own action pursuant to section 19.97(4). If you prevail in such an action, the court may award your actual attorney fees and other necessary costs.

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

Sincerely,

Thomas C. Bellavia
Assistant Attorney General

TCB:rk

c: Todd Wolf
District Attorney
Wood County

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