

State of Wisconsin\Government Accountability Board

Post Office Box 7984
212 East Washington Avenue, Third Floor
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



JUDGE TIMOTHY VOCKE
Chair

KEVIN J. KENNEDY
Director and General Counsel

May 28, 2013

The Honorable J.B. Van Hollen, Attorney General
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, Wisconsin 53702

Receipt of copy of the within acknowledged
this 31st day of May
20 13 Time 4:05
Attorney General of Wisconsin
By C.ushman

Opinion Request: Application of Open Meeting Requirements to Post-Election Activities

Dear Attorney General Van Hollen:

I write on behalf of the Government Accountability Board (hereinafter G.A.B.) to ask your opinion on the application of the Open Meeting Requirements of Wis. Stats. Subchapter V, Chapter 19, to post-election activities of municipal, county and state officials. Our agency provides information and training to local election officials on elections administration. One question that occurs with regularity is the application of open meeting requirements to elections administration activity. I understand your office has received similar public inquiries.

Wisconsin law requires certain Election Day responsibilities and post-election canvassing of election results to be conducted publicly. Many post-election duties are carried out by election inspectors (poll workers) and local government employees. There are several steps in the post-election process for which the G.A.B. is seeking guidance. Our questions, along with explanatory information, are set out below.

1A. Do the activities of election inspectors following the close of voting on Election Day as described in Wis. Stat. §7.51 constitute a “meeting” of a “governmental body” as those terms are defined in Wis. Stat. §19.82 (1) and (2)?

A “meeting” is 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.” Under the *Showers* test, there are two requirements for a meeting: (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.

The term “Local Board of Canvassers” is set out in the title of Wis. Stat. §7.51. The term is not defined in the Elections Code (Wis. Stats. Chapters 5-10, 12). There is no other statutory reference to “Local Board of Canvassers,” and the Government Accountability Board (G.A.B.) does not use this term in its informational and training materials.

The activities described in Wis. Stat. §7.51 are conducted by election inspectors (poll workers) after the close of voting. Election inspectors are appointed by the municipal governing body pursuant to Wis. Stat. §7.30. Election Inspectors are appointed for a two-year term beginning in January of an even-numbered year and ending on December 31 of an odd-numbered year. The general duties of election inspectors are described in Wis. Stat. §7.37.

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There are six (6) regularly scheduled elections during the two-year period. In many municipalities not all election inspectors serve at every election. In many cases an election inspector may only serve at one or two elections. The municipality may also choose to add election inspectors in anticipation of high turnout elections.

Pursuant to Wis. Stat. §7.51, election inspectors have clearly-delineated duties to conduct following the close of the polls on Election Day. Those duties are focused on reconciling voter lists, counting votes, recording polling place activity, preparing election returns, securing election materials, certifying reporting unit level election results and delivering election materials to the municipal clerk.

These duties would seem to meet the first *Showers* test of being for the purpose of engaging in governmental business, as the purpose is to complete tasks related to conducting a public election. The tasks of the election inspectors are principally administrative in nature, although some amount of discretion may be involved in counting votes.

It is not clear that election inspectors assigned to work the polls on Election Day constitute a “governmental body” as defined in Wis. Stat. §19.82(1) “Governmental body” includes a “state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order.” This provision focuses on the manner in which a body was created rather than on the type of authority the body possesses.

Election inspectors are appointed pursuant to statute by the local governing body. Election inspectors are a collection of public officials with specified duties under the Elections Code. It is not clear whether, when completing post-election tasks, the election inspectors are acting as a governmental body. If they are not a “governmental body,” their work at the polling place does not appear to meet the definition of a “meeting” pursuant to Wis. Stat. §19.82(2).

One factor to weigh in determining if election inspectors are acting as a governmental body is that each municipality has a differing amount of election inspectors serving a widely disparate number of polling places. For example, most municipalities have one set of election inspectors serving a single polling place. However larger municipalities have anywhere from 2 to 200-plus polling places, some of which are staffed by more than one set of election inspectors assigned to handle different wards located at a single polling place.

- 1B. If the activities of election inspectors under Wis. Stat. §7.51 are a “meeting” of a “governmental body,” does such a meeting constitute an “open session,” as defined in Wis. Stat. §19.82(3), and is it ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. §19.85?**
- 1C. If the activities of election inspectors under Wis. Stat. §7.51 are a “meeting” of a “governmental body,” is such a meeting subject to the public notice requirements of Wis. Stat. §19.84 and, if so, what public official is responsible for ensuring compliance with those notice requirements?**

The G.A.B. does not believe the actions of election inspectors described in Wis. Stat. §7.51 are covered by the open meeting requirements and does not advise municipal clerks to publish a notice of the activities of election inspectors conducted after the close of the polls as an open meeting. The duties of election inspectors are required to be conducted publicly. Wis. Stat. §7.51 (1). There is no provision for the duties of election inspectors to be conducted in private. The G.A.B. proactively works to ensure that these duties are carried out in a transparent and accessible manner. We have directed law enforcement to intervene at polling locations that were locked by election inspectors after the close of voting.

There already exist statutory requirements for the actions of election inspectors to be conducted publicly following notice. The canvassing of votes by election inspectors is required to be done publicly after the close of voting. Wis. Stat. §7.51 (1). The hours of voting and polling place locations are noticed pursuant to Wis. Stat. §10.01 (2)(d). The notice does not include a description of the activities conducted at the polling place. In addition there is no notice of how long, after the polls close, that election inspectors may be publicly conducting their post-election tasks specified in Wis. Stats §7.51. These public activities and notice requirements are independent of the Open Meetings Law provisions.

- 2A. Does the canvassing of the vote by the Municipal Board of Canvassers as described in Wis. Stat. §7.53 constitute a “meeting” of a “governmental body” as those terms are defined in Wis. Stat. §19.82(1) and (2)?**
- 2B. If the activities of the Municipal Board of Canvassers under Wis. Stat. §7.53 are a “meeting” of a “governmental body,” does such a meeting constitute an “open session,” as defined in Wis. Stat. §19.82(3), and is it ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. §19.85?**
- 2C. If the activities of the Municipal Board of Canvassers under Wis. Stat. §7.53 are a “meeting” of a “governmental body,” is such a meeting subject to the public notice requirements of Wis. Stat. §19.84 and, if so, what public official is responsible for ensuring compliance with those notice requirements?**

The G.A.B. believes meetings of the Municipal Board of Canvassers are subject to open meeting requirements. The Municipal Board of Canvassers is a defined entity pursuant to Wis. Stat. §7.53. In municipalities with more than one reporting unit for municipal offices, the Municipal Board of Canvassers is a formally constituted governmental subunit of specific individuals serving a fixed term with provisions for filling temporary or permanent vacancies. Wis. Stat. §7.53 (2).

In the case of a municipality with one polling place and one reporting unit for municipal offices, the election inspectors perform the duties of the Municipal Board of Canvassers on Election Day after the polls close. Wis. Stat. §7.53(1). In these jurisdictions, the election inspectors have two separate sets of duties under Wis. Stat. §7.51 and Wis. Stat. §7.53.

The duties of the Municipal Board of Canvassers are: to publicly declare the election results for municipal offices; prepare a statement showing the results of each election for a municipal office and any municipal referendum question; following a primary, prepare a statement certifying each candidate nominated to municipal office; and prepare a determination showing

each candidate elected to municipal office and the results of each municipal referendum. Wis. Stat. §7.53 (2)(d).

When the election inspectors perform the duties of the Municipal Board of Canvassers on Election Day after the polls close, it is not clear that they are a governmental body subject to the open meeting requirements. Their duties are required to be conducted publicly. Wis. Stat. §7.53 (2)(d). The G.A.B. believes the Department of Justice needs to provide direction on whether the role of the election inspectors performing the duties of the Municipal Board of Canvassers on Election Day is subject to the open meetings notice requirements pursuant to Wis. Stats. §§19.81 et. seq.

The actions of the Municipal Board of Canvassers are required to be conducted publicly. Wis. Stat. §7.53 (2)(d). The G.A.B. advises municipal clerks to notice the activities of the Municipal Board of Canvassers as an open meeting. Election Administration Manual, pg. 161. <http://gab.wi.gov/clerk/education-training/election-administration-manual>

There is no provision for the duties of the Municipal Board of Canvassers to be conducted in private. However, because the decisions of the Municipal Board of Canvassers may be reviewed in circuit court following an election recount conducted by the Municipal Board of Canvassers, there may be occasions where the Board may need to confer with legal counsel concerning litigation in which the Board is likely to become involved. This is a permissible reason for convening in closed session, provided it is properly noticed. Wis. Stat. §19.85 (1)(g). The G.A.B. believes this exception would also apply when the election inspectors serve as the Municipal Board of Canvassers pursuant to Wis. Stat. §7.53 (1).

The Municipal Board of Canvassers in municipalities with more than one reporting unit for municipal offices is a formally constituted governmental subunit. The G.A.B. believes the municipality is required to abide by the notice requirement of Wis. Stat. §19.84.

- 3A. Does the county-level canvassing of votes by the County Board of Canvassers under Wis. Stat. §7.60 constitute a “meeting” of a “governmental body” as those terms are defined in Wis. Stat. §19.82 (1) and (2)?**
- 3B. If the activities of the County Board of Canvassers under Wis. Stat. §7.60 are a “meeting” of a “governmental body,” does such a meeting constitute an “open session,” as defined in Wis. Stat. §19.82 (3), and is it ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. § 19.85?**
- 3C. If the activities of the County Board of Canvassers under Wis. Stat. §7.60 are a “meeting” of a “governmental body,” is such a meeting subject to the public notice requirements of Wis. Stat. §19.84 and, if so, what public official is responsible for ensuring compliance with those notice requirements?**

The G.A.B. believes meetings of the County Board of Canvassers are subject to open meeting requirements. The County Board of Canvassers is a formally constituted governmental subunit of specific individuals serving a fixed term with provisions for filling temporary or permanent vacancies. Wis. Stat. §7.60 (2). The canvass board meetings are subject to the provisions of Wis. Stats. §§19.81 et. seq. The G.A.B. advises county clerks to notice the activities of the County Board of Canvassers as an open meeting. *Procedures for County Boards of*

Canvassers, pg. 1 <http://gab.wi.gov/node/2719>; Election Recount Procedures, pg. 3
<http://gab.wi.gov/manuals/recount>.

- 4A. **Does the state-level canvassing of votes under Wis. Stat. §7.70 constitute a “meeting” of a “governmental body” as those terms are defined in Wis. Stat. §19.82 (1) and (2)?**
- 4B. **If the state-level canvassing of votes under Wis. Stat. §7.70 is a “meeting” of a “governmental body,” does such a meeting constitute an “open session,” as defined in Wis. Stat. §19.82 (3), and is it ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. §19.85?**
- 4C. **If the state-level canvassing of votes under Wis. Stat. §7.70 is a “meeting” of a “governmental body,” is such a meeting subject to the public notice requirements of Wis. Stat. §19.84 and, if so, what public official is responsible for ensuring compliance with those notice requirements?**

The chairperson of the Government Accountability Board, or a designee of the chairperson appointed by the chairperson to canvass a specific election, is required to publicly canvass the returns and make the required certifications and determinations for elections for state and federal office and state referenda. Wis. Stat. §7.70 (3)(a). By agency practice this activity is noticed pursuant to Wis. Stat. §19.84. The G.A.B. believes the work of its staff collecting county canvass statements and certifications along with preparing the documents for the state and federal certifications and determinations is not subject to the provisions of Wis. Stats. §§19.81 et. seq.

- 5A. **Does the canvassing of the vote by the School District Board of Canvassers as described in Wis. Stat. §7.53 (3) constitute a “meeting” of a “governmental body” as those terms are defined in Wis. Stat. §19.82 (1) and (2)?**
- 5B. **If the activities of the School District Board of Canvassers under Wis. Stat. §7.53 (3) are a “meeting” of a governmental body,” does such a meeting constitute an “open session,” as defined in Wis. Stat. §19.82 (3), and is it ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. §19.85?**
- 5C. **If the activities of the School District Board of Canvassers under Wis. Stat. §7.53 (3) are a “meeting” of a “governmental body,” is such a meeting subject to the public notice requirements of Wis. Stat. §19.84 and, if so, what public official is responsible for ensuring compliance with those notice requirements?**

The G.A.B. believes meetings of the School District Board of Canvassers are subject to open meeting requirements. The School District of Canvassers is a defined entity pursuant to Wis. Stat. §7.53 (3)(a). The School District Board of Canvassers is a formally constituted governmental subunit of specific individuals appointed by the school district clerk for each school district election with provisions for filling temporary vacancies. Wis. Stat. §7.53 (3)(a).

The duties of the School District Board of Canvassers are: to prepare a statement showing the number of votes cast of each election for a school district office and any school district referendum question; following a primary, prepare a statement certifying each candidate

nominated to school district office; and prepare a determination showing each candidate elected to school district office and the results of each school district referendum. The School District Board of Canvassers is required to file its statements and determinations in the school district office. Wis. Stat. §7.53 (3)(a).

6. In larger municipalities, permanent and temporary municipal employees conduct post-election activities preparing for the meetings of the municipal, school district and county boards of canvassers. Are these activities subject to the open meeting requirements of Wis. Stats. §§19.81 et. seq.?

The permanent and temporary municipal employees are organizing the election materials and returns delivered to the municipal clerk or Milwaukee City Election Commission by election inspectors following the close of the polls pursuant to Wis. Stat. §7.51 (5)(a). The election inspectors have already completed their duties pursuant to Wis. Stat. §7.51. The employees are organizing materials for the municipal canvass and preparing for the delivery of election materials and returns to the County Clerk or Milwaukee County Board of Election Commissioners pursuant to Wis. Stat. §7.51 (5)(b).

The G.A.B. does not believe these actions of permanent and temporary municipal employees are covered by the open meeting requirements. This activity is not being done by a governmental body, but by employees.

7. During the post-election activities of election inspectors or canvassing boards, to what extent do the openness requirements found in the open meetings law and in the state election code require that members of the public be allowed to inspect election documents or the materials relied on by election officials in preparing those documents?

The G.A.B. advises local election officials that members of the public may observe the post-election activities of election inspectors described in Wis. Stat. §7.51. This is based on the provisions of Wis. Stat. §7.51(1) which requires these activities to be done publicly and the provisions of Wis. Stat. §7.41 (1) which authorize any member of the public to be present at a polling place to observe the election. However, the G.A.B. advises local election officials that members of the public may not touch or inspect the materials and equipment used by election officials in post-election activities to prepare the required documents certifying reporting unit level election results.

The G.A.B. advises local election officials that members of the public should be permitted to readily observe post-election activities performed by election inspectors, but may not be positioned in such a way as to interfere with the work of the election inspectors. Similarly, the G.A.B. advises that members of the public may record the post-election proceedings, but may not interfere with the work of the election inspectors. G.A.B. staff advises that members of the public are not entitled to photograph the documents and materials used by election officials in post-election activities to prepare the required documents certifying reporting unit level election results. This would unduly interfere with the activities of election inspectors because of the proximity of observers to the election inspectors.

The G.A.B. provides the same direction with respect to public access to the meetings of Boards of Canvassers. The open meetings law requires governmental bodies to make a reasonable

effort to accommodate individuals who wish to record, film or photograph the meeting as long as it does not interfere with the conduct of the meeting. Wis. Stat. §19.90

The G.A.B. does not believe members of the public have a right to be present and observe the work of municipal, county or state employees organizing the election materials and returns or preparing the required documents to certify election results. These documents and materials would be subject to inspection and copying under the public records law once the government employees or governmental bodies are no longer creating and working with them.

8. Where the post-election activities of election inspectors or canvassing boards are subject to the requirements of both the open meetings law and the election code, what are the permissible and appropriate enforcement procedures for a violation of one or more of those requirements?

State law provides penalties and enforcement mechanisms to ensure compliance with the requirements of the open meetings law. Wis. Stats. §§19.96, 19.97. Election officials are prohibited from willfully neglecting or refusing to perform any of the duties prescribed under the separate election laws of chs. 5-12, or intentionally violating any provision of chs. 5-12. Wis. Stats. §§ 12.13 (2)(a), (b)7. Violations are enforced by the District Attorney. Wis. Stats. §§12.60 (4), 11.61 (2).

In addition, the Government Accountability Board has compliance review authority over the actions of local election officials. Wis. Stat. §5.06. The G.A.B. may order any election official to conform his or her conduct to law. Any elector may file a sworn complaint with the G.A.B. alleging that a local election official has acted contrary to law or abused the discretion vested in him or her by law. Wis. Stat. §5.06 (1). The Board may also act on its own. Wis. Stat. §5.06 (4).

Conclusion

The issues presented above continue to be a focus of inquiries despite the guidance and training provided by the G.A.B. to local election officials. The Board believes that a formal opinion from your office will assist in clarifying the application of the open meetings requirements and supporting the advice issued by the agency as part of its required training of local election officials and public outreach.

Thank you for your consideration of our request.

Government Accountability Board



Kevin J. Kennedy
Director and General Counsel