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August 22, 2018

Monte Schmiege

Dear Mr. Schmiege:

This letter is in response to your correspondence to Attorney General Brad Schimel, dated January 9, 2018, in which you stated you are a member of the West Bend Joint School District #1 school board serving on the policy committee, and wanted advice "as to the applicability of Wisconsin Open Meetings Law to blogs, social media posts, and other forms of electronic communication beyond email and instant messaging addressed in the Open Meetings Law Compliance Guide."

Specifically, you wanted advice about the applicability of the open meetings law "under any of these circumstances": 1) "Communicating information and/or personal opinion to the public in a posting that may or may not be viewed by other board members, with or without the intent of influencing other board members"; and 2) "Responding to a reporter's request for a personal opinion on a matter of public interest with the consequence of it being reported in printed an electronic form."

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Before I respond to the specific questions outlined in your correspondence, I wanted to provide you with some general information regarding the open meetings law, which I hope you will find helpful.

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publically and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. Wis. Stat. § 19.83. Under the law, a "meeting" is defined as:

> [T]he 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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

Wis. Stat. § 19.82(2).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement).

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *See State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.

The requirements of the open meetings law also extend to walking quorums. 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. *See Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *See State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a "meeting" through use of a walking quorum or other "elaborate arrangements" is subject to prosecution under the open meetings law. *Id.* at 687.

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.

It is important to note that the phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a "convening of members" under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence and electronic communications, including email.

I will now turn to the hypothetical questions you posed in your correspondence, but caution that any conclusions I have reached in this letter are based solely on the hypothetical questions you sent us, not on any specific facts that might exist in your situation. Regarding the first situation, "[c]ommunicating information and/or personal opinion to the public in a posting that may or may not be viewed by other board members, with or without the intent of influencing other board members," such as in blogs, social media posts, and other forms of electronic communication beyond email and instant messaging, I have insufficient information to draw any definitive conclusions about those situations in the abstract. Those kinds of electronic postings can possess many different kinds of characteristics, 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. 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.

It also bears repeating that 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. A walking quorum, however, may be found when the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion.

For those reasons, the Attorney General has cautioned that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See* Kay Correspondence (Apr. 25, 2007). With respect to email specifically, the Attorney General has strongly discouraged the members of every governmental body from using email to communicate about issues within the body's realm of authority. *See* Krischan Correspondence (Oct. 3, 2000); Benson Correspondence (Mar. 12, 2004) Exchanges

on other electronic media can be seen as closely analogous to email exchanges—such as interactive comments on a blog or social media exchanges, especially those exchanges that occur almost in real time.

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Features like "forward" and "reply to all" common in electronic communication or social media programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. It is quite possible that, through the use of those types of electronic communications, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members. Because of the absence of judicial guidance on the subject, and because electronic media communications create the risk that they will be used to carry on private debate and discussion on matters that belong at open meetings subject to public scrutiny, the members of governmental bodies should refrain from using electronic media to communicate about issues within the body's realm of authority.

Therefore, a court could find that the kinds of electronic communications you describe in your hypothetical situations constitute improper walking quorums if: 1) a sufficient number of body members have engaged in a collective discussion or information gathering related to governmental business; and 2) then agree, tacitly or explicitly, to act in some uniform fashion. At the very least, the use of electronic media to conduct serial individual contacts or back-and-forth exchanges is strongly discouraged. As with email exchanges, a court could construe such back and forth communication on electronic media as a convening of members under the open meetings law, because it resembles an in-person discussion. *See* Krischan Correspondence (Oct. 3, 2000). A court could also find that there is a "close proximity" of time of the exchanges over electronic media if a single official uses electronic media to communicate with others in succession, asking—explicitly or tacitly—for their support of a particular position. *See* Benson Correspondence (Mar. 12, 2004). Regardless of how a court would view such communications, however, in the interest of government openness and transparency such discussions and decisions should occur in the light of a properly noticed open meeting.

Turning now to the second situation you posited, "[r]esponding to a reporter's request for a personal opinion on a matter of public interest with the consequence of it being reported in printed an electronic form," I first note that a phone call or an email to an individual board member is generally not a meeting under the open meetings law. Further, the Attorney General has previously concluded that there is no meeting within the meaning of the open meetings law when the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action. *See* Katayama Correspondence (Jan. 20, 2006).

Moreover, the Attorney General has long taken the position that written communications generally do not constitute a "convening of members" for purposes of the open meetings law. *See* Merkel Correspondence (Mar. 11, 1993). This is particularly true of

written communications that involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it appears unlikely that a Wisconsin court would conclude that the circulation of an online article, written by a reporter who has requested a personal opinion of an individual member, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

In your correspondence, you also stated that you are "interested in this matter from the standpoint of running for re-election," and that "[a]s a sitting board member, it seems my options for communication may be more limited than those for someone who is running for the office and not a sitting member." You further stated that, "[t]o some extent, it seems freedom of speech is curtailed by Open Meetings Law," and "[t]here are implication[s] for record keeping as well."

DOJ's Office of Open Government is only authorized to provide assistance to citizens within the scope of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, and the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and interpretations of constitutional law are outside of this scope. You may wish to consult with private legal counsel concerning such questions. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney fees. You may reach it using this contact information:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666
http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx

Regarding the "implication[s] for record keeping," it is unclear whether you are referring to recordkeeping requirements under the open meetings law or record retention requirements for public records. As to requirements under the open meetings law, you may wish to consult DOJ's Open Meetings Law Compliance Guide, pp. 18–23, available on our website at https://www.doj.state.wi.us/office-open-government/office-open-government. The duty to retain records is governed by the record retention statutes and record retention schedules created pursuant to those statutes. For more information on record retention, you may wish to visit the Wisconsin Public Records Board website at http://publicrecordsboard.wi.gov/.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (https://www.doj.state.wi.us/office-open-government/office-open-government). DOJ provides

the full Wisconsin Open Meetings Law, maintains an Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,

Sarah K. Larson
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Office of Open Government

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cc: Mary Hubacher, Buelow Vetter