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July 16, 2008

Mr. Wayne L. Herbst
School Board Member
Park Falls School Board
N15879 Old 182 Road
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Dear Mr. Herbst:

This letter is in response to your May 29, 2008, letter to Attorney General J.B. Van Hollen in which you request advice regarding the application of Wisconsin's open meetings law to certain activities of the Park Falls School Board and the Glidden School Board.

You first ask whether adequate public notice was given for a joint meeting of the two school boards that took place on May 12, 2008. According to your letter and accompanying materials, the published notice for that meeting included the following agenda item: "Develop agreement on items to be included in board resolution to consolidate Park Falls and Glidden School Districts." Under that agenda item, according to the minutes of the meeting, the two school boards considered and voted in favor of five motions: a motion establishing an interim name for the consolidated school district and setting up a committee to develop a permanent name; a motion regarding the use of the Park Falls and Glidden school buildings for different grade levels; and three motions related to the size and composition of the school board for the consolidated district. Your letter asks whether the agenda item was sufficiently specific to apprise members of the public that the two school boards would take final action on the issues embodied in those five motions.

The open meetings law provides, in pertinent part, that the public notice of a meeting of a governmental body must "set forth the . . . subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. This statutory language requires a case-specific balancing analysis for the purpose of determining whether the notice reasonably informs the public of the subject in question under the particular factual circumstances of the case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 22 and 27, 301 Wis. 2d 178, 732 N.W.2d 804. The reasonableness standard does not invariably require a public notice to enumerate every specific issue or sub-issue that may be discussed at a meeting. *Id.*, ¶ 33. Rather, particular issues may be discussed under more general

subject headings if the general heading has reasonably apprised the public of the subject matter of the meeting. *Id.*

The factors to be considered in determining whether a subject description is reasonable under the circumstances include: (1) the burden on the body of providing a more detailed description; (2) whether the subject is of particular public interest, based on the numbers of people interested and the intensity of their interest; and (3) whether the subject involves non-routine action that the public would be unlikely to anticipate from a less detailed description. *Id.*, ¶ 28. Where adequate notice has been given for a particular subject, the governmental body is free to discuss any aspect of that subject, "as well as issues that are reasonably related to it." *Id.*, ¶ 34.

In addition, the Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken." *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that "adequate notice [...] may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified." *Buswell*, 301 Wis. 2d 178, ¶ 37 n.7. Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 573-74 and 577-78, 494 N.W.2d 408 (1993)—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Buswell*, 301 Wis. 2d 178, ¶ 26; *Olson*, 252 Wis. 2d 628, ¶ 15. The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting.

The key issues raised by your first question thus are: (1) whether, under all the relevant factual circumstances, the specific subjects of the five motions passed on May 12, 2008, are reasonably related to the general subject of the proposed consolidation of the Park Falls and Glidden School Districts; and (2) whether, under all the relevant factual circumstances, the notice that the two school boards were planning to develop an agreement on items to be included in a board resolution to consolidate the districts reasonably alerted the public that the two boards might do something as important as taking formal action on the five motions passed on May 12, 2008.

Both of those issues, however, are fact-specific matters that can only be fully addressed in the context of an open meetings law enforcement action in which all parties would have an opportunity to develop a complete factual record regarding all the circumstances that might be related to the reasonableness questions and to any other legally material issues. The Attorney

General's Office, when responding to inquiries about the applicability of the open meetings law, can neither resolve nor speculate about such fact-dependent disputes. Accordingly, I have explained how the open meetings law applies to the type of situation you have described, but I can offer no opinion as to whether the notice for the May 12, 2008, meeting actually was or was not reasonable, under all the relevant circumstances.

You also ask whether it was permissible, under the open meetings law, for the secretary of the superintendent of the Park Falls School District to poll individual members of the Park Falls School Board about an item of business outside a duly noticed board meeting. According to your letter, at a meeting of the Park Falls School Board occurring after the joint meeting of May 12, 2008, you asked that one of the motions that had been passed at that joint meeting be taken up again and reconsidered at an upcoming special meeting. You indicate that there was general agreement to your request. You further state, however, that prior to the scheduled date of the special meeting, the superintendent directed his secretary to call all five of the board members who originally voted in favor of the motion to be reconsidered and to ask if they would change their votes and all five apparently replied in the negative. The superintendent conveyed the results of that poll to the president of the Park Falls School Board, who then decided that the reconsideration issue you had requested would not be on the agenda for the upcoming meeting. You ask whether this pre-meeting polling of board members violated the open meetings law.

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. My opinion on this question is thus based solely on the facts as you have alleged them in your letter. I caution, therefore, 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 my opinion on this question.

Subject to that qualification, I note that a meeting under 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 open meetings law also applies to 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. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976). Although none of these smaller 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. The open meetings law prohibits such serial or "walking" quorums, in order to ensure that the discussion and debate that influences a governmental body's decision is open to public scrutiny.

According to the facts alleged in your letter, five of the nine members of the Park Falls School Board, through a series of one-on-one conversations with the superintendent's secretary, collectively agreed that they would uniformly vote against your proposed reconsideration motion, if it were raised at the upcoming meeting. Such use of an agent or surrogate to poll a quorum of the members of a body through a series of individual contacts is a prohibited walking quorum. Therefore, limited to the facts you have alleged, I believe a court could reasonably find that the polling in question violated the open meetings law.

You also ask two other questions: (1) whether votes cast at the May 12, 2008, meeting by school board members who also occupy other incompatible offices are valid votes; and (2) whether section 120.11(2) of the Wisconsin Statutes requires a special school board meeting to be held upon the written request of any school board member, with or without the agreement of other board members. Unfortunately the Attorney General's Office cannot advise you about those questions. Except in the areas of the open meetings law (located at sections 19.81 to 19.98) and the public records law (located at sections 19.31 to 19.39), the Attorney General is precluded from giving legal opinions or advice to persons or entities other than state officers and agencies, the two branches of the Legislature, the Governor, county corporation counsel, and district attorneys. Although your last two questions may be related to school board meetings, they are outside the scope of the open meetings law. This office cannot assist you with such matters. You may wish to consult with your school board's legal counsel or a private attorney.

I hope this information is helpful to you and thank you for your interest in compliance with the open meetings law. Please note that the opinions contained in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1).

Sincerely,

Thomas C. Bellavia

Thomas C. Bellavia
Assistant Attorney General

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