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DEPARTMENT OF JUSTICE

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May 30, 2007

Mr. Phillip A. Koss
District Attorney
Walworth County Judicial Center
Post Office Box 1001
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Dear Mr. Koss:

Thank you for your letter of March 7, 2007, enclosing the February 28, 2007, letter from David Bretl ("Bretl") and the February 28, 2007, opinion letter from George K. Steil, Sr. ("Steil") and Duffy Dillon ("Dillon"); all relating to my February 21, 2007, letter to Lawrence Vant ("Vant"). You also forwarded me a copy of the March 9, 2007, letter from Mr. Steil and Mr. Dillon, enclosing a recent court of appeals decision that has been recommended for publication. You ask whether the letters from Mr. Bretl, Mr. Steil and Mr. Dillon affect the conclusion in my letter that the Public Works Committee ("Committee") of the Walworth County Board violated the open meetings law on October 30, December 12 and December 18, 2006. In summary, the additional information affects my analysis and additionally causes me to conclude that a court could determine that the notices of the three Committee meetings on October 30, December 12 and December 18, 2006, were legally deficient under existing legal precedent. However, because a court could also determine that the case law at the time of the Committee's meetings was ambiguous, and because the parties in an enforcement action would have an opportunity to develop a more complete factual record than has been submitted to this office, the outcome of a forfeiture prosecution may not be certain, and you may well determine in the exercise of your prosecutorial discretion to address the matter through means other than a formal forfeiture prosecution.

My February 21, 2007, letter to Mr. Vant correctly observed that the Committee held meetings on October 30, December 12 and December 18, 2006, at which it conducted both open and closed session discussions regarding a development proposal brought by Intersport, Inc. The February 21 letter erroneously observed that "[t]he meeting notices for the October 30, December 12 and December 18 Public Works Committee meetings each indicate that the committee *would* convene in closed session to discuss the county's negotiations with Intersport" (February 21 letter at 3). The meeting notices for those three dates actually indicate that the Committee "*may*" go into closed session, although the meeting notices did not expressly indicate

that any substantive information about the proposed project would be discussed or disclosed in open session. Based on the erroneous observation that the Committee "would" go into closed session, the February 21 letter then reasoned that "[a] person who was interested in that subject would reasonably believe from the meeting notice that he/she would not be able to obtain any substantive information about the Intersport project because there was no indication that any of the discussion would occur in open session" (*id.*). The letter concluded that the three meeting notices were legally deficient because none reasonably apprised the public that substantive information about the projects would be discussed or disclosed during an open session prior to closure of the meeting (*id.*).

The February 28, 2007, letter from Mr. Bretl provides some information about the content of the closed sessions. Mr. Bretl states that "[t]he wording used on agendas to discuss the Intersport matter was no different than the wording used on all other county committee agendas and is the way we have handled closed sessions, without complaint, for many years" (February 28, 2007, Bretl letter at 1). Mr. Bretl also states that the county's policy of "closing the doors only when absolutely necessary," as applied to Intersport, "meant closing the meeting to the public only to develop a negotiating strategy with respect to their proposal. It was my feeling that matters not related to bargaining strategy should be discussed openly, as was done" (*id.* at 2). For purposes of this letter, I assume the accuracy of Mr. Bretl's representation that when the county provides public notice of a closed session under Wis. Stat. § 19.85(1)(e), it signals to the public that its closed session discussion will be about developing a negotiating strategy.

The February 28, 2007, letter from Mr. Steil and Mr. Dillon observes that, because each of the meeting notices uses the word "may," the Committee "always retained the discretion to discuss the Intersport proposal in open session" (February 28, 2007, Steil/Dillon letter at 11). The letter observes that the court of appeals in *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 14, 252 Wis. 2d 628, 643 N.W.2d 796, concluded that there is no statutory requirement that meeting notices "'be exactly correct in every detail'" (February 28, 2007, Steil/Dillon letter at 8). The letter also reviews prior published and unpublished appellate decisions that discuss the degree of specificity required for subject matter descriptions in meeting notices. Mr. Steil's March 9, 2007, letter advises you of a court of appeals opinion issued the previous day, *State ex rel. Citizens for Responsible Development v. City of Milton* ("*CRD*"), 2007 WI App 114, ___ Wis. 2d ___, ___ N.W.2d ___ (publication ordered, April 26, 2007), (copy enclosed) which will not be reviewed by the supreme court. The *CRD* case reviewed many justifications for closed sessions pursuant to Wis. Stat. § 19.85(1)(e) proffered by the city, but allowed closed sessions in that case only when the city was developing negotiating strategies. *CRD*, 2007 WI App 114, ¶¶ 13-19. Mr. Steil's letter suggests that the decision underscores the legal appropriateness of the Committee's decision to discuss as much as possible about the Intersport proposal in open session.

The Committee's practice to narrowly limit its Wis. Stat. § 19.85(1)(e) closed sessions to the development of negotiation strategies, as approved in the *CRD* case, clearly complies with the open meetings law. The requirement that governmental bodies give notice of the subject matter of meetings, however, extends to open session subject matters as well as closed session subject matters. The legal question presented to me is whether the Committee's meeting notices at issue, in light of the surrounding circumstances, were reasonably likely to apprise members of the public that the Committee would discuss or obtain information about Intersport's development proposal in open session, before convening into closed session to develop the county's strategy for negotiating with Intersport.

Wisconsin Stat. § 19.81(1) declares 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." To effectuate this legislative purpose, Wis. Stat. § 19.84(2) provides that every public notice of a meeting of a governmental body 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." Whether a meeting notice is reasonable, in any given case, necessarily depends in part on the surrounding circumstances. The basic thrust of the open meetings law is to provide the public with the "best notice available" of governmental business that will be conducted. 66 Op. Att'y Gen. 68, 70 (1977). "[W]hen any matters are known in advance to be a part of the agenda they should be described in the notice." 66 Op. Att'y Gen 143, 144 (1977).

Wisconsin Stat. § 19.83(1) provides, in relevant part, that "[a]t any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85." Most of the exemptions in Wis. Stat. § 19.85 contain a number of subjects within the exception. For example, Wis. Stat. § 19.85(1)(e), the exception used by the Committee to justify its closed session discussions of its strategies for negotiating with Intersport, permits a closed session for the purpose of "[d]eliberating 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." "Deliberating" and "negotiating" are different activities; and the purchase of public property is a different subject than the investment of public funds. For that reason, Wis. Stat. § 19.85(1) requires a government body to adopt a motion to convene into closed session, and requires the body's chief presiding officer to announce and record in open session "'the nature of the business to be considered at such closed session'" and "'the specific exemption or exemptions under [section 19.85(1)] by which such closed session is claimed to be authorized.'" 66 Op. Att'y Gen. 93, 97-98 (1977). The Attorney General has advised that some specificity is needed in describing the subject matter of a contemplated closed session so that the members of the governmental body can intelligently vote on the motion to close the meeting. *See* June 29, 1977, letter from Bronson C. La Follette to Robert J. Heule (copy enclosed). The same specificity required in the presiding officer's announcement of the

nature of the business to be considered at the closed session is required in the meeting notice of a contemplated closed session. 66 Op. Att'y Gen. at 98.

As the February 28 letter from Mr. Steil and Mr. Dillon indicates, the court of appeals has "only rarely addressed the issue of what amounts to sufficient notice of the 'subject matter' of a meeting under Wis. Stat. § 19.84(2)" (February 28, 2007, letter at 6). No Wisconsin case, published or unpublished, has addressed the precise issue presented here. Several court of appeals decisions, however, employ analytical methods and articulate principles that may be useful in predicting how a court would address the question presented.

Since 1989, the court of appeals has issued two published decisions addressing the "subject matter" requirement as it relates to notices of open session meetings: *State ex rel. H.D. Ent. v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999), and *Olson*, 252 Wis. 2d 628, ¶¶ 4-5.

In 1999, the court of appeals in *H.D. Enterprises* considered the legal sufficiency of a meeting notice identifying "licenses" as the subject matter of a meeting. In January 1998, a local grocery store filed an application for a class "A" liquor license. *H.D. Ent.*, 230 Wis. 2d at 482. On January 15, 1998, at the city's direction, the local newspaper published notice of the application. *Id.* The notice, as required by statute, identified the name and address of the license applicant and the type of liquor license applied for. Wis. Stat. § 125.04(3). Prior to January 27, 1998, the city gave public notice of a city council meeting which included as an agenda item the word "licenses." H.D. Enterprises and other opponents of the license attended the January 27 meeting and spoke against the grocery store's liquor license application. *H.D. Ent.*, 230 Wis. 2d at 482. Subsequently, the city posted notice for a February 10, 1998, city council meeting, which also contained "licenses" as a subject of the meeting. *Id.* At the February 10 meeting, the city council reconsidered its January 27, 1998, denial of the grocery store's class "A" liquor license application, and granted the license. *Id.* Neither H.D. Enterprises nor the other license opponents who attended the January 27 meeting also attended the February 10 meeting. *Id.* The court noted its holding in *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985), that a meeting of a closed session to "'conduct a hearing to consider the possible discipline of a public employee'" was legally sufficient, and concluded without additional analysis that "the word, 'licenses,' was specific enough to apprise members of the public as to the subject matter of the meeting." *H.D. Ent.*, 230 Wis. 2d at 486. The court observed that as of February 10, 1998, H.D. Enterprises had prior experience with meeting notices that contained "licenses" as a subject matter by reason of the meeting notice for the January 27, 1998, meeting, observed that H.D. Enterprises and others appeared at the January 27 meeting to oppose the grocery store's application and observed that H.D. Enterprises had not complained that the meeting notice for the January 27 meeting described the subject simply as "licenses." *Id.* at 482, 487. The court did not discuss the effect, if any, that the January 15, 1998, newspaper publication of the Wis. Stat. § 125.04(3) notice had on the license opponents'

attendance at the January 27 meeting. Nor did the court discuss the significance, if any, that the January 27 and February 10 meeting notices both described the subject as "licenses," although the January meeting was an original consideration of the license, and the February meeting was a reconsideration of the previously denied application. Moreover, the court did not expressly address the fact that *Schaeve* involved notice of a closed session which the public was not entitled to attend, and that the Stoughton city council's meeting notice was for an open session that the public was entitled to attend. Judge Vergeront dissented from the court's opinion.

In 2002, the court of appeals in *Olson* addressed the legal sufficiency of an amended meeting notice for an open session of the city's Joint Review Board. *Olson*, 252 Wis. 2d 628, ¶ 1. On August 11, 1999, the clerk posted a notice for an August 26, 1999, Joint Review Board meeting, including the following subject: "'Consideration of Resolution Approving City Council Resolutions creating TIF District No. 6 and adopting the Project Plans'" (Appellant's Appendix at 165, accessed on April 18, 2007, through the University of Wisconsin Law Library Wisconsin Briefs electronic database, *http://library.law.wisc.edu/elecresources/databases/wb/index.php*, Docket No. 01-0201). The clerk posted a revised notice identifying the same subject on August 12, 1999. *Olson*, 252 Wis. 2d 628, ¶ 4. The last paragraph of the revised notice also provided: "[F]urther notice is hereby given that the above meeting may constitute a meeting of the Joint Review Board . . . and must be noticed as such, although . . . the above Boards will not take any formal action at this meeting." *Id.*, ¶ 11. At the meeting, the Joint Review Board took action to approve the TIF district. *Id.*, ¶ 12. The court acknowledged that the meeting notice contained incorrect information, in that it advised the public both that the Joint Review Board might approve the TIF district and project plans, and that it would not take any formal action at the meeting. *Id.*, ¶¶ 13-14, 16. Citing *H.D. Enterprises*, the court characterized the challenge to the Joint Review Board meeting notice as a "request[] that we adopt a *per se* rule that Wis. Stat. § 19.84(2) is violated in each instance that a public notice contains any type of incorrect information, even when it is not misleading to the public." *Olson*, 252 Wis. 2d 628, ¶ 14. Citing *H.D. Enterprises*, and even though the *H.D. Enterprises* case did not involve incorrectness similar to the incorrectness in the *Olson* case, the court stated that "[t]here is no such requirement in the statute that the notice provided be exactly correct in every detail." *Olson*, 252 Wis. 2d 628, ¶ 14. The court concluded that even if the last paragraph of the meeting notice created some ambiguity as to whether the Joint Review Board would be taking formal action on the subject noticed, "the notice contains enough information to alert any interested individual who might have been confused by the notice to find out more." *Id.*, ¶ 17.

In addition to the two published decisions involving the legal sufficiency of subject matter descriptions in meeting notices for open session meetings, *H.D. Enterprises* and *Olson*, the court of appeals has also issued two unpublished decisions that provide useful guidance for the analysis. *State ex rel. Buswell v. Tomah Area School District*, Appeal No. 2005AP2998 (unpublished, July 6, 2006; *review petition granted*, September 12, 2006) (copy enclosed), addressed the legal sufficiency of a notice of a closed session meeting, relying on but questioning

the holding in *H.D. Enterprises*. *CRD*, 2007 WI App 114, addressed the narrowness of the Wis. Stat. § 19.85(1)(e) exemption and has implications for the specificity required for meeting notices where that exemption is invoked.

In *Buswell*, the court of appeals' unpublished July 2006 decision addressed a challenge to a Tomah school board notice of a special June 1, 2004, meeting that provided: "Contemplated Closed Session for Consideration and/or Action Concerning Employment/Negotiations with District Personnel Pursuant to Wis. Stats. 19.85(1)(c)." *Buswell*, Appeal No. 2005AP2998, slip op. at 2). During the closed session, the school board approved a two-year bargaining contract with TEA, the teacher's union, including a new procedure that gave hiring preference to union members for coaching vacancies within the district. *Id.* The school board also gave notice of a June 15, 2004, meeting that included the agenda item: "TEA Employee Contract Approval." *Id.* At the June 15 meeting, the school board officially ratified the contract that had been tentatively approved at the June 1 closed session. *Id.* Buswell sued, asserting that neither meeting notice sufficiently described the new procedure for hiring coaches. *Id.* The court rejected the argument, and concluded that, pursuant to the controlling precedent of *H.D. Enterprises*, the terms "Employment/Negotiations" and "TEA Contract Approval" "are not more general than the term "licenses" in *H.D. Enterprises*. *Buswell*, Appeal No. 2005AP2998, slip op. at 4. The court did not fully embrace the reasoning or result in *H.D. Enterprises*, however. The court stated, in a paragraph omitted from the portion of the decision quoted in the February 28 letter from Mr. Steil and Mr. Dillon (*Buswell*, Appeal No. 2005AP2998, slip op. at 3-4):

> ¶6 Buswell argues, as did the dissent in *H.D. Enterprises*, that the underlying policy of the open meetings law requires some greater degree of specificity for notice provisions. *See id.* at 488-94 (Vergeront, J., dissenting in relevant part). In particular, Buswell notes that WIS. STAT. § 19.81(1) states "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," and § 19.81(4) directs the statute to be liberally construed to achieve that objective. While we are sympathetic to Buswell's policy argument, and might have decided the issue differently prior to our *H.D. Enterprises* decision, we do not write on a clean slate. *H.D. Enterprises* has already struck the balance between the public's right to information and the government's need to conduct its business efficiently in favor of permitting very general notice provisions for the proposed subject matter of meetings. Arguments urging a shift in that balance need to be directed to the Wisconsin Supreme Court. *See generally Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (we are bound by the precedent of our own court.).

On September 12, 2006, the Wisconsin Supreme Court accepted a petition to review the court of appeals' decision in *Buswell*. The *Buswell* case was pending in the supreme court at the time of the October 30, December 12 and December 18, 2006, meetings of the Committee.

Finally, the court of appeals in the *CRD* case, 2007 WI App 114, expressly declined to consider CRD's argument that Milton's closed session meetings were improperly noticed, *id.*, ¶ 1 n.2, but addressed whether any portions of Milton's ten meetings to discuss and negotiate an agreement to develop an ethanol plant were properly closed. Milton closed all ten meetings in their entirety, citing Wis. Stat. § 19.85(1)(e) as justification. *CRD*, 2007 WI App 114, ¶ 2. Minutes from the meetings reflected discussions about negotiating with the developer, discussions about negotiating to purchase land, discussions about possible problems with having an ethanol plant in the community and discussions about other possible projects for the industrial park. *Id.* The court determined that the burden was on the governmental body to show that competitive or bargaining interests require a closed session under Wis. Stat. § 19.85(1)(e), *CRD*, 2007 WI App 114, ¶ 10, construed the statute to limit its application to situations where the body's competitive or bargaining reasons left it with no option other than to close the meeting, *id.*, ¶ 14, and determined that, of the six reasons offered by Milton to justify the closed sessions, only those portions of the meetings that would have revealed Milton's negotiation strategy with the plant developer could be closed under Wis. Stat. § 19.85(1)(e). *CRD*, 2007 WI App 114, ¶¶ 13-19.

The *CRD* case has important implications for meeting notices that contain notices of contemplated closed sessions under Wis. Stat. § 19.85(1)(e). Since so few of the subjects addressed in Milton's closed sessions required closure to protect the city's claimed interest, the court strongly suggested that it would treat meeting notices that simply quote or paraphrase the text of Wis. Stat. § 19.85(1)(e) and identify its statutory number as no more than the legally insufficient "blanket approach" condemned in *State ex rel. Journal/Sentinel Inc. v. Pleva*, 151 Wis. 2d 608, 616, 445 N.W.2d 689 (Ct. App. 1989); *i.e.*, "simply [an] assert[ion] that competitive or bargaining reasons require closed meetings without explanation." *CRD*, 2007 WI App 114, ¶ 10.

With these principles and authorities in mind, I turn to the October 30, December 12 and December 18, 2006, meetings.

The *H.D. Enterprises* decision was based in part on the commonsense idea that the public's experience with the subjects addressed by a governmental body under a recurring subject matter description provides notice of those subject matters in a manner that might not be precisely conveyed by the description in the absence of that experience. Thus, the court reasoned that because H.D. Enterprises knew from the meeting notice for the January 27 meeting that "licenses" was the subject matter description the city council used when it considered liquor

licenses, it should have known from the "licenses" agenda item for the February 10 meeting that the city council might reconsider its previous decision to deny the grocery store's liquor license.

Mr. Bretl's February 28, 2007, letter states that the county's practice for many years has been to close meetings under Wis. Stat. § 19.85(1)(e) "only to develop a negotiating strategy." Pursuant to the court's reasoning in *H.D. Enterprises*, members of the public interested in county board committee business would understand from the county's longstanding practice that when the county issued a meeting notice for a closed session under Wis. Stat. § 19.85(1)(e), the closed session would be solely for the purpose of developing a negotiating strategy, and that no part of the strategy discussion would take place in open session. Minutes of the board's meetings for the 12-month period preceding the October 30, 2006, meeting provide factual support for that understanding. The board convened in closed session under Wis. Stat. § 19.85(1)(e) on November 8, 2005, and April 20, 2006. The minutes of both meetings reflect that in each instance, the closed session motion was made and adopted, and reflect that no discussion of the closed session subject occurred before the meeting was closed. The November 8, 2005, motion was closed "with respect to the strategy regarding negotiations" with two other entities. The April 20, 2006, motion was "to discuss Children with Disabilities Education Board bargaining negotiations." In addition, between October 2005 and October 2006, the board convened in closed session under Wis. Stat. § 19.85(1)(g) (January 2006) and Wis. Stat. § 19.85(1)(c) (March 14, 2006). The minutes for these meetings also reflect that no discussion of the closed session subject matter occurred before the meeting was closed.

A review of the county's meeting notices also reflects that presentations have regularly been made to the board, and are identified by subject at meetings of the board sitting as a committee of the whole, or are located in the "Special Order of Business" section of the board's meeting notices and are identified by descriptions like "report" or "presentation" or "overview." See, for example, the meeting notices for January 10, 2006 (Regular meeting, special order of business, "Overview Regarding Features of the New County Board Room – Shane Crawford, Public Works Director"; Committee of the whole, "Economic impact of agriculture in Walworth County"); February 14, 2006 (Regular meeting, special order of business, "Overview Regarding Features of the New County Board Room – Shane Crawford, Public Works Director"); March 14, 2006 (Regular meeting, special order of business, "Report of the 4-H Executive Board of the Junior and Senior Leaders' Association"); May 9, 2006 (Committee of the whole, "Presentation by Gateway Technical College concerning study regarding the economic impact of Gateway Technical College in the Community"); and July 11, 2006 (Committee of the whole, "Wisconsin Counties Association – Effective Communications with our Legislators"). Pursuant to the court's reasoning in *H.D. Enterprises*, members of the public familiar with the county's meeting notice practices would reasonably expect that when visitors or county staff planned to make presentations, the meeting notice would contain an open session item designated as a "report" or "presentation" or "overview" relating to the subject of the presentation.

The notice of the October 30, 2006, at 1, meeting contained the following subject description:

> The committee may convene in closed session pursuant to the exemption contained in Sec. 19.85(1)(e), Wis. Stats., for the purpose of deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specified business, whenever competitive or bargaining reasons require a closed session.
>
> 1) Motion and roll call to convene in closed session to discuss:
>
> - Potential development of county-owned property by outside entity
>
> 2) Return to open session for possible action on closed session item

Pursuant to *H.D. Enterprises* and the county's longstanding practice described by Mr. Bretl, a member of the public would understand from the October 30 meeting notice that the Committee's discussion would be limited to developing a strategy for negotiating with the outside entity about potential development of county-owned property. A member of the public would understand from the county's practice of not preceding Wis. Stat. § 19.85(1)(e) closed sessions with open session discussions of the closed session subject that the Committee's first action with respect to the potential development of county-owned property would be a motion to convene to closed session to discuss its bargaining strategy. A member of the public would understand from the absence of an open session agenda item with words like "report," "presentation," "overview" or words of similar import that no presentation would be made by county staff or visitors about the outside entity's potential development.

The minutes of the October 30, 2006, meeting reflect that what actually occurred was just the opposite of the reasonable expectations raised by the meeting notice. The minutes of the October 30, 2006, meeting state: "County Administrator David Bretl suggested that the committee discuss the background and general development concept of the entity interested in county property in open session." The minutes further reflect that Deputy Administrator Shane Crawford distributed a brochure from Intersport that contained an overview of its plan, reflect that the details of Intersport's proposal were identified in the open session, and reflect that Mr. Crawford entertained a couple of questions from supervisors before Mr. Bretl suggested that the Committee convene in closed session "to discuss in-depth negotiations, etc." At a minimum, the information contained in the notice for the October 30, 2006, meeting incorrectly described the subjects that would be discussed at the meeting. One subject—which was not identified in the notice—was an open session staff presentation describing the general features of Intersport's proposal. The circumstances surrounding the October 30 2006, open session—especially Mr. Crawford's distribution to the Committee of Intersport's brochure containing an overview of its planned development—support an inference that the presiding officer knew in advance that the "outside entity" was Intersport, and knew that aspects of Intersport's proposal unrelated to

the Committee's bargaining strategy, would likely come before the Committee that day. The other subject—which was identified in the notice—was a closed session discussion about the Committee's strategy for negotiating with an "outside entity." Although the *Olson* case rejects the argument that incorrect information in a meeting notice is a *per se* violation of the open meetings law, it strongly suggests that the open meetings law is violated when incorrect and *misleading* information is contained in a meeting notice. Absent controverting evidence, a court might infer that the October 30 meeting misled the public by limiting the meeting notice to what the public would expect to be a closed session discussion about bargaining strategy, and by withholding specific notice that the "outside entity" was Intersport, and that the Committee expected an open session overview presentation about Intersport's proposal as another subject of the meeting.

The meeting notice for the December 12, 2006, meeting contained the following subject matter description:

> The committee may convene in closed session pursuant to the exemption contained in Sec. 19.85(1)(e), Wis. Stats., for the purpose of deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specified business, whenever competitive or bargaining reasons require a closed session.
>
> 1) Motion and roll call to convene in closed session to discuss:
>
> - Negotiations with Intersport
>
> 2) Return to open session for possible action on closed session item

This meeting notice—nearly identical in form to the notice for the October meeting—created the same reasonable public expectations as the October meeting notice: the only subject identified in the notice was the Committee's closed session discussion of negotiation strategy, and there was no notice that any information regarding Intersport would be presented in open session. The minutes reflect that executives from Intersport, joined by former University of Wisconsin-Madison Athletic Director Pat Richter, made a detailed presentation about Intersport's proposal, including its proposal for leasing and purchasing county property. Although the presentation was made in open session, the minutes state that no member of the public was present at the meeting. After the visitors' presentation, the Committee convened in closed session to discuss its bargaining strategy. Because the December 12 meeting involved a presentation by a group of visitors, the circumstances surrounding the meeting support a very strong inference that the presiding officer knew in advance that Intersport would be making a formal presentation to the Committee about the details of its proposal. Absent controverting evidence, a court might very well infer that the December 12 meeting misled the public by limiting the meeting notice to what the public would expect to be a closed session discussion about bargaining strategy, and by withholding specific notice that the Committee expected

individuals representing Intersport to make a presentation about their proposal as another subject of the meeting.

The meeting notice for the December 18, 2006, meeting was identical to the notice for the December 12 meeting. Like the December 12 notice, it identified only a closed session discussion of bargaining strategy. The minutes for the December 18 meeting, however, reflect that Intersport's brochure was distributed in open session, that in open session the supervisors asked questions about the project, inquired about alternative sources for information concerning the project, and conducted some discussion about the speed of the process. As with the prior two notices, the circumstances surrounding the December 12 meeting support an inference that the presiding officer knew in advance that the Committee would likely conduct an open session discussion about the merits of Intersport's proposal before convening to closed session to discuss the county's bargaining strategy. Absent controverting evidence, a court might infer that the December 18 meeting misled the public by limiting the meeting notice to what the public would expect to be a closed session discussion about bargaining strategy, and by withholding specific notice that the Committee expected an open session discussion about the merits of Intersport's proposal as another subject of the meeting.

Although it is my conclusion that a court could conclude that the three meeting notices were misleading and failed to conform to the requirement that bodies give notice of all of the subjects they will consider at the meeting, it is not clear that a prosecution of a forfeiture action to redress the violations would be successful, and it is possible that the remedial benefits of declaratory relief by a court might be obtainable without having to incur the expense of litigation.

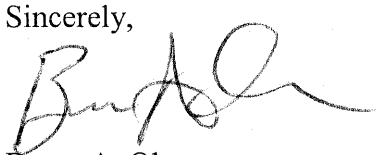
The open meetings law is generally to be construed liberally to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1) and (4). However, the law must be construed narrowly when forfeitures are sought, because forfeitures are penal in nature.

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. If you are asked to prosecute, you will have to weigh all of the appropriate factors as they apply to the Walworth County District Attorney's Office to determine how your prosecutorial discretion is exercised.

Arguably, the statutory requirement in Wis. Stat. § 19.84(2) that a governmental body identify every subject that might be considered at a meeting and the highly limited nature of the Wis. Stat. § 19.85(1)(e) exemption should be enough to put every governmental body on notice that an open session presentation or discussion about the substance of a proposed development is a different subject than a closed session discussion about the body's strategy in negotiating the development, and that both subjects must be included in a meeting notice. However, in light of the court of appeals' reliance on *H.D. Enterprises* in *Olson* and *Buswell*, and the absence of additional appellate case law between *Pleva* and *CRD* emphasizing the narrowness of the Wis. Stat. § 19.85(1)(e) exemption and the specificity that is required to justify closed sessions, however, a circuit court might well decide that until the *CRD* case, the law was not clear about the degree of specificity required for meeting notices for bodies that conduct some of their business regarding a proposal in open session, and some of their business about that proposal in closed session pursuant to Wis. Stat. § 19.85(1)(e). Now that the *CRD* case has been ordered published, governmental bodies will be on clear notice about the highly limited circumstances under which a meeting can be closed for competitive or bargaining reasons and the need to clearly specify the subjects they will consider, and are likely to modify their meeting notice practices to conform to those articulated standards, without the necessity of litigation.

All things considered, it would be understandable if in the exercise of your discretion you were to address this matter through means other than a formal forfeiture action, *e.g.*, a warning letter or stipulated agreement with the Board to avoid such conduct in the future.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

c: Lawrence Vant
George K. Steil/Duffy Dillon
David Bretl

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