



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Bruce A. Olsen
Assistant Attorney General
608/266-2580
olsenba@doj.state.wi.us
FAX 608/267-2223

July 13, 2007

Mr. David Musolf
N7550 North Shore Road
Lake Mills, WI 53551

Dear Mr. Musolf:

Your June 6, 2007, letter to Legal Services Administrator Kevin Potter has been forwarded to me for response.

As you know, I contacted Jefferson County Corporation Counsel Philip C. Ristow ("Ristow") after receiving your message, summarizing the three principal concerns raised by your letter, and requesting additional documentation to assist my analysis of the three open meetings violations you asserted in your message. I enclose a copy of my June 8, 2007, communication to Mr. Ristow with this letter. Mr. Ristow responded by letter on June 20, 2007. I enclose a copy of his letter and its enclosures.

I have completed my review of the matter. Disputed questions of fact that the Department of Justice has no authority to resolve prevent me from reaching a conclusion about two of the three issues you raise. I have concluded, however, that on the basis of the information made available to me and in the absence of any contravening information, a court could conclude that the public notice for the March 28, 2007, Jefferson County Highway Committee ("Committee") meeting failed to reasonably apprise members of the public that the Committee would leave the Jefferson County Highway Office ("Highway Office") meeting location identified in the notice and would tour Jefferson County Trunk Highway ("CTH") "G" during the course of the meeting, in violation of section 19.84(2) of the Wisconsin Statutes.

1. Absence of a record in the minutes of the March 28, 2007, meeting of two adopted Committee motions. The meeting notice for the March 28, 2007, meeting of the Committee contains the following item under the "New Business" heading: "Review and discuss 2007 construction project on County Trunk Highway G." Your June 6 letter encloses a

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printout copy of a June 5, 2007, email you sent to Jefferson County District Attorney David Wambach ("Wambach") that provides the factual allegations to support your complaint. That email describes the two actions allegedly taken by the Committee:

The highway commissioner, under "New Business" then made a presentation to the committee regarding the project. The committee members asked questions and discussed the proposed project, including some dialogue with those in attendance. It was suggested and agreed to by the members of the committee that the commissioner be directed to contact the state Department of Transportation to seek possible exemptions from state highway requirements that would allow some or most of the mature bur oak trees to remain along County G. Further, it was suggested by a committee member that in order to maintain an open line of communication with the concerned citizens that an individual be designated as a contact and liaison for the commissioner and that he keep that individual apprised of his conversations with the DOT and of the project in general. This too was agreed to and accepted by the five committee members. I specifically asked whether there would be a formal motion regarding these two agreed upon committee directives. The chair responded by stating that this was not necessary since everyone was in agreement. My understanding of parliamentary procedure is that the committee adopted the directives by unanimous consent.

Mr. Ristow's June 20, 2007, letter takes issue with your characterization of the discussion relating to this agenda item. He asserts that no decisions were made by the Committee with respect to whether the Jefferson County Highway Commissioner ("Commissioner") should seek an exception to the "clear zone" on CTH "G" dictated by the Department of Transportation's ("DOT") manual because the Committee had no authority to make such decisions (June 20, 2007, letter at 3). Mr. Ristow also asserts that one member of the Committee suggested that the Commissioner advise Janet Bade ("Bade") about the decisions the Commissioner made with respect to the CTH "G" project. Mr. Ristow also asserts that no tape or video recording of the March 28, 2007, Committee meeting exists.

There appears to be a dispute of facts as to whether the Committee adopted any motions or issued any directives to the Commissioner at the March 28, 2007, meeting, and a dispute about the content of any motions or directives that may have been adopted or issued. The Department of Justice has no statutory authority to resolve such disputes of fact.

Under these circumstances, I am able to reach only the most general conclusions. Section 19.88(3) provides that "[t]he motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19." *If* any motions were made at the March 28, 2007, meeting of the Committee, the Committee would have to record and preserve those motions in order to

comply with the open meetings law. *If* any roll call votes were made at that meeting, those roll call votes would also have to be recorded and preserved in order to comply with the open meetings law.

2. Absence of a record in the minutes of the March 28, 2007, meeting of motions rescinding the directives to the Commissioner. The minutes of the March 28, 2007, meeting reflect that two Committee members left the meeting at 9:40 a.m., and that three other members and the Commissioner then left the meeting site to “tour[] CTH “G” regarding repairs, right of way, trees, safety, and drainage.” Your June 5 email to Mr. Wambach states that the three Committee members told the Commissioner during the tour of the project that “he need not follow the directive adopted earlier by the committee and that he should proceed without contacting DOT.” Your June 5 email to Mr. Wambach also states that it appears that the Commissioner failed to comply with the Committee’s directive to keep an open line of communication with citizens, because the Commissioner waited two months before contacting Ms. Bade to tell her what happened on the tour of the CTH “G” project.

Mr. Ristow’s June 20, 2007, letter takes issue with your characterization of what tree removal decisions were made, who made them, and when they were made. Mr. Ristow also takes issue with your assertion that the Commissioner failed to comply with the Committee’s directive to keep an open line of communication with Ms. Bade. Mr. Ristow asserts that the Committee never made a decision about whether the Commissioner should contact DOT to seek a “clear zone” exception, because that decision is one entrusted to the professional engineering judgment of the Commissioner, and not the Committee. Further, Mr. Ristow asserts that the Commissioner exercised his professional judgment after reviewing the matter with the staff of the Jefferson County Highway Department, that the review took some time, and that the Commissioner contacted Ms. Bade after his review was completed.

Whether the circumstances related to your second concern give rise to an open meetings violation again depend on the resolution of disputed facts that the Department of Justice has no authority to resolve. Thus, I am able to provide only a general response to your second concern. *If* the Committee were to have adopted any motions during its tour of the CTH “G” project and failed to record and preserve a record of any such motions, the Committee would have violated the requirement of section 19.88(3). On the other hand, *if* the Committee directed the Commissioner to keep Ms. Bade informed and he failed to do so, that failure would not be a violation of the open meetings law.

3. Meeting notice description of March 28, 2007, tour of CTH “G” project. The public notice for the March 28, 2007, meeting identifies the meeting location as “Office of the Highway Commissioner – Committee Room, 141 West Woolcock Street, Jefferson, Wisconsin,” and describes item 12 of the 14-item agenda as: “Review highway projects in the County.” The minutes of the March 28 meeting indicate that the meeting began at 8:00 a.m. at the Highway

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Office. The minutes of the March 28 meeting indicate that Committee members Rex Weston and John Molinaro “left at 9:40 a.m.,” and further indicate that “Mr. Buchanan, Mr. Munyon, Mr. Reese, and Commissioner Kern toured CTH ‘G’ regarding repairs, right of way, trees, safety, and drainage.”

Section 19.84(2) provides that every public notice of a meeting must give the “time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof.” No Wisconsin case, to my knowledge, has interpreted how a governmental body should give notice of the “place” of the meeting “in such form as is reasonably likely to apprise members of the public and the news media thereof.” *Id.* The term “subject matter” has been construed, however. In order to give notice of a subject matter “in such form as is reasonably likely to apprise members of the public and the news media thereof[.]” *id.*, a meeting notice posted prior to June 13, 2007, could be no more general than the term “licenses” was to describe a city council’s reconsideration of a previously denied application for a liquor license. *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, ¶ 21, ___ Wis. 2d ___, 732 N.W.2d 804. Following the *Buswell* decision, a meeting notice must be “reasonably specific under the circumstances.” *Id.* In determining whether a notice is reasonably specific considering all of the circumstances, a court must, after June 13, 2007, “analyz[e] such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate.” *Id.*, ¶ 28.

In my opinion, based solely on the information made available to me, and in the absence of any contravening facts, a court could determine that the March 28, 2007, meeting notice failed to apprise the public that a portion of the meeting would occur in a location different than the location identified on the meeting notice; *i.e.*, that the “[r]eview [of] highway projects in the County” would occur in the vicinity of CTH “G” rather than at the Committee Room of the Commissioner’s Office on Woolcock Street. Based on that factual determination, a court could conclude that the Committee’s March 28, 2007, meeting notice failed to provide reasonable notice to the public that a portion of the meeting would occur away from the location identified in the meeting notice, in violation of section 19.84(2). Moreover, although the matter is not entirely free from doubt, a court might also conclude that the March 28, 2007, meeting included a subject separate and distinct from a discussion of highway projects in the county; *i.e.*, a tour of CTH “G,” and that the Committee violated section 19.84(2) by engaging in that aspect of its business without first providing reasonable public notice of that subject.

In my opinion, the determinations in the previous paragraph could be supported by a review of the Committee’s meeting notices and meeting minutes during the years 2005 and 2006. As part of my review of the questions you raised, I asked the Jefferson County Corporation Counsel to provide me with copies of the meeting notices and meeting minutes for 2005 and 2006 which reflected that the Committee conducted a tour of highway projects in the county. In

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response, I received meeting notices for the Committee's meetings scheduled for August 31, 2005, September 7, 2005, January 4, 2006, January 18, 2006, and December 6, 2006. Each of the meeting notices contained an agenda item described as "[r]eview highway projects in the County" or "[r]eview highway and ongoing projects in the County." I also received the Committee's minutes for each of those meetings. Each of the minutes identifies the location of the meeting as the "Highway Office."

The minutes for the August 31, 2005, meeting reflect that the discussion of "[r]eview highway and ongoing projects in the County" included a notice that the Committee would be taking a field trip on September 7, 2005, "to look at completed and future projects." The location of those projects was not disclosed. It appears from the minutes that the discussion took place at the Highway Office.

The minutes for the September 7, 2005, meeting reflect that the Commissioner and the Committee "toured various road projects within the County." Neither the meeting notice nor the minutes for that meeting identify the location of the projects.

The minutes for the January 4 and January 18, 2006, meetings reflect that no discussion of "[r]eview highway and ongoing projects in the County" occurred at either meeting, although the meeting notice for each meeting indicated that such a discussion could occur.

The minutes for the December 6, 2006, meeting reflect that the Commissioner and the Committee, minus one member, toured county roads regarding requests for speed limit changes on CTH "F" and CTH "B," and that they toured some parks and "Jonas property."

In light of the Committee's practice to use the same language in its meeting notices to describe discussions of highway projects during its meetings at the Highway Office and tours of undisclosed county projects, a court could determine that a member of the public who read the meeting notice for the March 28, 2007, meeting would not know whether the agenda item "[r]eview highway projects in the County" referred to a discussion of projects at the Highway Office, or a tour of highway projects in the county. Moreover, a member of the public who read the March 28, 2007, meeting notice would have no way of determining from the notice what projects the Committee planned to tour, even if the person might suspect that the Committee was likely to leave the Highway Office and embark on a tour of county roads or other projects.

The Department of Justice has provided guidance to local governmental bodies about how to comply with the requirements of the open meetings law when those bodies conduct tours

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or inspections of public works. In an April 8, 1993, letter to Town of Menasha Deputy Clerk Julie Rappert (copy enclosed), the Department of Justice advised:

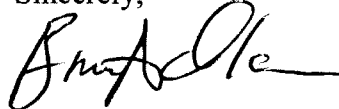
[T]here are a number of options a town board has for conducting road inspections in compliance with the open meetings law. One option would be to designate an individual town employe or member of the board to inspect the roads and ask that person to report on the inspection at a properly noticed, regular town board meeting. I understand that some towns have arranged to have an employe or board member video tape road sites and present the video tape at a regular town board meeting. Another option would be for each member of a town board to individually inspect the road sites and then discuss their inspections at a properly noticed regular town board meeting. The town board could also tour the sites together in a van. The town board must, however, provide advance public notice of its meeting to inspect the road sites. In addition, the town board should follow one of two procedures. The first is to list each road site in the order that the town board intends to inspect the sites in the public notice to enable members of the public to follow the town board members to each site. The board members should discuss town board business only while they are at a site and accessible to the public. The board members should not discuss any town board business while traveling from site to site. The second procedure is to arrange to permit citizens interested in attending the meeting to ride in the van along with the town board members.

The potential claims identified in this letter 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. 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). You indicate that the Jefferson County District Attorney has considered your complaint and has declined to take formal action with respect to the violations you assert. Because it appears that more than 20 days have elapsed since you filed your complaint with the district attorney, 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.

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Thank you for your interest in ensuring full compliance with the requirements of the open meetings law. Because this letter also responds to the information provided by Mr. Ristow, I am providing him with a copy of this letter and its enclosures.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

c: Philip C. Ristow
Corporation Counsel
Jefferson County

David Wambach
District Attorney
Jefferson County