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May 30, 2007

Mr. Jeffrey J. Wirth
14 Brodhead Street
Mazomanie, WI 53560

Ms. Kim Lamoreaux
News Publishing Company
1126 Mills Street
Black Earth, WI 53515

Dear Mr. Wirth and Ms. Lamoreaux:

I am writing in response to a series of electronic communications I have received from each of you regarding the process by which the six-member governing board of the District One Emergency Medical Service ("EMS") has addressed the EMS's plan for obtaining a larger facility for its operations. The earliest of those communications was February 16, 2007. The most recent was April 25, 2007. The information to which I have had access includes your original messages to me, a press release from the EMS, open session minutes of the Mazomanie Village Board, and articles from the website of the News Sickle Arrow newspaper regarding the EMS, written between January 1, 2006, and May 10, 2007.

You question (1) whether the EMS commission complied with the Wisconsin open meetings law on October 4, 2006,¹ when it convened in closed session pursuant to section 19.85(1)(e) of the Wisconsin Statutes, to discuss the "purchase/lease/remodel (the Mazo Deli), or building an EMS facility on Lot 9 of the Wick addition" (Appendix ("App.") 15); (2) whether the EMS commission complied with the Wisconsin open meetings law on February 8, 2007, when it convened in closed session pursuant to section 19.85(1)(e) to discuss "building of EMS facility on Lot 9 of the Wick addition Mazomanie" App. 19; and (3) whether the Mazomanie Village Board complied with the Wisconsin open meetings law on February 13, 2007, when it convened in closed session pursuant to section 19.85(1)(e) "regarding discussion

¹Your electronic mail message identifies September 28, 2006, as the date of the first meeting about which you are concerned. In subsequent email exchange, however, you clarified that the date of the meeting that concerns you was October 4, 2006.

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on building of EMS facility on Lot 9 of the Wick Addition” (App. 22). In addition to your open meetings questions, you inquire about the legality of the building project itself.

The analysis and conclusions contained in this response relate only to your open meetings inquiries, and are based solely on the information identified in the first paragraph. I have not conducted any investigation to determine the factual accuracy of the information you have provided. If an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record related to the open meetings issues.

This letter does not address your questions about the legality of the building project. By law, the Department of Justice is authorized to provide legal advice to citizens on the open meetings and public records laws, but is not authorized to provide legal advice about whether a particular set of circumstances complies with other provisions of law. If you have reason to believe that any violation of the criminal law has occurred, I encourage you to bring that matter to the attention of the Dane County District Attorney. If you believe that non-criminal violations of the law may have occurred, I encourage you to contact a private attorney who can better advise you about the available alternatives in the context of your particular situation.

EMS was established by an intergovernmental agreement pursuant to section 66.0301, and is governed by a commission consisting of six members. Each EMS commission member is a member of the governing body of one of the six municipalities served by EMS. Pursuant to the intergovernmental agreement, the Villages of Black Earth and Mazomanie, and the Towns of Vermont, Black Earth, Mazomanie and Berry each provide a member of the village or town board to serve as an EMS commissioner. Because EMS was created by the resolutions or orders of its participating municipal governing bodies, it is a “governmental body” subject to the open meetings law. Sec. 19.82(1), Wis. Stats.; Correspondence from James E. Doyle to Paul Bucher, October 15, 1993 (I-10-93) (consortium of school districts created by intergovernmental contract is a governmental body subject to the open meetings law) (copy enclosed).

1. October 4, 2006, EMS commission meeting: assumed facts. EMS headquarters is located in the Village of Mazomanie. It shares space for training, volunteer sleeping quarters and storage with the village police and fire departments, and village administrative offices. In May 2006 EMS announced that it was running out of space. The EMS commission initially considered a number of alternative solutions. Jeffrey Wirth (“Wirth”), who at that time was the president of the Village of Mazomanie, proposed that the village move its offices to another location, and that the EMS remodel its current location. The village board did not endorse that proposal for consideration by the EMS commission. The EMS commission considered two locations to potentially purchase: the Mazo Deli in Mazomanie, and a building in Brodhead. In July 2006 the Wick family offered to donate a vacant parcel of land, on the condition that Wick Building Systems receive the contract to construct a new facility for EMS. The EMS

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commission toured the lot in late July 2006. Mr. Wirth states that there was no discussion during that visit whether the EMS commission would purchase the lot.

Mr. Wirth states that the EMS commission posted notice of a meeting to take place on October 4, 2006. The meeting notice included notice of a contemplated closed session under section 19.85(1)(e), for the purpose of “[d]eliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” According to Mr. Wirth, the closed session subject was identified as “purchase/lease/remodel (the Mazo Deli), or building an EMS facility on Lot 9 of the Wick addition” (App. 15).

Mr. Wirth states that a local newspaper reporter contacted EMS commission chairman Tom Schlick (“Schlick”) prior to the October 4, 2006, closed session, to question the reason for the closed session, but that Mr. Schlick would not elaborate on why the closed session was necessary. At the October 4 meeting, the EMS commission allowed public comment from approximately 20 people in attendance before convening into closed session pursuant to section 19.85(1)(e) for a little more than an hour. Mr. Wirth states that the board reconvened in open session after the closed session, and passed a resolution, without discussion or debate, to build a new EMS facility with a spending cap of \$490,000.

Although I have not been provided with the minutes of the open or closed sessions of the October 4 meeting, articles in the News Sickle Arrow purporting to quote members of the EMS commission provide some information which, if true, would contribute to the analysis of whether any portion of the October 4 meeting was properly closed under section 19.85(1)(e). An October 12, 2006, article in the News Sickle Arrow newspaper purports to quote statements made by Mr. Schlick at an October 9, 2006, meeting of the Vermont Town Board, as follows (App. 2):

“We have worked with numerous builders and subcontractors to come up with what I’ll term a construction estimate or a buying and building estimate,” Schlick said. “I can emphatically tell you there’s no contract, there’s no contract developed, there’s no contract signed, or sent out at this point. (Builders) are totally aware that they’ll have to fully follow state statutes under a bid process. So assuming that a majority of six entities, hopefully all of six entities, by a majority of their board approve this process, our next step is to create that bid spec.”

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Another October 12, 2006, News Sickle Arrow newspaper article purports to quote an exchange between two members of the village board of the Village of Black Earth, at a village board meeting subsequent to the October 4 EMS commission meeting, as follows (App. 3):

Black Earth board representative to the EMS commission Jonathan Brown in his report to the board, "every other entity seems to be onboard, other than the Village of Mazomanie."

Village president Vern Wendt said, "it needs to be researched what this building will cost us for upkeep and maintenance. It isn't just the principle and interest, but what is the cost of utilities?"

Brown said, "That was part of what was discussed in the (EMS) closed session."

An October 25, 2006, article from the News Sickle Arrow purports to quote an exchange between a Mazomanie village trustee and Mr. Schlick at an October 24, 2006, meeting of the village board, as follows (App. 6):

"We delayed a resolution in July to give more time for alternatives," said Schlick. "Enter the Wick property. It was assessed at \$120,000. So now we could look at a new facility. We worked up numerous floor plans to drive down a construction estimate. (The EMS commission) tabled it in September so we could continue to whittle down construction estimates."

Village trustee Kevin Graham asked if there were any estimates on equipment costs.

"There are no equipment costs," said Schlick. "Any additional furnishings the EMS Association will pay for."

Graham asked what kind of building would be built.

Schlick replied, "What we would call a Wick building. Nothing has been negotiated here. We had to come up with a construction estimate. We'll hire someone to handle the bidding process. No negotiations have happened, and there is no formal plan."

October 4, 2006, EMS commission closed session: analysis and conclusions. The question whether the EMS commission lawfully convened in closed session on October 4, 2006, has at least two components. First, it must be determined whether the EMS commission

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adequately complied with all of the procedural requirements for convening into closed session. Second, it must be determined whether the substance of the October 4, 2006, discussion fits the legal standard claimed by the EMS commission to justify closure.

Procedural requirements. Section 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, section 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.” The meeting notice of a contemplated closed session must contain the same amount of specificity in describing the subject of the closed session as is required for the presiding officer’s announcement of the nature of the business that will be considered at the closed session. 66 Op. Att’y Gen. 93, 98 (1977). The Attorney General has advised that 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).

Section 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 section 19.85 contain a number of subjects within the exception. For example, section 19.85(1)(e), the exception used by the Committee to justify its closed session discussion on October 4, 2006, 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.

Wisconsin appellate courts have only rarely addressed the issue of what amounts to sufficient notice of the “subject matter” of a contemplated closed session under section 19.84(2). The most relevant case is *State ex rel. Journal/Sentinel Inc. v. Pleva*, 151 Wis. 2d 608, 445 N.W.2d 689 (Ct. App. 1989), *affirmed on another ground*, 155 Wis. 2d 704, 456 N.W.2d 459 (1990).

The court of appeals in *Pleva* addressed, among other issues, the legal sufficiency of meeting notices for closed sessions posted by the finance committee of Milwaukee World Festival, an organization that conducted its business pursuant to the open meetings law by reason of a contractual agreement with the City of Milwaukee. The meeting notices

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provided "1. Review and consideration of the 1988 Operating Budget" as a subject, and further indicated that "Agenda item #1 will [some notices said "may"] be convened in closed session as per Wisconsin Statute 19.85 (1) (e). The committee may reconvene in open session for the purpose of voting on a motion if appropriate" (*Wisconsin Appendices and Briefs*, 155 Wis. 2d 686-704, Respondent's Appendix at 78, 84, 85 (Wisconsin State Law Library, call number KFW 2400 B7 155 Wis. 2d 686-704)). See also *Pleva*, 151 Wis. 2d at 611-12. The court of appeals reversed the circuit court's dismissal of the open meetings complaint and remanded the matter to the circuit court, stating, *id.* at 616 (footnote omitted):

The record before this court does not reflect the committee's basis for determining that their meetings fell within the exemption delineated in sec. 19.85(1)(e), Stats. Merely stating that the meetings would involve competitive or bargaining issues is a blanket approach in closing such committee sessions. Among the many procedural requisites, the finance committee was required to state the nature of the business to be considered before it closed the budget-planning sessions. On remand, respondents will be required to establish the nature of the items to be discussed in the meetings so as to justify the finance committee's vote for closure.

The *Pleva* decision puts the burden on the governmental body to justify the appropriateness of a closed session. *Pleva* also holds that a meeting notice of a contemplated closed session under section 19.85(1)(e) is a legally insufficient "blanket approach" if the meeting notice merely states what the Festival's meeting notices stated; *i.e.*, that the identified subject of the closed meeting will involve competitive or bargaining issues, or that the identified subject of the closed meeting is justified under section 19.85(1)(e).

Section 19.85(1) requires a specific procedure before a governmental body may lawfully convene into closed session. First, the body must introduce a motion in open session to convene into closed session. Second, the body's chief presiding officer must announce in open session both "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. at 97-98. Third, the motion must be carried by a majority vote "in such manner that the vote of each member is ascertained and recorded in the minutes" (emphasis added), unless the closure vote is unanimous. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 51, 370 N.W.2d 271 (Ct. App. 1985). Fourth, the presiding officer's two-element announcement that must precede the closed session "shall become part of the record of the meeting." Sec. 19.85(1), Wis. Stats. Since the announcement must be made in open session, the record of the announcement must become part of the record of the meeting's open session.

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I have not been provided the meeting notice for the October 4, 2006, EMS commission meeting. Nor have I been provided a copy of the minutes of the October 4, 2006, open session that should reflect the motion to convene in closed session and the presiding officer's announcement about the nature of the business to be considered in closed session and the statutory exemption that is claimed to authorize the closed session that day. Thus, I can offer only the following general statements about whether the EMS commission complied with the procedural requirements of the open meetings law that day, based on Mr. Wirth's message and newspaper reports.

First, it is my opinion that a court could conclude that the reported subject of the contemplated closed session identified in the meeting notice—"purchase/lease/remodel (the Mazo Deli), or building an EMS facility on Lot 9 of the Wick addition" (App. 15)—was not sufficiently described, because a member of the public could not determine from reading the notice whether the subject involved any bargaining or competitive interest of the EMS commission. For example, it is not clear how bargaining interests would be implicated if the actual conversation was about the relative advantages and disadvantages of buying, leasing, or building a different space for the EMS, as suggested in the newspaper reports. A court might well conclude that the subject description did not provide enough information to the members to allow them to intelligently vote whether to close the meeting.

Second, if the minutes of the open session meeting for October 4, 2006, were the official record of the October 4, 2006, meeting, and if those minutes failed to reflect that the presiding officer made an announcement about the nature of the business that was to be conducted in the closed session and the specific statutory exemption claimed to authorize closure, it is my opinion that a court could conclude either that (a) the EMS commission failed to comply with the procedural requirement of section 19.85(1) that the presiding officer make such an announcement, or (b) the EMS commission failed to keep a record of the presiding officer's announcement. Similarly, if the minutes of the October 4, 2006, meeting reflect that the presiding officer made such an announcement, and the minutes were to contain no more information about the closed session than the meeting notice contains, it is my opinion that a court could conclude that the presiding officer failed to adequately describe the nature of the business of the closed session, and offered only a legally insufficient "blanket approach" to the announcement; *i.e.*, one that invokes the statutory exemption without explaining why the body's bargaining or competitive interests required a closed session.

Closed session justification. After a governmental body closes a portion of a meeting, the law imposes an additional requirement. Section 19.85(1) provides that "[n]o 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."

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Wisconsin appellate courts have only rarely addressed the circumstances that justify a closed session under section 19.85(1)(e). The most relevant case is *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).

The CRD decision addressed whether any portions of the City of Milton’s ten meetings to discuss and negotiate an agreement to develop an ethanol plant were properly closed. Milton had closed all ten meetings in their entirety, citing section 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 section 19.85(1)(e). CRD, 2007 WI App 114, ¶ 10. The court held that “[t]he legislature’s choice of the word ‘require’ thus connotes its intent to limit the exception under § 19.85(1)(e) to those situations where the government’s competitive or bargaining reasons leave no other option than to close meetings.” *Id.*, ¶ 14. The court 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 section 19.85(1)(e). CRD, 2007 WI App 114, ¶¶ 13-19. The case underscores the need for governmental bodies to articulate, with clarity and specificity, the nature of the business that will be conducted in closed session and the negotiating and bargaining reasons that give the body no option to closure of the meeting in order to protect its negotiating and bargaining interests.

I have not been provided with a copy of the closed session minutes for the October 4, 2006, meeting. Those minutes might clarify whether, as to each subject discussed in closed session, the EMS’s competitive or bargaining interests left no other option than to close the meeting for the discussion of that subject. *Id.*, ¶ 14. Alternatively, those minutes might clarify that, for some or all of the subjects of the discussion, the EMS’s competitive or bargaining interests did not leave it with no other option than to close the meeting for the discussion of those subjects.

For example, if it were true that the EMS commission’s October 4, 2006, closed session included a discussion about the utilities costs for a new building, as an EMS commissioner is reported to have said at a Black Earth Village Board meeting, it is possible a court could conclude that at least that portion of the discussion should not have been held in closed session, because the court could find that the subject of utility costs was unrelated to any EMS competitive or bargaining interest. This possible court conclusion could be further supported by Mr. Schlick’s statements, if true, that the project was in the early stages of consideration, such as preparing construction estimates for various possible floor plans, and considering how additional

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expenses such as equipment and furnishings would be paid for, and by the commission's adoption of a \$490,000 construction budget after reconvening into open session, without any discussion or debate. If an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record about the nature of the business discussed in closed session.

2. February 8, 2007, EMS commission meeting: assumed facts. Mr. Wirth states that the EMS commission posted notice of a meeting to be held February 8, 2007. According to an article from the February 15, 2007, News Sickle Arrow, the agenda includes an item related to an offer to purchase the land that the Wick family had offered in July 2006 to donate to EMS on the condition that it receive the building contract. According to the newspaper, the agenda also contained notice of a contemplated closed session under section 19.85(1)(e), identifying the subject as "building of EMS facility on Lot 9 of the Wick addition Mazomanie" (App. 19). The News Sickle Arrow article continues, as follows (App. 12):

The commission took no action on an agenda item regarding an offer to purchase the property. Commission attorney Tim Fenner of the law firm Axley Brynnelson said, "We're still in the process. After March 1, we'll have more information."

Fenner said one of the issues the commission is dealing with is the ability to promise to award a construction bid to Wick Building Systems.

"A donation tied with a commitment to get the contract to build the facility is not allowed under the law," said Fenner. "We have to award the contract in accordance with Wisconsin statutes. They can't tie it to something the municipality cannot do. That's the problem we're struggling with. The Wicks have done a wonderful community thing here, but you have to make sure we still operate under the framework of the law."

Fenner confirmed one option being considered by the commission is to purchase the property from the Wicks, then have the building materials and labor donated instead.

February 8, 2007, EMS commission meeting: analysis and conclusions. As with the October 4, 2006, meeting, the question whether the EMS commission lawfully convened in closed session on February 8, 2007, has a procedural and a substantive component.

Procedural requirements. I have not been provided the actual meeting notice for the February 8, 2007, meeting. Nor have I been provided with the minutes of the February 8, 2007, open session that should reflect the motion to convene in closed session and the presiding

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officer's announcement about the nature of the closed session business and the statutory exemption claimed to authorize closure. Thus, I can offer only the following general statements about whether the EMS commission complied with the open meetings law's procedural requirements that day.

First, it is my opinion that a court could conclude that the reported subject of the contemplated closed session identified in the meeting notice—"building of EMS facility on Lot 9 of the Wick addition Mazomanie" (App. 19)—was not sufficiently described, because a member of the public could not determine from reading the notice whether the subject involved any bargaining or competitive interest of the EMS commission, and because the subject description did not give EMS commission members enough information to allow them to make an informed decision whether to vote to close the meeting.

Second, if the minutes of the open session meeting for February 8, 2007, were the official record of that meeting, and if those minutes failed to reflect that the presiding officer made an announcement about the nature of the business that was to be conducted in the closed session and the specific statutory exemption claimed to authorize closure, it is my opinion that a court could conclude either that (a) the EMS commission failed to comply with the procedural requirement that the presiding officer make such an announcement, or (b) that the EMS commission failed to keep a record of the announcement. If the presiding officer made such an announcement and the minutes contain no more information about the closed session than the meeting notice contains, it is my opinion that a court could conclude that the presiding officer failed to adequately describe the nature of the business of the closed session, and offered only a legally insufficient "blanket approach" to the announcement that invokes the statutory exemption without explaining why the body's bargaining or competitive interests required a closed session.

Closed session justification. I have not been provided with a copy of the closed session minutes for the February 8, 2007, meeting. As with the closed session minutes of the October 4, 2006, meeting, those minutes might make it clear whether the EMS's competitive or bargaining interests left no other option than to close the meeting for every subject discussed.

On the other hand, if the purported quotations attributed to Mr. Fenner were accurate, the minutes might confirm that the closed session discussion was about the relative merits of the two alternative approaches for constructing a new EMS building, *i.e.*, donation of the land and construction by Wicks versus purchase of the land from Wicks and donation of the materials and labor needed for the building. If that were the case, a court could conclude that the EMS's bargaining and competitive interests did not require a closed session in order to consider the relative merits of those alternatives. Of course, if an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record about the nature of the business discussed in closed session.

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3. February 13, 2007, Mazomanie Village board meeting: assumed facts. Mr. Wirth states that the Mazomanie Village Board convened in closed session on February 13, 2007, pursuant to section 19.85(1)(c) to discuss the building project. I have located a copy of the open session minutes from that meeting through the Village's website. The minutes reflect the following (emphasis in original):

14. CLOSED SESSION pursuant to Wisconsin Statutes 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 regarding discussion on building of EMS facility on Lot 9 of the Wick Addition. Motion by Raeanne LaCourt, second by Lowell Holcomb to go into closed session under the above statute. Roll call vote: Kevin Graham, yes. Lowell Holcomb, yes. Raeanne LaCourt, yes. Carol Linley, yes. Frank Racek, yes. Scott Stokes, yes. Motion carried. Sue Dietzen was asked to stay in closed session.

15. OPEN SESSION at approximately 8:00 p.m. Motion by Lowell Holcomb, second by Raeanne LaCourt to go into open session at 9:26 p.m. Motion carried.

<http://www.villageofmazomanie.com/Meetings/2007/Minutes021307.doc> (App. 11).

A February 15, 2007, article in the News Sickle Arrow reports the following (App. 12):

Mazomanie's board representative to the EMS commission Carol Linley said such a closed session under that exemption was permitted, even though the village board is not negotiating or purchasing public property. In essence, because the EMS Commission discussed the issue in closed session, the only way the EMS commissioners can discuss the issue with their respective boards is to do so in closed session.

Kim Lamoreaux ("Lamoreaux") states in an April 25, 2007, email message that "I was told by Mazomanie Village President Scott Stokes that the meeting was convened as a method of 'updating' the village board on the EMS district's progress" (App. 22).

February 13, 2007, Mazomanie Village Board meeting: analysis and conclusions. As with the October 4, 2006, and February 8, 2007, meetings of the EMS commission, the question whether the Mazomanie Village Board lawfully convened in closed session on February 13, 2007, has a procedural and a substantive component.

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Procedural requirements. I have not been provided the meeting notice for the February 13, 2007, village board meeting. If that meeting notice identified the subject of the contemplated closed session in the same words the open session minutes use to describe the motion to convene into closed session, and if it were true that the purpose of the closed session was to update village board members on the status of the EMS district's building project, as claimed in Ms. Lamoreaux's April 25, 2007, email, it is my opinion that a court could determine that the meeting notice failed to comply with the requirement of section 19.84(2) that meeting notices identify the subject of contemplated closed sessions "in such form as is reasonably likely to apprise members of the public and the news media thereof." A subject description to discuss "building of EMS facility on Lot 9 of the Wick Addition" (App. 22) encompasses many more potential topics of discussion than an update on the status of the project. A court could reason that a broad characterization of the closed session subject matter deprived the public of information about the actual content of the closed session, and deprived village board members of the specificity they needed in order to 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). Again, I would like to stress that if an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record about the content of the meeting notice and the purpose for which the meeting closed.

In addition to the issue of the content of the meeting notice, there is a question about the village's compliance with the procedural requirements of section 19.85(1). That statute requires the presiding officer to announce "the nature of the business to be considered at [the] closed session" and to announce "the specific exemption or exemptions under [section 19.85(1)] by which such closed session is claimed to be authorized." Section 19.85(1) also provides that the presiding officer's two-part announcement "shall become part of the record of the meeting."

In my opinion, a court could determine, based on the village's open session minutes, that the village board complied with the procedural requirements of section 19.85(1). The minutes are, presumably, the official record of the meeting. The minutes reflect that section 19.85(1)(e) was the exemption used to justify the closed session. The minutes raise the inference that the presiding officer announced that the nature of the business of the closed session was a "discussion on building of EMS facility on Lot 9 of the Wick Addition" (App. 11).

Closed session justification. Mr. Wirth and Ms. Lamoreaux both question the village's use of the "competitive or bargaining reasons" exemption, since the village is not directly involved in any negotiation or bargaining with respect to the donation or purchase of the land and the purchase or donation of the building materials and labor.

I have not been provided with a copy of the closed session minutes for the February 13, 2007, meeting. It is possible that those minutes might clarify that the village had a competitive

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I have not been provided with a copy of the closed session minutes for the February 13, 2007, meeting. It is possible that those minutes might clarify that the village had a competitive or bargaining interest that was discussed, and that the nature of the topics to be discussed left the village with "no other option than to close [its] meetings." *CRD*, 2007 WI App 114, ¶ 14.

If, however, the closed session was for the purpose of updating village board members on the status of the EMS district's building project, it is possible there could be elements of an update that would not adversely affect the bargaining or negotiating interests of either the village or the EMS district if they were discussed in public. For example, if a more fully developed factual record were to establish that the village's EMS commission representative explained why the EMS commission was considering purchase rather than donation of the property, the representative's description of the state's bidding statutes as they apply to the EMS district would not obviously appear to adversely affect either the village's or the EMS district's bargaining or negotiating interests. If that topic were part of the update, it is my opinion that a court could determine that the topic should have been reported to the village board in open session without adversely affecting the EMS district's bargaining or negotiating interests. On the other hand, if a more fully developed factual record were to establish that the only purpose of the update was to tell the village board about the EMS commission's strategies concerning the pricing of the project, the terms of payment, contingencies or the parameters within which the EMS commission authorized its legal counsel to make offers or counteroffers, it is my opinion that a court would likely conclude that the entire closed session was justified under section 19.85(1)(e). If an enforcement action were commenced, the parties would have an opportunity to develop the complete factual record about the February 13, 2007, closed session. Such a developed record would permit a more specific analysis and more definite conclusions than I am able to provide in this letter.

Thank you for your interest in assuring full compliance with Wisconsin's open meetings law. I hope the information contained in this letter is useful to you, and that you understand why I am not able to provide definitive conclusions with respect to the three meetings that concern you. At Mr. Wirth's request, I am providing a copy of this letter and its enclosures

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to Anthony Varda, a town supervisor in the Town of Berry. In addition, I am providing a copy of this letter to Timothy Fenner, legal counsel for the EMS.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olsen", with a long horizontal flourish extending to the right.

Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

c: Anthony Varda
Timothy Fenner

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