



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

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March 2, 2009

Ms. Janelle Martinson  
4090 Vilas Road  
Cottage Grove, WI 53527

Dear Ms. Martinson:

I am writing in response to your November 10, 2008, request to Attorney General J.B. Van Hollen that the Department of Justice commence an open meetings enforcement action, seeking forfeitures and a court order voiding action taken by the Cottage Grove Village Board on June 16, 2008. You allege that the village board violated the open meetings law on five occasions by failing to reasonably notify the public about the subject it intended to consider in closed session, as required by section 19.84(2) of the Wisconsin Statutes. You state that the subject was the village's sale of a portion of Fireman's Park, which is public parkland purchased by the village taxpayers and state taxpayers through a grant from a Wisconsin Department of Natural Resources ("DNR") stewardship fund, to a private entity, specifically the Wisconsin Rugby Club. You state that the meeting notices were also misleading because the village parks commission has been working on developing a community recreational center for the last five years, and that project did not involve the sale of parkland to a private entity. You also question the propriety of the village board's closed session vote to sell the parkland to the club. It is not clear to me whether you have also filed your verified complaint and its supporting documentation with the Dane County District Attorney, since your verified complaint asks either the district attorney or the Attorney General to commence an enforcement action.

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Sec. 19.97(1), Wis. Stats. In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys' familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence. 65 Op. Att'y Gen. Preface, ii (1976). The Department of Justice usually only gets involved in matters of statewide concern. Your concerns appear to be local in nature. If you have not already filed your complaint with the district attorney, and if after considering the balance of this letter you wish to continue to pursue this matter, I suggest that you provide your complaint and a copy of this letter to the Dane County District Attorney. The Department of Justice will not be taking the enforcement action you request at this time.

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Section 19.98 authorizes the Attorney General to provide advice to any person regarding the applicability of the open meetings law to particular factual situations. The analysis and conclusions contained in this response are based solely on the information you have provided. I have not conducted any independent investigation to determine the factual accuracy of any of that information.

Although your complaint relates to the meeting notices for the village board's March 17, April 21, May 5, June 16, and July 7, 2008 meetings, the materials you submitted do not contain any of the meeting notices for those meetings. You did, however, enclose copies of the open session and closed session minutes and other documentation for each of those meetings, and those minutes contain written descriptions of the justification for each closed session. For purposes of this letter, I will assume that the five meeting notices described the statutory bases for the closed sessions and the subjects of the closed sessions in ways identical to the descriptions contained in the respective open and closed session minutes of the five meetings.

The March 17 minutes identify the motion to convene to closed session as follows (underlining in original; italics added to identify subjects of closed session):

The Village of Cottage Grove Village Board will enter into Closed Session pursuant to Wisconsin State Statute §19.85(1)(e) deliberating or negotiating the purchase of public property, investing of public fund, conducting other specified business whenever competitive and/or bargaining reasons require a closed session; *negotiation purposes, negotiation with developers, intergovernmental agreements; Negotiation of possible Land Purchase for municipal facilities and/or conservancy area; The Farm;*

....

and §19.85(1)(g) conferring with legal counsel who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved; *pending litigation.*

The closed session minutes reflect that the board heard a report from village trustee Randy Margenau about his meeting with Jim Bradt, and heard a report that the land conservancy grant application would be presented to Dane County on March 26, 2008. The minutes state that the agreement with the Wisconsin Rugby Club should be finalized next week.

The April 21 minutes identify the motion to convene to closed session by citing section 19.85(1)(e) and reciting the language of that statutory section as in the March 17 minutes, and identify the subjects of the closed session as follows:

[N]egotiation purposes, negotiation with developers, intergovernmental agreements; Possible Land Purchase in cooperation with Dane County Parks System; Possible Transaction, Agreement for Recreational Facility.

The closed session minutes reflect that members of the parks committee came to voice their opposition to the village's sale of a portion of Fireman's Park to the Rugby Club, reflect that the village board did not act on the project, and reflect that the village administrator was instructed to go back to the Rugby Club to discuss a long term lease. The minutes reflect conversation about the land conservancy and the Town of Cottage Grove with respect to the purchase of some property, reflect a report about a developer's agreement for the library project, reflect a discussion about the possible purchase of a small parcel for possible use as a lift station, and reflect a discussion about the appeal of an unsuccessful operator's license applicant and the need to revamp the ordinance involved.

The May 5 minutes identify the motion to convene to closed session by citing section 19.85(1)(e) and reciting the language of that statutory section as in the March 17 minutes, and identify the subjects of the closed session as follows:

[N]egotiation purposes, negotiation with developers, intergovernmental agreements; Agreement for Recreational Facility-Fireman's Park.

The closed session minutes reflect that the village board approved an agreement for Recreational Facility-Fireman's Park upon finalizing the agreement through legal counsel.

The June 16 minutes identify the motion to convene to closed session by citing section 19.85(1)(e) and reciting the language of that statutory section as in the March 17 minutes, and identify the subjects of the closed session as follows:

[N]egotiation purposes, negotiation with developers, intergovernmental agreements; Possible Land Purchase in cooperation with Dane County Parks System; Land Conservancy Purchase/Grant; Agreement for Recreational Facility update.

The closed session minutes reflect that the village administrator reported on a possible land purchase, reflected under the heading "Land Conservancy," reflect that the administrator reported on a tour of the Jim Bradt farm and the need to get a handle on the grant process, reflect that an owner agreed to sell the village an easement for a sewer line and bike trail, for which

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DNR would reimburse the village, reflect that the village board approved the sale of land to the Wisconsin Rugby Club and was informed that DNR still needed to approve the deed restriction, and reflect that the village board was informed that a lawsuit in another matter was coming to an end, and that the board approved an amendment to an agreement related to the lawsuit.

The July 7 minutes identify the motion to convene to closed session by citing section 19.85(1)(e) and reciting the language of that statutory section as in the March 17 minutes, and identify the subjects of the closed session as follows:

[N]egotiation purposes, negotiation with developers, intergovernmental agreements; Possible Land Purchase in cooperation with Dane County Parks System; Land Conservancy Purchase/Grant; Agreement for Recreational Facility update; Sewer Easement Negotiations.

The closed session minutes reflect that the village administrator reported that the village would not benefit by purchasing a particular parcel of land; reflect under the heading "Fireman's Park" a report that the village still needed DNR's written approval to sell the property, that the village had received a verbal confirmation, and that the purchase of the farm property would fulfill any obligations needed by the DNR. Under a separate heading, "WI Rugby," the minutes reflect that the board received a report that the contract with the Rugby Club was close to being final and that the contract would contain a contingency regarding the need for DNR approval. The minutes further reflect that the village board approved an offer to purchase sewer and bike trail easement property for a particular price. The minutes also reflect that the board received a report that the village would be getting a bequest from an estate.

Section 19.84(2) provides that every public notice of a meeting 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." *Id.* The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att'y Gen. 68, 70 (1977).

In June 2007, the Wisconsin Supreme Court articulated the factors that must be considered, on a case-by-case basis, in determining whether a government body's meeting notices give reasonable notice of the subjects that a body may consider in closed session. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804. The statute's "reasonableness" standard "strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business." *Id.*, ¶ 3. This reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances." *Id.*, ¶ 22. In making that determination, the factors to be considered

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include: “[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate.” *Id.*, ¶ 28 (bracketed references added).

The first factor “balances the policy of providing greater information with the requirement that providing such information be ‘compatible with the conduct of governmental affairs.’ Wis. Stat. § 19.81(1).” *Id.*, ¶ 29. The determination must be made on a case-by-case basis. *Id.* “[T]he demands of specificity should not thwart the efficient administration of governmental business.” *Id.* The second factor takes into account “both the number of people interested and the intensity of that interest,” though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis. *Id.*, ¶ 30. The third factor considers “whether the subject of the meeting is routine or novel.” *Id.*, ¶ 31. There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed. *Id.* “Novel issues may . . . require more specific notice.” *Id.* The Department of Justice has provided additional interpretive guidance by advising:

Whether a meeting notice reasonably apprises the public of the meeting’s subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body.

*Wisconsin Open Meetings Law: A Compliance Guide*, at 12 (Wisconsin Department of Justice, 2007), available on the internet at: [http://www.doj.state.wi.us/AWP/2007OMCG-PRO/2007\\_OML\\_Compliance\\_Guide.pdf](http://www.doj.state.wi.us/AWP/2007OMCG-PRO/2007_OML_Compliance_Guide.pdf).

The key issue raised by your inquiry is whether, under all the relevant circumstances, each of the five meeting notices reasonably alerted the public that the village board was considering an agreement with a private entity for the construction of a private recreational facility on village park property. That is a fact-specific matter 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 of the meeting notices.

In the case of the five meeting notices that concern you, the village has increased the difficulty of determining the reasonableness of its meeting notices by frequently including subjects like “negotiation purposes,” “negotiation with developers,” and “intergovernmental agreements” in meeting notices where the closed session minutes do not reflect the occurrence of

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any closed session negotiations, any closed session discussion of negotiation strategy, or any closed session discussion of agreements between governments.

The village has also increased the difficulty of determining the reasonableness of the meeting notices by identifying the subject of the proposed agreement with the Wisconsin Rugby Club in different ways at meetings where that proposed agreement was the subject of closed session discussion. For example, the March 17 meeting notice identifies a subject of "Negotiation of possible Land Purchase for municipal facilities and/or conservancy area" when the proposed agreement was discussed in closed session. The April 21 meeting notice identifies a subject of "Agreement for Recreational Facility" when the proposed agreement was discussed in closed session. The May 5 meeting notice identifies a subject of "Agreement for Recreational Facility-Fireman's Park" when the proposed agreement was discussed in closed session. The June 16 and July 7 meeting notices both identify the subject of "Agreement for Recreational Facility update" when the proposed agreement was discussed in closed session.

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 notices for any of the five meetings actually was or was not reasonable, under all the relevant circumstances.

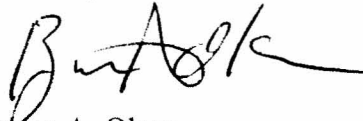
In addition to questioning the reasonableness of the meeting notices, you also question whether it was proper for the village board to vote in closed session to approve the agreement with the Wisconsin Rugby Club. As you correctly observe, the Attorney General has advised that governmental bodies vote in open session unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session. *Wisconsin Open Meetings Law: A Compliance Guide*, at 20 (Wisconsin Department of Justice, 2007). Assuming that the village board approved the transaction with the Rugby Club in closed session on May 5, 2008, it is unclear to me whether that vote was an integral part of the deliberations. The information provided to me is not a sufficient basis on which to form an opinion.

As I noted at the outset of this letter, it is unclear to me whether you have brought your concerns to the attention of the Dane County District Attorney. I hope that the information provided in this letter is helpful to you in thinking about whether to take that step. Thank you for your interest in compliance with the open meetings law. Please note that the opinions contained

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in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1).

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olsen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bruce A. Olsen  
Assistant Attorney General

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