



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Sarah K. Larson
Assistant Attorney General
larsonsk@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779

April 24, 2019

Sam Kaufmann
[REDACTED]@gmail.com

Dear Mr. Kaufmann:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 7, 2018, regarding your open meetings law concerns in the Village of Waunakee. Your questions pertain to the notices of the following meetings: 1) the Village of Waunakee Plan Commission meeting on September 10, 2018; and 2) the Waunakee-Westport Join Plan Commission meeting on September 11, 2018.

The Attorney General and DOJ's Office of Open Government (OOG) 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. Other laws outside of the open meetings law may set forth the various types of notices and public hearings required for meetings of a governmental body, but I cannot advise you on those matters, as those matters fall outside the scope of the OOG's authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, I can provide some information that you may 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 publicly 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 law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). In addition to these three requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body, but as already noted, I cannot advise you on other statutes that fall outside of the scope of the OOG's authority and responsibilities. In general, however, when a specific statute prescribes the type of meeting notice a governmental body must

give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a).

The open meetings law provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

Every public notice of a meeting must give the time, date, place and subject matter of the meeting, and the notice must be in such a form so as to reasonably apprise the public of this information. Wis. Stat. § 19.84(2). The notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–78, 494 N.W.2d 408 (1993).

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

The open meetings law 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 Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But 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. *Id.* Thus, 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.* See also Herbst Correspondence (July 16, 2008). For additional information on the notice requirements of the open meetings law, please see pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

I will now address the concerns you have outlined in your correspondence. First, you expressed various concerns about the specificity of the notice for the September 10, 2018 meeting. As noted above, whether a notice is sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. *Buswell*, 2007 WI 71, ¶¶ 27–29. Using the limited information provided in your correspondence, a court might conclude that the notice in question was reasonably likely to apprise the public of the subject matters to be discussed at the meetings, because it listed the zoning projects to be discussed, including locations, basic descriptions of the properties, and some addresses. *Id.* ¶¶ 36–37, 41. Therefore, a court might

conclude that the notice was not misleading or vague under the open meetings law. *Id.* However, a court would also need to analyze all other relevant facts before deciding whether the notice in question was reasonable. *Id.*

Your correspondence suggested that the September 10, 2018 notice might be deficient because it did not specify “what the new zoning would be.” There may be requirements about these zoning matters contained in other laws, but again, I cannot advise you on those matters, as they fall outside the scope of the OOG’s authority and responsibilities. Under the open meetings law, a court might decide that, by reading the notice, the public would still be reasonably apprised that the governmental body would be discussing the zoning of those particular properties, and that the burden of providing more specific or multi-faceted zoning information would be too great. *Buswell*, 2007 WI 71, ¶¶ 42–45. Therefore, depending on the circumstances, a court might decide that providing that level of specificity was not required if it was too burdensome or unreasonable, even though it might have been beneficial or helpful to the public to include that level of detail in the notice. *Id.* However, the limited information provided in your correspondence makes it difficult to properly evaluate because such an inquiry is very fact-intensive. *Id.* ¶¶ 27–29.

Next, with respect to a specific proposed project that was listed on the notice for the September 10, 2018 meeting, you expressed concerns that the “majority of citizens received no notification of the meeting where they could learn about the project.” Similarly, you allege that the “legal notice” and the “newspaper legal notice” for the September 11, 2018 meeting contained no notice of various projects, and made “no mention” of various “meeting agenda items.” You asked, “Is this lack of noticing for items other than the public hearings allowed?” From the limited information you provided, it is unclear to me whether you are asking about the notices to the public, newspaper notices, or both. It is also unclear from your correspondence whether you are alleging that there were no public notices posted, or whether you are saying that citizens did not directly receive notices from the governmental body—for example, in the mail or via email.

Generally, however, it is important to note that notice to the public, notice to news media, and notice to the official newspaper are separate requirements. First, as to the public notice, the chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. *See* 66 Op. Att’y Gen. 93, 95 (1977). As a general rule, the Attorney General has advised that the governmental body post notices at three different locations within the jurisdiction that the governmental body serves. *Id.* Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves. *See* 63 Op. Att’y Gen. 509, 510–11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. Meeting notices may also be posted at a governmental body’s website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice. *See* Peck Correspondence (Apr. 17, 2006).

Second, as to the notice to the news media, the chief presiding officer must give notice of each meeting to members of the news media who have submitted a written request for notice. Wis. Stat. § 19.84(1)(b); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶¶ 3–4, 7, 278 Wis. 2d 388, 692 N.W.2d 304. Although this notice may be given in writing or by telephone, it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. *See* 65 Op. Att’y Gen. Preface, v–vi (1976); 65 Op. Att’y Gen. 250, 251 (1976). Governmental bodies cannot

charge the news media for providing statutorily required notices of public meetings. *See* 77 Op. Att'y Gen. 312, 313 (1988).

Third, as to the notice to the newspaper, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). The governmental body is not required to pay for, and the newspaper is not required to publish, such notice. *See* 66 Op. Att'y Gen. 230, 231 (1977). As noted above, however, the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published. *See* Mallin Correspondence (Mar. 14, 2016).

In short, the open meetings law requires that "notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or designee" to the following: 1) the public, 2) news media who have filed a request for such notice, and 3) the official newspaper. Wis. Stat. § 19.84(1)(b). All three requirements are separate, and all of the notices must be sufficient.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. You did not specifically request the Attorney General to file an enforcement action; nonetheless, we respectfully decline to pursue an enforcement action at this time. However, by way of a copy of this letter, I am making the Village aware of your concerns.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

You may wish to contact a private attorney regarding this matter. 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 the service using the contact information below:

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>

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
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Administrator, Village of Waunakee