



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

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

Thomas C. Bellavia
Assistant Attorney General
608/266-8690
bellaviatc@doj.state.wi.us
FAX 608/267-2223

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Ms. Cynthia Georgeson
Johnson Outdoors, Inc.
555 Main Street
Racine, WI 53403

Dear Ms. Georgeson:

I have been asked to respond to your July 21, 2005, email to Deputy Attorney General Daniel Bach inquiring about the applicability of Wisconsin's open meetings law to the Racine Independent Education Commission ("the Commission")—an independent body that has been established to study operations and finances in the Racine Unified School District ("the District").

As you may be aware, I previously discussed this question by telephone with a reporter from the Racine Journal Times. In that conversation, the reporter indicated to me that the Commission, although made up of volunteers from the community who are not government officials, was created by a directive of the Superintendent of the District. Based on that limited information, I told the reporter that, in my opinion, the Commission probably would be considered to have been created by an order of a government official and hence would be subject to the open meetings law.

With your email, you provided further information about the Commission for this office to consider, in the form of a newspaper Op-Ed column signed by the members of the Commission and a detailed analysis of the Commission's status by Attorney Jeffrey Leavell. In addition, the Journal Times sent this office a copy of a June 21, 2005, memorandum from the Superintendent to the Racine Board of Education ("the Board") in which the Superintendent describes the creation and purpose of the Commission in greater detail. In response to that memorandum, on August 10, 2005, you sent this office additional documentation of the process by which the Commission was formed, including emails dated May 12 and 25, 2005, a one-page "Concept Overview" of the Commission, and a chart containing a time-line of the Commission's proposed activities. According to the May 25, 2005, email, the latter two documents were to be discussed at a meeting on May 26, 2005. In addition, on August 11, 2005, I received an unsolicited letter from the Superintendent that attempts to further clarify his role in the Commission's formation.

According to the above sources of information, the Commission is an independent entity that is not an agent of any other person or group, public or private. Its membership is made up of volunteers from the community, not government officials or employees. The Commission's activities are advisory in nature and it has no power to make governmental decisions on behalf of the Superintendent, the Board, or the District. In addition, any expenses associated with the Commission and its work are being paid from private sources, at no cost to taxpayers.

There appears to be some disagreement, however, regarding the facts concerning the process by which the Commission was formed. The sources agree that volunteers from the community initially asked the Superintendent if he would like their assistance and expertise in examining issues related to the District's operations and finances. According to the Superintendent's memorandum of June 21, 2005, however, the Superintendent then asked two of those individuals—Robert Ryan ("Ryan") and Greg Campbell ("Campbell")—to form and co-chair an independent commission, made up of interested volunteers to be selected by the co-chairs, for the purpose of studying and discussing critical areas of the District's operations and finances and providing recommendations and options for the consideration of the Superintendent and the Board. The letter from Attorney Leavell, likewise, indicates that the Superintendent asked Ryan and Campbell to serve as chairpersons and to organize individuals of their choosing to participate on the Commission.

In contrast, in his letter of August 11, 2005, the Superintendent asserts that he did not appoint either the co-chairs of the commission or its members, was not asked to give input on its membership, and did not help to define its work. His role, according to that letter, was limited to being informed by the co-chairs about the proposed make-up and activities of the Commission and to agreeing that the Commission could have access to District records and staff. The letter also states that the Superintendent's only personal meeting with any members of the Commission was a meeting with Ryan and Campbell on June, 13, 2005, but it does not indicate whether there may have been other communications outside of any personal meetings. The Concept Overview and timeline chart indicate that a framework for the Commission's activities was in place as early as May 25, 2005. The email of the same date also indicates that Campbell had already agreed to be a co-chair at that time and that efforts were under way to find a second co-chair. The documents do not say, however, when or how Ryan became a co-chair, and provide no details on how the other commission members were selected.

In analyzing whether the Commission is a "governmental body" within the meaning of the open meetings law, one must bear in mind that the law must be liberally construed to achieve the legislative policy of providing the public with the fullest and most complete information regarding the affairs of government compatible with the conduct of governmental business. *See* sec. 19.81(1) and (4), Wis. Stats. To answer the question, two determinations must be made.

First, one must determine whether the group at issue constitutes a collective body, rather than a mere assemblage of individuals. 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.” Sec. 19.82(1), Wis. Stats. The use of the terms “board,” “commission,” “committee,” “council,” “department,” and “body corporate and politic” all suggest multi-member groups that act together as a unit to perform some common purpose. Sec. 19.82(1), Wis. Stats. In addition, a “meeting” is statutorily defined as a convening of the members of a body for the purpose of exercising certain responsibilities, authority, power or duties. *See* sec. 19.82(2), Wis. Stats. Likewise, the Wisconsin Supreme Court has held that a meeting subject to the open meetings law takes place only if there are a sufficient number of members present to determine the governmental body’s course of action. *See State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). It follows that a meeting subject to the open meetings law must involve a group of persons that has a numerically definable membership and that acts as a body through some mechanism of collective decision-making.

In my opinion, the Commission is a collective body, in this sense, rather than a mere assemblage of individuals. Its purpose is to study critical areas of the District’s operations and finances and provide recommendations and options for the consideration of the Superintendent and the Board. The function of providing such advice to government officials may bring a group within the coverage of the open meetings law, even if the group does not possess final decision-making authority over the subjects on which it makes recommendations. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979); Wisconsin Department of Justice, “*Wisconsin Open Meetings Law: A Compliance Guide*” (2003) at 1-2. The fact that the Commission lacks final decision-making power over government action regarding those subjects also does not mean that the Commission does not engage in collective decision-making with regard to its own recommendations about those subjects. The Commission obviously will have to follow some decision-making procedures in order to produce a set of collectively formulated recommendations and options. Nor is it an “*ad hoc*” body, in the sense of having a membership that is not fixed, but rather varies on an as-needed basis depending on the special purpose of each individual group meeting. *See* Correspondence to James G. Godlewski, September 24, 1998; Correspondence to Jayne Mullins, October 23, 2002. A court, therefore, would probably find that the Commission is not a mere assemblage of individuals with a shared interest in certain issues, but rather constitutes the kind of collective body to which the open meetings law may apply.

The second requirement is that there must be a directive creating the group in question. The statutory definition of a “governmental body” applies only to entities that are “created by constitution, statute, ordinance, rule or order.” Sec. 19.82(1), Wis. Stats. This phrase plainly includes not only state or local bodies created by the constitution or statutes of the State of Wisconsin, but also bodies created by “rule or order.” *Id.* The term “rule or order” has been

broadly construed by this office to include any directive, formal or informal, that creates a body and assigns it duties. *See* 78 Op. Att’y Gen. 67, 68-69 (1989). This includes directives issued by governmental bodies, presiding officers of such bodies, or certain government officials such as a county executive, a mayor, or a head of a state or local agency, department or division. *See id.* at 69-70. Even a directive characterized as “informal” may suffice. Otherwise, government officials could evade the requirements of the open meetings law by the simple expedient of creating committees without taking formal action. *See* 78 Op. Att’y Gen. at 69.

Based on all of the factual materials that have been provided to this office, it appears that the original initiative behind the formation of the Commission emerged from discussions among interested members of the community, rather than from any government official or entity. In addition, it appears that the intent of those individuals was to form an autonomous, private advisory body that would provide information and advice to government officials but that would not be formed or directed by such officials and would not itself be a governmental body. Such an entity, if established without any governmental involvement, would not be created by a governmental directive within the meaning of the open meetings law.

It is also clear, however, that, in the course of forming the Commission, at least some of these community volunteers communicated with the Superintendent about the proposed composition and activities of the body. Such communication necessarily gives rise to questions about the extent of governmental involvement in the formation of the Commission. The mere fact that the original impetus for the Commission may have arisen from the community, rather than from the government, is not in itself decisive. The relevant issue is whether the body in question was established by a governmental directive, not whether such a directive itself may have arisen out of prior discussions in the community. Under the facts presented here, then, the key question is whether any involvement of the Superintendent in the Commission’s formation was sufficient to constitute an informal directive within the meaning of the open meetings law, even if such an outcome was not intended by the community members who originally proposed the Commission and who communicated with the Superintendent.

Unfortunately, the facts regarding the nature and extent of the communications involving the Superintendent appear to be in dispute. I appreciate that the community volunteers did not intend to create a governmental body and that, in accord with that intent, this office has been supplied with a number of documents that seek to minimize the Superintendent’s involvement in the Commission’s formation. If a court, after developing a complete record, were to find, as a factual matter, that the Superintendent really did play only a passive role in that process and did not have any affirmative input into the composition or organization of the Commission or into its proposed mission and planned activities, then I think the court could conclude that there was no governmental directive and that the Commission would not be considered a governmental body subject to the open meetings law.

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Conversely, however, if a court were to find that the Superintendent asked Ryan and Campbell to organize and co-chair the Commission and select its other members, or that the Superintendent had affirmative input into the scope or direction of the Commission's purposes or proposed actions, then I think the court could conclude that such governmental involvement would constitute an informal governmental directive that established the Commission as a body and/or assigned it some or all of its advisory duties. This office has frequently found that advisory bodies established by such formal or informal directives issued by individual government officials are created by rule or order within the meaning of the open meetings law. See Wisconsin Department of Justice, *"Wisconsin Open Meetings Law: A Compliance Guide"* (2003) at 2. Depending on the resolution of disputed factual questions, therefore, it is possible that a court would hold that the Commission is subject to the statutory open meetings requirements.

This office cannot resolve factual disputes when answering citizens' questions about the applicability of the open meetings law. It is thus impossible for me to give a more definitive opinion as to whether a court would be likely to conclude that the open meetings law applies to the Commission. However, given the inherent flexibility of the concept of an "informal" governmental directive and the strong legislative policy in favor of liberally construing the open meetings law in a way that will provide the public with the fullest and most complete possible information regarding governmental affairs, I would recommend that any citizen group that wants to provide formal, collective advice to government officials without being considered a "governmental body" subject to the open meetings law should minimize, or entirely avoid, any involvement in the group's formation by any of the government officials to whom it plans to provide that advice, and should thoroughly document all aspects of the group's composition, organization, purposes, and planned activities before engaging in any discussion of such matters with government officials. Unless the members of such a group can prove that government officials were not involved in the group's formation, they would probably be well advised to conduct their activities in accordance with the open meetings law.

Sincerely,


Thomas C. Bellavia
Assistant Attorney General

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