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

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Mr. William F. Greenhalgh
Greenhalgh Legal Services
Post Office Box 11
Baraboo, WI 53913-0011

Dear Mr. Greenhalgh:

On April 30, 2009, you submitted a request on behalf of the Town of Delton ("the Town"), which your office represents, for an opinion on whether Wisconsin's Open Meetings Law permits a joint intergovernmental task force that has been established by the Town and the Ho-Chunk Nation ("HCN") to conduct its meetings in closed session based on HCN's desire to protect the confidentiality of its business plans related to the development of gaming and resort operations in the Delton area. HCN Attorney General Sheila Corbine subsequently contacted the Wisconsin Department of Justice ("DOJ") and requested an opportunity to submit a position paper regarding this inquiry. HCN's position paper was received by DOJ on May 27, 2009.

BACKGROUND

The joint task force was established by two resolutions, copies of which were submitted with your letter: (1) a February 2, 2009, resolution by the Delton Town Board ("the Town Board"); and (2) a February 3, 2009, resolution by the HCN Legislature. Each of the two resolutions declared the intent of the respective governments to engage in intergovernmental cooperation and to establish a task force consisting of representatives appointed by each participating government entity.

The Town Board resolution provided for three members of the task force to be appointed by the Town Board. According to the information provided, those three members include one citizen member and two members of the Town Board, which itself has a total of five members.

The HCN resolution appointed HCN's Vice President to the task force and delegated to him the power to appoint two additional HCN representatives. According to the information provided, the Vice President is also a member of the HCN Legislature, which has a total of eleven members. The other two HCN representatives appointed to the task force by the Vice President are government employees of HCN who are not members of the HCN Legislature.

The two resolutions also respectively charged the task force with reporting its activities and findings to the Town Board and to the HCN Legislature. The two resolutions do not give the

task force any governmental decision making authority of its own. Any governmental action proposed by the task force thus would have to be ratified by the Town Board and/or the HCN Legislature. Ratification by the Town Board would require the presence of a quorum of that five-member board (*i.e.*, three members). Ratification by the HCN Legislature would likewise require the presence of a quorum of that eleven-member body.

According to your letter and the HCN position paper, the purpose of the joint task force is to provide a forum for the candid discussion of intergovernmental cooperation issues. You note that HCN owns over 700 acres of land in the middle of the Town. Some of that land is trust land that is exempt from Town and county regulations. Other land is owned in fee by HCN and is subject to Town and county regulations. You also note that HCN operates as a business entity, as well as a governmental entity. HCN's business interests include development of gaming and resort operations in the Town.

Both the Town resolution and the HCN resolution cite growth and land development within their respective jurisdictions as an area with regard to which intergovernmental cooperation is needed, with specific reference to regional sanitary sewer services, zoning impacts, and other jurisdictional and financial matters. Both resolutions also specified that the initial duties of the task force were to include the investigation of regional water and sewer services. Discussion of these growth and development issues by the task force necessarily will include consideration of various aspects of HCN's business operations.

HCN maintains that its plans for future business operations and business development along the Highway 12 corridor constitute confidential and proprietary information that HCN does not wish to discuss in open session meetings, for fear of disclosing its business secrets to potential competitors. HCN has thus asked that all meetings of the task force be held in closed session and that each member of the task force sign a confidential non-disclosure agreement.

QUESTION PRESENTED/BRIEF ANSWER

Based on the above facts, you have asked whether the task force "can meet in closed session for general meetings based on the Ho-Chunk Nation's concerns." For the reasons that follow, Wisconsin's Open Meetings Law does not allow the task force to generally conduct all of its meetings in closed session, based on HCN's desire for confidentiality, but does permit the task force to close those portions of its meetings that involve specific information which, if discussed in open session, would directly and substantially harm the Town's competitive or bargaining interests.

ANALYSIS

The first issue logically raised by your inquiry is whether meetings of the joint task force are subject to Wisconsin's Open Meetings Law at all. The Open Meetings Law generally applies to every "meeting" of a "governmental body" as those terms are defined in Wis. Stat. § 19.82.

A "governmental body" is broadly defined as "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). Under that definition, whether a particular entity is a "governmental body" is determined not by the kind of power it wields, but rather by how the entity was created—*i.e.*, whether it was created by constitution, statute, ordinance, rule, or order.[1] The DOJ has long taken the position that an "order," for purposes of Wis. Stat. § 19.82(1), can include, among other things, any directive by a governmental body that creates another body and assigns it duties. *See* 78 Op. Att'y Gen. 67, 68-69 (1989).

For purposes of Wisconsin's Open Meetings Law, the joint task force at issue here was created by the February 2, 2009, resolution of the Town Board. That resolution clearly is a formal directive by the Town Board establishing the task force and assigning it the duty to investigate, discuss, and report on intergovernmental cooperation issues between the Town and HCN related to growth and land development. The February 2, 2009, resolution of the Town Board thus is an "order" within the meaning of Wis. Stat. § 19.82(1). It follows that the task force, as an entity created by an "order," is a "governmental body" that is subject to the Open Meetings Law.

This conclusion is not affected by the fact that the February 3, 2009, resolution of the HCN Legislature also purports to "create" the task force from HCN's perspective. When the Town Board issued its resolution, it effectively directed the establishment of an advisory body and charged that body with investigating and discussing certain issues and with reporting its findings and recommendations to the Town Board. That is enough to make the resulting advisory body subject to the Open Meetings Law. The HCN resolution was issued by a separate sovereign and thus is not a governmental directive issued by the State of Wisconsin or any political subdivision, agency, or official thereof. That resolution, therefore, does not affect the legal status of the task force under Wisconsin's Open Meetings Law. Any time a Wisconsin governmental body seeks to establish an advisory group that includes citizens, business

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[1]Under Wis. Stat. § 19.82(1), the definition of a "governmental body" also includes a "quasi-governmental corporation." The legal standard for determining whether an entity is a "quasi-governmental corporation" is different than the standard for determining whether an entity is a "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]" *Id. See State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. The "quasi-governmental corporation" standard is not applicable here because the joint task force is not a corporation.

representatives, or other "outside" members, those members will always have to consent to participating in that advisory group. Their act of consent, however, does not change the legal status of the governmental body's directive creating the group and assigning it its advisory function. From the perspective of the Wisconsin Open Meetings Law, the HCN resolution similarly embodies HCN's agreement to participate in the task force established by the Town Board's resolution.

The fact that the task force does not possess any final governmental decision making authority also does not prevent it from being considered a "governmental body." It is well established that the governmental business to which the Open Meetings Law applies is not limited to formal or final decision making, but rather comprises all stages of the governmental decision making process, including preliminary decisions, discussion, or simply information gathering. *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 572, 494 N.W.2d 408 (1993). Accordingly, any entity that is authorized to deliberate and interact with other parties and to make advisory recommendations relative to matters of municipal business may be subject to the Open Meetings Law, even if the entity lacks the authority to bind the municipality to any final decisions. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979). If this were not the case, a governmental body would be able to shield the investigative or deliberative phases of its decision making from public scrutiny by delegating those functions to an advisory body.

Here, the Town Board has expressly delegated to the task force the authority to investigate and deliberate on issues of government business and to provide advisory reports on those issues to the Town Board. Under the legislative policy of the Open Meetings Law, the public is entitled to information about all stages of the Town Board's decision making, including investigations, deliberations, and recommendations. Therefore, the investigative, deliberative, and advisory powers that have been delegated to the task force are sufficient for the task force to be considered a "governmental body" that is subject to the Open Meetings Law.[2]

Because the task force is a governmental body, its meetings must comply with the requirements of the Open Meetings Law. A "meeting" is statutorily defined 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." Wis. Stat. § 19.82(2). Such a meeting occurs whenever members of a governmental body convene for the purpose of conducting governmental business and the number of members present is sufficient to determine the body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). As previously noted, the purpose of conducting governmental business is not limited to

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[2]The conclusion that the task force is itself a "governmental body" may give rise to the question whether officials of the HCN government appointed to membership on the task force would thereby be subject to liability for violations of the open meetings law under Wis. Stat. §§ 19.96-19.97. Whether the HCN appointees might be protected from such liability by HCN's sovereign immunity is not a question about the interpretation of the open meetings law and the Department of Justice cannot offer an opinion on such matters.

formal or final decision making, but also includes investigating, deliberating, and making recommendations. *Badke*, 173 Wis. 2d at 572. It follows that a "meeting" subject to the Open Meetings Law takes place whenever members of the task force gather for the purpose of investigating, discussing, or preparing recommendations regarding any matter of government business and the number of task force members present is sufficient to determine an action (including an advisory action) by that body.[3]

According to HCN's position paper, meetings of the task force should not be considered "meetings" within the meaning of the Open Meetings Law because they do not involve a sufficient number of members to control any action by either the Town Board or the HCN Legislature. I respectfully disagree with that position. For the reasons already discussed, the task force is itself a governmental body that is subject, on its own account, to the Open Meetings Law. Therefore, any gathering of a sufficient number of task force members is a meeting of the task force that must comply with the requirements of the Open Meetings Law, without regard to whether that gathering also constitutes a meeting of any other entity.

Under Wis. Stat. § 19.83(1), every meeting of a governmental body—including a meeting of the task force—must be preceded by public notice and all discussion or action of any kind, formal or informal, must be conducted in open session except where closed proceedings are specifically authorized by Wis. Stat. § 19.85. Such an open session meeting must be "held in a place reasonably accessible to members of the public and open to all citizens at all times." Wis. Stat. § 19.82(3). A meeting may be closed to such public access only for one or more of the specific purposes enumerated in subparagraphs (a) through (j) of Wis. Stat. § 19.85(1). The remaining issue logically raised by your inquiry, then, is whether meetings of the task force fall within any of those specific closed-session exemptions.

The only closed session exemption in Wis. Stat. § 19.85(1) that has been suggested as justifying closed meetings of the task force is subparagraph (e), which allows a governmental body to convene in closed session for the purpose of "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." HCN contends, in its position paper, that this provision authorizes closure of meetings of the task force because "the type of business being discussed by the taskforce likely requires negotiation and could lead to future collaboration on joint projects which may involve the investing of public funds and are also likely to involve bargaining as to the expenditure of funds by each government."

While it is true that some of the government business to be discussed at meetings of the task force may fall within the scope of Wis. Stat. § 19.85(1)(e), it does not follow that all

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[3]The information that has been submitted to DOJ does not indicate how many members of the task force must be present to determine an advisory action by that body.

meetings of the task force may be closed under that provision. The closed session exemptions enumerated in Wis. Stat. § 19.85(1) are restrictive rather than expansive and must be narrowly interpreted to advance the general legislative policy of open government. *State ex rel. Citizens for Resp. Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640. The use of the word "require" in Wis. Stat. § 19.85(1)(e) has thus been construed as authorizing closure of a meeting only to the extent that definite competitive or bargaining interests leave the governmental body with no option other than closing the meeting. *Citizens for Resp. Dev.*, 300 Wis. 2d 649, ¶ 14. The fact that the governmental body may have a valid reason for *desiring* to close a meeting does not suffice to justify closure under Wis. Stat. § 19.85(1)(e). To satisfy that statutory exemption, closure must be *required*, not merely desired. *Citizens for Resp. Dev.*, 300 Wis. 2d 649, ¶¶ 13-14.

Consistent with the above emphasis on the word "require," one of my predecessors has advised that speculation as to the possibility that an open meeting could harm the government's competitive or bargaining interests is an insufficient basis to close a meeting under Wis. Stat. § 19.85(1)(e). *See* Gempeler Correspondence, February 12, 1979 (enclosed). Accordingly, meetings of the task force may not be closed in a blanket manner under Wis. Stat. § 19.85(1)(e) just because such disclosure may appear desirable or because those meetings may at times be likely to involve discussions of the investing of public funds or of bargaining as to the expenditure of public funds. Rather, a meeting of the task force may be closed only on those occasions when the particular meeting in question is going to involve specific information which, if discussed in open session, would directly and substantially harm the competitive or bargaining interests at issue. *See also* Wisconsin Department of Justice, *Wisconsin Open Meetings Law: A Compliance Guide* (2009), at 21.

Moreover, a request for confidentiality from a business entity with which a municipal government may be negotiating does not, in itself, suffice to justify closure under Wis. Stat. § 19.85(1)(e). *Citizens for Resp. Dev.*, 300 Wis. 2d 649, ¶¶ 13-16. In such situations, the need for closure must arise not from the interests of the business entity, but from the state or municipal governmental interests in question. *Id.*; *c.f. State ex rel. Herro v. Village of McFarland*, 2007 WI App 172, ¶¶ 16-17, 303 Wis. 2d 749, 737 N.W.2d 55 (where two Wisconsin governmental entities were represented on an intergovernmental body, bargaining interest justifying closure under Wis. Stat. § 19.85(1)(e) did not have to be shared by all members of the body).

Here, based on the limited available information, it appears that, with regard to the business interests in question, HCN is acting as a private business entity, legally comparable to the business entity in *Citizens for Resp. Dev.* Moreover, even considered as a governmental entity, HCN is not a Wisconsin governmental entity, as was the town whose interests were involved in *Herro*. It follows that HCN's interest in protecting the confidentiality of its proprietary business information, standing alone, cannot justify closure of task force meetings under Wis. Stat. § 19.85(1)(e). Rather, a task

force meeting can be closed under that exemption only when an open session would harm the Town's competitive or bargaining interests.

Finally, where only a portion of a meeting requires closure to protect the competitive or bargaining interests of a Wisconsin governmental entity, Wis. Stat. § 19.85(1)(e) authorizes closure only of that portion of the meeting. Other portions of the same meeting must be held in open session. *Citizens for Resp. Dev.*, 300 Wis. 2d 649, ¶ 19. Accordingly, Wis. Stat. § 19.85(1)(e) allows the task force to close only those portions of its meetings that involve information which, if discussed in open session, would directly and substantially harm the Town's competitive or bargaining interests.

I hope that this information is helpful to you and thank you for your interest in compliance with the Open Meetings Law.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:TCB:rk

Enclosure

c: Sheila D. Corbine
Attorney General
Ho-Chunk Nation