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Mr. James Huff
District 5 County Supervisor
3212 22nd Avenue
Kenosha, WI 53140

Dear Mr. Huff:

This letter is in response to your October 30, 2007, letter to Kevin Potter in which you asked whether the signing of a letter by 16 members out of the 28 total members of the Kenosha County Board ("the Board") constituted a "walking quorum" violation of the open meetings law. The letter in question—dated October 12, 2007—was addressed to the Kenosha County Executive and indicated that the 16 signatories had reviewed a "Staffing and Operational Analysis" and a "Project Financing Analysis" related to a plan for a proposed Kenosha County Emergency Center. The letter further stated that, "[a]fter a careful review and consideration of the various arguments for and against this project, as currently proposed, we wish to inform you that we will not vote to authorize any additional funding to continue this project as currently proposed." In addition, the letter went on to state several fiscal policy reasons for opposing the proposed project and for favoring less costly alternatives.

According to your letter of inquiry, the October 12 letter was left in the county clerk's office and one member of the group of 16 then called the other members of that group and asked them to sign on to the letter. No other information has been supplied regarding the substance of those calls or any other conversations that might have occurred among any members of the group of 16 prior to the issuance of the fully signed letter. Nor has any information been provided about how the text of the October 12 letter was composed—*e.g.*, whether by one person working alone or through any sort of group process.

Whether the circumstances described above set out a violation of the open meetings law is a fact-specific question that cannot be definitively answered in an inquiry of this nature. When responding to questions about the applicability of the open meetings law, the Department of Justice cannot conduct factual investigations to determine the accuracy and completeness of the information that has been provided. The opinions in this letter are thus based solely on the facts as you have alleged them in your letter. I caution, at the outset, that if an enforcement action alleging violations of the open meetings law were commenced, the parties would have an

opportunity to develop a more complete factual record related to the issues and that record might or might not support the opinions expressed in this letter.

A meeting subject to the open meetings law is defined as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Sec. 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that the open meetings law applies whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). The concept of "governmental business" has been broadly construed to include any formal or informal action, including discussion, decision, or information gathering, on matters within the governmental body's realm of authority. *Showers*, 135 Wis. 2d at 102-03. It is thus clear that if members of a governmental body convene in order to discuss or gather information on any matter of the body's business and if that convening includes a sufficient number of members to control an action by the body, then the gathering in question is subject to the requirements of the open meetings law. Discussions among smaller groups of members generally do not constitute "meetings" subject to those requirements.

The Wisconsin Supreme Court has also recognized, however, that members of governmental bodies might employ "elaborate arrangements" to shield certain gatherings from the open meetings law. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). One such arrangement is a "walking quorum"—*i.e.*, a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to determine the body's course of action. *Conta*, 71 Wis. 2d at 687. Although none of these private gatherings, considered individually, includes enough members to constitute a "meeting," in the aggregate they effectively determine the body's course of action outside of the public's view. By prohibiting such serial or "walking" quorums, the open meetings law ensures that the discussion and debate that influences a governmental body's decision is open to public scrutiny.

The concept of a walking quorum has two essential elements: (1) a series of gatherings among sub-quorum-sized groups of members for the purpose of discussing or collecting information on some subject of the body's business; and (2) an explicit or tacit agreement among enough members to control an action by the body. If either element is absent, no walking quorum violation will be found.

Those two elements are not necessarily present when an individual member of a governmental body merely endorses a written document. Even if a majority of members of the body read and sign the document one after another, a walking quorum has not occurred unless the members: (1) have effectively engaged in collective discussion or information gathering

outside the context of a properly noticed meeting; and (2) have agreed with each other to act in some uniform fashion. Accordingly, the Attorney General's Office has previously concluded that, where a set of resolutions was circulated to the members of a county board prior to a meeting and a majority of those members signed on to the circulated resolutions as co-sponsors, there was no "walking quorum" violation, as long as the contact among the co-sponsors did not involve discussion or debate about the substance of the resolutions or agreements to later vote uniformly for or against them. *See* correspondence to Melanie Kirsch (July 28, 1998) (copy enclosed). In reaching that conclusion, this office emphasized that co-sponsoring a resolution does not necessarily imply a decision to later vote in a particular manner. The mere presence of the signatures of a majority of members on a co-sponsorship resolution, without more, thus does not establish an agreement among those members to act uniformly and, accordingly, does not constitute a "walking quorum" violation.

The factual circumstances about which you inquire, however, involved a majority of Board members signing on to a document that not only discussed policy matters pending before the Board, but also expressly committed the signatories not to vote for any additional funding for the Emergency Center project in its current form. The 1998 opinion letter expressly noted that the signatures of a majority of members of a body on a resolution would violate the "walking quorum" rule if those members thereby *reached a decision* outside the context of a meeting of the body. Here, the October 12, 2007, letter plainly embodied a decision by 16 of the Board's 28 members to agree to a specific, uniform future course of action. Therefore, under these facts I believe a court could reasonably find a "walking quorum" violation of the open meetings law had occurred.

Thank you for your interest in Wisconsin's open meetings law.

Sincerely,

Thomas C. Bellavia

Thomas C. Bellavia
Assistant Attorney General

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Enclosure

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