



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

March 12, 2009

Mr. Rick Skindrud
1303 LaFollette Road
Mt. Horeb, WI 53572

Dear Mr. Skindrud:

Attorney General J.B. Van Hollen has asked me to respond to the letter and package of written and audio-visual materials you hand-delivered to the Wisconsin Department of Justice on January 13, 2009, relating to various meeting and public records practices of the town board of the Town of Primrose and its committees.

Your letter is subdivided into nine discrete segments. The materials you have provided are keyed to the segment of the letter to which they pertain. Thank you very much for providing such a well-organized set of materials for our review. The care with which you organized the materials has greatly facilitated our ability to consider and analyze your concerns and to provide this response.

The legal authority of the Attorney General and the Wisconsin Department of Justice is specifically defined, and limited, by laws passed by the Wisconsin Legislature. Under these laws, our principal functions are to act as legal counsel to the Governor, the two branches of the Legislature and state agencies, and to provide opinions and advice to state officers and agencies and the legal representatives of counties on matters pertaining to the duties of their respective offices. Fortunately, the Legislature has given the Attorney General authority to provide interpretations of the open meetings and public records laws to members of the public. Secs. 19.39 and 19.98, Wis. Stats. Where a segment of your letter and supporting materials implicates either the open meetings or public records laws, this letter responds substantively to your concerns based on the materials you have provided. However, some of your concerns implicate areas of the law as to which the Legislature has not given the Attorney General and the Department of Justice authority to provide you with legal advice. Where your letter and supporting materials implicate those areas of the law, this letter will be unable to provide you with the advice you seek. I regret that we cannot be of greater assistance to you, but hope that you understand that we must act within the constraints of our legal authority.

Mr. Rick Skindrud
March 12, 2009
Page 2

1. **August 18, 2008, email.** You inquire whether an email exchange reflects a walking quorum violation of the open meetings law. You provide a copy of an email message from the town clerk to the town supervisors, enclosing a proposed agenda and asking whether any supervisor has additions or corrections. You also include a supervisor's reply, directed solely to the clerk, that the agenda looked good, that he would not likely be attending the meeting, and that the supervisor requested a change of date for a public hearing on amendments to the town's land use plan. The messages do not reflect any communication between the clerk and the supervisor regarding the merits of any matter that could be considered by the town board.

A "walking quorum" is 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 reach a quorum. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987), quoting *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. The Department of Justice has advised that the signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a "walking quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. See Kay correspondence, April 25, 2007; Kittleson correspondence, June 13, 2007 (copies enclosed). The reasoning of those letters applies to the April 18, 2008, email exchange. It is my opinion, based solely on the information you have provided and in the absence of any contravening information, that a court would not find that the email exchange resulted in a walking quorum violation.

2. **Town of Primrose ordinances regarding land division, driveways, building permits, and citations.** The Attorney General and the Department of Justice do not have legal authority to respond substantively to your questions regarding the town's duty to enforce all portions of its ordinances, the town's duty to follow its own procedures, the town's duty to correct errors in the minutes of town board meetings, or the availability of remedies for town residents to redress violations of town ordinances by the town board. The end of this letter contains information about resources that may assist you in obtaining answers for those questions.

The Department of Justice does have authority to respond to some of the concerns expressed in this segment of your letter. You state that the town does not have records of some motions regarding the approval of a particular structure and driveway. If you mean that the structure and driveway were built even though the owner did not seek the approvals that were required under the ordinances, I do not have authority to respond substantively to your concern. If, however, you mean that the town board considered and passed motions pertaining to the

driveway and structure, but that the town did not keep a record of the adopted motion, it is my opinion that a governmental body's failure to keep a record of its motions is a violation of the open meetings law. Section 19.88(3) of the Wisconsin Statutes requires every governmental body to keep a record of the motions and roll-call votes at each meeting. The end of this letter contains information about how to pursue an action to enforce alleged violations of the open meetings law.

3. Purchase of lawnmower. You state that the town board adopted a motion at its October 2008 meeting to defer the purchase of a lawnmower for the Mount Vernon Park Association until a certified public accountant could be contacted, and that the accountant recommended against the purchase at the November meeting. You state that the public was informed at the December meeting that the town paid a bill for the purchase of the mower during the month of November. You ask who authorized and signed the purchase order on behalf of the township.

To the extent that your letter asks the Department of Justice for factual information, please be informed that the Department does not have the information you request. I suggest that you submit a public records request to the town asking to inspect and/or copy the purchase order that is of concern to you. The Department does not have authority to advise you whether the purchase was lawful.

4. Right of citizens to amend town's land use plan. You state that the town's planning commission held a public hearing in April 2008 on a proposed amendment to the town's land use plan, and that the overwhelming number of people present supported the amendment. Despite that support for the amendment, the planning commission recommended to the town board that the amendment be referred to a comprehensive planning committee.

The Department does not have authority to advise you about the rights, if any, of town residents to amend the town's land use plan by using another procedure. This segment of your letter does, however, raise an open meetings concern to which I can substantively respond in general terms. You state that a November 16, 2005, email demonstrates that the town board and the town land advisory committee met with certain county officials regarding land use policy, and assert that public notice of the meeting was not given. The email from Brian Standing, a Dane County employee, provides, in relevant part:

I [Brian Standing], our planning director Todd Violante and County Executive Chief of Staff Topf Wells met with members of the Land Advisory Committee, the town Planning Commission and the Town Board a few weeks back, including Al [Coven] and Dave [Garfoot]. We discussed much of the same ideas that I covered in my presentation [to the Land Advisory Committee on November 14, 2005].

Section 19.82(2) defines a "meeting" 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," and further provides that "[i]f one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for [those] purpose[s]." Assuming that the town's land use policy is a subject within the realm of the authority of the town land advisory committee, the town planning commission, and the town board, a meeting of each body occurred if one-half of the members of the body were in attendance at the gathering described in the email. Because your letter does not identify the members of each of the three bodies, or whether any body had at least one-half of its members in attendance at the gathering described in the email, I am unable to determine whether any violation of the open meetings law may have occurred on the date of that gathering.

5. Public participation plan and comprehensive plan steering committee. Your letter and its supporting materials raise some questions to which I can respond, and some to which I cannot respond. The Department of Justice does not have authority to provide advice with respect to the lack of publication of the public participation plan, or with the continued unavailability of the town square website, for example.

The materials reflect that the town board approved a public participation plan on July 15, 2008, which included the creation of a plan steering committee. The resolution adopted by the town board provided that the public notices of the steering committee's meetings "will be posted in several locations around the Town, the Town website, and appear in one or more local newspapers." I assume, but cannot know for certain, that the quoted language expressed the town board's intention to assure that meeting notices appeared in at least one local newspaper by paying for the publication of the notices. As a general matter, the open meetings law gives governmental bodies the option to give public notice of their meetings through posting or by paid publication. 66 Op. Att'y Gen. 93, 95 (1977) (copy enclosed). The open meetings law does not prevent a governmental body from determining that both methods of notice are required in order to sufficiently advise the public about its upcoming meetings. Where a body designates the locations where the public can obtain notice about the body's upcoming meetings, the public is entitled to rely on that designation, and the reasonableness of that reliance strengthened the more times that the meeting notice actually appears in the designated locations. It is my opinion that a court could conclude that a violation of the open meetings law occurred if a body deviated from a longstanding practice of providing public notice of its meetings in a particular way. On the other hand, if the body only promised to give public notice of its meetings in a particular way, but never instituted the practice, it is unlikely that a court would find that the public reasonably relied on the body's unfulfilled promise. Because I do not have information about the steering committee's actual meeting notice practice, I am unable to provide any opinion about whether a court would be likely to find an open meetings violation with respect to the manner in which the steering committee gives public notice of its meetings.

You also allege that a series of email exchanges between members of the steering committee amount to unposted meetings. The messages you enclosed with your letter provide only enough information to permit a general response. Although no Wisconsin court has applied the open meetings law to email exchanges, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body. It appears to me that most of the email messages you enclosed are electronic transmissions of documents from members of the steering committee or from county employees to committee members. Such transmissions appear to be more analogous to non-electronic cover letters enclosing hard copies of documents than to conversation. I see little evidence of a rapid back-and-forth conversation-like exchange of viewpoints among multiple members of the steering committee.

6. Annual meeting minutes for April 8, 2008. Town electors adopted a motion at the April 2008 annual town meeting to have town board meetings announced in the newspaper, as well as in public service announcements, on the town's website, and through public posting. You state that some town board meetings have been held without prior newspaper publication.

Governmental bodies may give public notice of their meetings by posting, by paid publication, or by both methods. *See* 63 Op. Att'y Gen. 509, 510-11 (1974) (copy enclosed). Where the body gives public notice of its meetings by paid publication, the body must ensure that the meeting notice is actually published prior to the beginning of the meeting. As reflected in the discussion above regarding the meeting notice practices of the comprehensive plan steering committee, the likelihood that a court would find an open meetings violation when a body departs from its usual notice practice depends on a fact-intensive inquiry. The factual information available to me is not sufficient to conduct that inquiry.

You state that the town board's site visits are never published in the paper. If a majority of the town board visits a site that is the subject of a matter pending before the board, that gathering is a meeting of the town board as defined by section 19.82(2). The town board must give prior public notice of its site visits, including the time, date, place, and subject matter of the site visit. Sec. 19.84(2), Wis. Stats. If site visits are never published in the newspaper, it may be difficult to establish public reliance on that method of giving notice. If site visits are never preceded by any form of public notice, a court would likely find a violation of the open meetings law.

7. Town of Primrose planning commission meetings. The resolution that created the town's planning commission provided that "Regular Plan Commission meetings shall be held on the First Monday of every month at 8:00 p.m[.]" The resolution further provides that

“Special Plan Commission meetings may be called by any Town Board member or Plan Commission Chairperson or Vice-Chairperson.” You enclosed copies of the minutes of the plan commission meetings for Monday, August 4, 2008, Monday, October 13, 2008, and Monday, October 10, 2008, reflecting start times of 7:30 p.m., 7:35 p.m., and 7:30 p.m., respectively. Only the August meeting was held on the first Monday of the month. The minutes do not identify whether any of the meetings is a regular or special meeting of the plan commission.

You ask whether the plan commission can ignore on a regular basis the meeting schedule prescribed by the resolution that created it. The open meetings law does not prescribe when governmental bodies must meet. The Department of Justice therefore lacks authority to respond substantively to your concerns.

8. Town’s response to public records request. You state that a town resident has repeatedly asked the town for a copy of provisions allegedly contained in the town’s land use policy relating to the children and family members of landowners, and the town has ignored the request. You enclose copies of various documents related to the resident’s concern. Only some of those documents could possibly be construed as public records requests for the provisions in question. The most recent document appears to be the minutes of the June 17, 2008, town board meeting, at which a town resident informed the town board that there are inconsistencies between the town’s land use plan and its ordinances, and indicated that the resident would like to have “provisions for children of owner” defined.

The public records law provides access to existing records maintained by records custodians. The law does not require a custodian to provide requested information if no record exists, and does not require a custodian to answer questions of interest to a requester. If a town resident wants a copy of an existing record maintained by the town, the resident should make a public records request for the document or documents he or she seeks. Although a record requester is not required to make a written records request, section 19.35(1)(h), a written records request that reasonably describes the requested documents triggers the custodian’s duty to provide access to the requested documents or to explain in writing why the request is being denied in whole or in part, as soon as practicable and without delay. Sec. 19.35(4)(a) and (b), Wis. Stats.

9. Conduct of town board members at meetings. You invite me to review the recordings of the October 21 and November 25, 2008, town board meetings, based on your “concern for appropriate behavior based on oath of office.”

The open meetings law does not contain provisions governing the behavior of members at meetings. The Department of Justice therefore lacks authority to respond substantively to your concerns. Because the Department does not have authority to provide you with legal advice on this aspect of your letter, I have not reviewed the recordings of the meetings. If you have

Mr. Rick Skindrud
March 12, 2009
Page 7

evidence that members' behavior demonstrates that a crime has been committed, we would suggest that you contact your local police or sheriff's departments or the district attorney's office. If you do so, be prepared to provide all relevant information and understand that they have broad authority to decide whether or not specific matters should be investigated or pursued.

Conclusion. The potential open meetings 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). Your letter does not indicate that you have brought your concerns to the attention of the Dane County District Attorney. If you do so, and if the district attorney (or a special prosecutor from another county) declines to take formal action on the violations you assert within 20 days, you can initiate your own action pursuant to section 19.97(4). If you prevail in such an action and are represented by counsel, the court may award your actual attorney fees and other necessary costs.

You may wish to have a private attorney review your concerns that implicate areas of the law other than the open meetings and public records laws. If you do not have an attorney, you can retain a referral from the State Bar of Wisconsin using the contact information set forth below.

Attorney Referral and Information Service
State Bar of Wisconsin
Post Office Box 7158
Madison, Wisconsin 53707-7158
(800) 362-9082
(608) 257-4666

The referral service is free. If you do consult an attorney, we would suggest you provide him or her with all of the relevant documents and information and to make sure that you clearly understand the amount you will be charged for the attorney's services.

A wide variety of legal information, often including forms or other materials geared towards non-attorneys, is available on the Internet, from local clerks of court, at public libraries, and at the Wisconsin State Law Library in Madison. Among other resources, all Wisconsin Statutes and Administrative Rules are available through the Wisconsin State Legislature's website, <http://www.legis.state.wi.us>. You can also find links to legal materials by accessing the State Bar of Wisconsin website, <http://www.wisbar.org>, and selecting the "Legal Resources" tab. In addition, the Wisconsin State Law Library, <http://wsll.state.wi.us/>, has a wide variety of Wisconsin legal resources available to the public.

Mr. Rick Skindrud
March 12, 2009
Page 8

Where we have been able to respond substantively to your concerns, please note that the opinions expressed in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice pursuant to section 165.015(2). Where we are unable to respond to your concerns, or are able to provide only a general response, I hope that the information we have provided will be helpful to you and that your concerns will be resolved fairly.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

olsenba/misc/c090202022-let-skindrud.doc