



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

May 26, 2009

Ms. Florence Connors
1266 Highway 92
Verona, WI 53593

Ms. Dawn Haag
9158 Britt Valley Road
Mount Horeb, WI 53572

Dear Ms. Connors and Ms. Haag:

I am writing in response to your February 16, 2009, letter and enclosures to Attorney General J.B. Van Hollen, regarding the activities of Town of Primrose officials as they relate to the town's comprehensive planning process. You state that the town is developing a comprehensive plan pursuant to the requirements of section 66.1001 of the Wisconsin Statutes, and has entered into an agreement with Dane County to provide assistance in preparing the plan, including assistance in complying with the procedural requirements of the plan. You state, and section 66.1001(4)(a) confirms, that a written plan for public participation is one of the required procedural components of the plan. You allege that the town is violating many of the criteria of section 66.1001, including its own public participation plan. You also allege that the town's Comprehensive Planning Steering Committee ("CPSC") has violated the open meetings law by failing to provide adequate notice of its meetings and by engaging in walking quorums through the use of email. In addition, you allege that the CPSC has denied access to email communications between its members regarding the CPSC's business in violation of the public records law. You state that you have not brought your concerns to the attention of the Dane County District Attorney because of the county's contract with the town, and because one of the members of the CPSC is a former employee of the district attorney's office.

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,

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 2

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. Unfortunately, however, your concerns related to the town's alleged noncompliance with the requirements of section 66.1001 implicate an area 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. This letter is therefore unable to provide you with advice regarding your concerns under section 66.1001, including your concern that the public participation plan has not been published in a newspaper (the plan you provided does not contain such a requirement), your concern that the public has not had the opportunities for participation that the town's public participation plan requires, and your concern that the town board has limited the CPSC's membership to itself and the members of the town plan commission that the town board appoints. I regret that we cannot be of greater assistance to you, but hope you understand that we must act within the constraints of our legal authority.

1. Public comment periods at CPSC meetings. You state that members of the public are given only one opportunity to make statements at CPSC meetings, and state that the CPSC does not respond to the public's questions until a subsequent meeting, if at all. Sections 19.83(2) and 19.84(2) permit a governmental body such as the CPSC to set aside a portion of an open meeting as a public comment period. That period must be included in the meeting notice. During a public comment period, the body may receive information from the public and may discuss any matter raised by the public. If a member of the public raises a subject that does not appear on the meeting notice, however, the Department of Justice advises that the best course of action is for the body to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. The open meetings law allows the CPSC to limit public input at its meetings to the input provided during a public comment period. Moreover, the open meetings law does not require the CPSC to respond to matters raised by members of the public during the meeting where the matters were raised. I believe, based solely on the information you have provided, and in the absence of any contravening information, that it is highly unlikely that a court would find an open meetings violation with respect to the CPSC's public comment periods.

2. Method of giving public notice of CPSC meetings. The materials submitted with your letter 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

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 3

publication. 66 Op. Att'y Gen. 93, 95 (1977) (copy enclosed). The open meetings law does not prevent the town board from determining that both methods of notice are required in order to sufficiently advise the public about upcoming meetings of the CPSC.

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. I believe 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 by a particular method. 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, and unlikely that a court would conclude that the body's failure to comply with its stated method of notice failed to provide the public with adequate notice of its meetings.

You state that the CPSC has had only four public meetings since the middle of 2008, and that the notice of the September 22, 2008, meeting was not published in any local newspaper. Based on the minutes of the CPSC's meetings posted on the town's website, <http://tn.primrose.wi.gov/>, and the minutes you provided with your letter, it appears that the CPSC's first two meetings were on September 16 and September 22, 2008. It also appears that the CPSC adopted a motion at its September 16 meeting to hold its next meeting on September 22. If so, it is unclear how a court would evaluate the reliance interest, if any, that would have been created by the publication of the September 16 meeting notice, and the nonpublication of the September 22 meeting notice, in light of the September 16 motion.

3. CPSC use of electronic communication for discussion and decision-making.

You state that the members of the CPSC have set up a password-protected email group which allows them to communicate by electronic messages. You state that the email group has not provided copies of the group's messages to the town clerk, who is the town's records custodian. You state that the CPSC members have made collective decisions during the course of these electronic messages rather than at its in-person meetings.

You draw my attention to a January 22, 2009, email message from CPSC chairperson Joshua Dein ("Dein"), which invites members of the CPSC to visit the "Town Square" portion of the town's website at least 2-3 times per week to review the information contained there and to add comments. It appears that the Town Square portion of the town's website gives individuals the opportunity to post messages regarding various aspects of the comprehensive planning process and also gives individuals the opportunity to comment on the messages posted by others. The January 22 email message states that members of the CPSC will receive email messages each time a new message is posted to the CPSC section of the Town Square. Your letter

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 4

encloses a copy of the following meeting notice regarding the Town Square portion of its website (http://tn.primrose.wi.gov/meetings.htm#notice_emeeting):

Intent

This open and public “electronic public hearing,” “town square” or “electronic discussion forum” is for people interested in topical information pertaining to the Town of Primrose Comprehensive Plan. It is intended to serve as an additional venue where Town of Primrose citizens can provide input and discuss related topics. No meetings of the Town Board, Planning Commission, or Comprehensive Planning Steering Committee will convene and no official town business will be conducted. All submitted content (even removed content) and e-mail addresses become a matter of public record and subject to any open records request.

Official Public Meeting Notice

This hereby serves as an official notice pursuant to the state Open Meetings Law that a possible quorum of town governmental bodies may exist while participating on the Town of Primrose Comprehensive Plan project electronic discussion forum, accessible online at this listed web address: <http://www.tn.primrose.wi.gov/BulletinBoard.htm>. The electronic discussion forum discussion will last the duration of the Town of Primrose Comprehensive Plan project (approximately June, 2009). At any given time, a quorum of any Town of Primrose committee, Planning Commission, or the Town Board, could be participating in a discussion on this site. However, no governmental body will convene or make any decisions while active on the electronic discussion forum - the electronic discussion forum exists for discussion and informational purposes only. The websites are all publicly accessible and reviewable.

People who do not have a computer or access to the Internet at work or home can generally find free publicly accessible terminals for use at their local library, or at the Town Hall. Alternate means of accessing this information are available; please contact the Town Clerk at 608-832-4471. Information taken off-line (due to limited server space) will also be made available for public review and subject to open records requests. This announcement will be posted permanently at the Town Hall until the project ends.

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 5

You also draw my attention to a January 29, 2009, email message from Dein to the CPSC members, suggesting that the CPSC use the Town Square feature to begin discussions on the first elements of the comprehensive plan. Dein proposed that the CPSC hold two such virtual meetings during the week of February 1, 2009, with each meeting lasting from 7:30 to 9:30 p.m. The information available to me does not indicate whether any such virtual meeting was actually held. The section of the CPSC's website that contains the CPSC's meeting notices does not contain any notices for meetings during the week of February 1, 2009.

Finally, you draw my attention to a four-page series of email exchanges between the Dane County employee serving as lead planner for the town's Comprehensive Plan and Dein on February 2 and 3, 2009, in which it appears that the CPSC made changes to a survey and a mailing list of persons to receive the survey, outside of in-person CPSC meetings. The lead planner expressed his discomfort about proceeding with the survey and mailing list on that basis, and encouraged the CPSC to add the review and approval of the revised survey mailing list and survey document to the CPSC's next meeting. In the series of messages, Dein appeared to confirm that the CPSC made changes to the land use and demographic surveys, and made changes to the mailing list outside the context of one or more in-person discussions.

The open meetings law defines "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." Sec. 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that the above statutory definition of a "meeting" applies whenever a convening 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" refers broadly to any formal or informal action, including discussion or information gathering, on matters within the realm of a governmental body's realm of authority. *Id.* at 102-03. In *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993), the supreme court stressed that a governmental body is engaged in governmental business when its members gather simply to hear information on a matter within the body's realm of authority, *id.* at 573-74, and even if they do not discuss the information or otherwise interact with each other. *Id.* at 574-76. The open meetings law provides that if one-half or more of the members of a governmental body are present, the members are rebuttably presumed to be gathered for the purpose of exercising their responsibilities, authority, power, or duties. Sec. 19.82(2), Wis. Stats. The open meetings law further provides that every meeting of a governmental body must be preceded by public notice. Sec. 19.83(1), Wis. Stats. The law requires that every public notice set forth the time, date, place, and subject matter of the meeting. Sec. 19.84(2), Wis. Stats. The open meetings law is violated when a governmental body takes action with respect to a subject within the realm of its authority outside the context of a meeting for which proper public notice was given.

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 6

The application of the open meetings law to email communications has not been addressed by Wisconsin's appellate courts. The Attorney General has long taken the position that the circulation of paper communications by members of a governmental body generally do not constitute a "convening of the members," sec. 19.82(2), Wis. Stats., for purposes of the open meetings law. Merkel correspondence, March 11, 1993 (copy enclosed). Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp, it is still unlikely that a court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of members of a governmental body for purposes of the open meetings law.

Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a "convening of members," depending on how the communication medium is used. Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, 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. Krischan correspondence, October 3, 2000 (copy enclosed). In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

Legal uncertainty about the application of the open meetings law to electronic communications, and factual uncertainty about the CPSC's electronic communication practices allow only a general response to the concerns you raise.

First, I believe that a court would likely conclude that a series of electronic communications, in the form of email exchanges or posts to a website, by members of the CPSC which are designed to occur during a fixed period of time on a particular day, meet the legal definition of a "meeting" subject to the requirements of the open meetings law. If the CPSC has made collective decisions by such electronic means, without providing advance public notice of those communications and without providing contemporaneous access to its communications, it is likely that a court would conclude that the CPSC violated the open meetings law. In the course of the February 2-3, 2009, email exchange, Dein appeared to confirm that some collective decisions of the CPSC were made during the course of such electronic communications.

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 7

Second, if the CPSC conducted scheduled "virtual meetings" through the use of the Town Square website, I believe that a court would be unlikely to conclude that the "Official Public Meeting Notice" language on the town's website was sufficient to meet the notice requirements of section 19.84(2). The "Official Public Meeting Notice" on the website does not identify the date of such scheduled and planned communications, nor the time on that date when the communications are scheduled to begin, nor the subject matters that will be discussed during the course of those communications. Moreover, section 19.84(4) requires that "[s]eparate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting." For many years, the Attorney General has advised that "blanket" meeting notices that list in a single notice all of the dates on which a governmental body will meet, does not comply with the "separate notice" requirement of section 19.84(4). 63 Op. Att'y Gen. 509, 512-13 (1974) (copy enclosed). The "Official Public Meeting Notice" on the website is even more general than the blanket meeting notice disapproved in that opinion.

Third, I am not able to offer an opinion about whether the "Official Public Meeting Notice" on the town's website might be legally sufficient to insulate the members of the CPSC from liability under the open meetings law, if CPSC members were to regularly review messages posted by others on the Town Square portion of the town's website, and were to regularly post their own comments to those messages, as Dein encouraged in his January 22, 2009, email. It is likely that a court would base its conclusion on a determination whether the particular communications that might be involved were more like non-electronic written communications, or more like in-person discussion, using the four factors identified in the fourth preceding paragraph above.

4. CPSC demonstration of the "Town Square" portion of the town's website. You state that the town chairperson presided at a township caucus on January 24, 2009. During that gathering, he announced that the CPSC would be giving a demonstration regarding the Town Square portion of the town's website after the caucus. You state that the demonstration took place after the caucus, but that no public notice was given of that demonstration. You state that members of the CPSC took and answered questions from the public during the demonstration. You assert that the gathering of the CPSC members met the definition of a "meeting" under the open meetings law. Your letter refers to, but did not enclose a news article from the Mount Horeb Mail. I have not been able to locate information about a January 24, 2009, "township caucus" on the town's website.

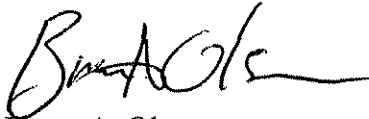
I am not able to provide an opinion regarding the likelihood that a court would find an open meetings violation on the basis of the information available to me.

Ms. Florence Connors
Ms. Dawn Haag
May 26, 2009
Page 8

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 Department of Justice. 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.

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,



Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

olsenba\misc\c090227028-let-connors-haag.doc