



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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VIA EMAIL (MDefour@madison.com) and U.S. MAIL

Mr. Matthew DeFour
Wisconsin State Journal
1901 Fish Hatchery Road
Madison, WI 53713

Dear Mr. DeFour:

You have asked whether an advisory committee created with respect to an audit of the Dane County public safety communications system performed by a consulting firm pursuant to a contract with Dane County is subject to the open meetings law. You have provided me with some information about the audit and the committee. Section 19.98 of the Wisconsin Statutes authorizes the Attorney General to provide advice to any person regarding the applicability of the open meetings law to particular factual situations.

The analysis and conclusions contained in this response are based solely on the information you have provided or that I have been able to locate on Dane County's website. I have not conducted any investigation to determine the factual accuracy of any of that information. Although there may be disputes of fact regarding the operation of the advisory committee which prevent me from offering a definitive answer to your question, it is my opinion, based solely on the information I have considered and in the absence of any contravening information, that a court could conclude that the advisory committee is a governmental body subject to the notice and openness requirements of the open meetings law, and that the advisory committee violated the open meetings law by failing to give advance public notice of its meetings and by not permitting members of the public to attend any portions of its meetings. If an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record related to the issue you raise. A more complete factual record may or may not support the conclusion expressed in this letter.

Section 7.11(9)(b) of the Dane County Ordinances ("Ordinances") creates the Executive Committee of the Dane County Board of Supervisors ("Executive Committee").¹ The Executive

¹The internet, <http://www.co.dane.wi.us/unified/information/ordinances.aspx> (last visited January 23, 2009), contains the Code of Dane County Ordinances.

Committee's duties include the duty to "oversee program reviews and audits conducted by county board staff or contractors, and review the results thereof." Ordinances, § 7.13(7). The Ordinances also provide that "[w]hen an ordinance requires an act to be done by a person which may be legally performed by an authorized agent of that principal person, the requirements shall be construed to include all acts performed by such agent." *Id.*, § 3.03(7). "Person" as used in the Ordinances, includes "bodies politic, [and] any other entity of any kind which is capable of being sued." *Id.*, § 3.03(4). The Ordinances further provide that words which purport to give joint authority to three or more persons shall be construed to give that authority to a majority of those persons. *Id.*, § 3.03(12).

It appears from the minutes of the June 4, 2008, meeting of the Executive Committee that it considered a draft scope statement for an audit of the 9-1-1 system. The Executive Committee directed staff to make changes to the draft and to share the revised draft with the committee. Although the minutes of subsequent meetings do not reflect the Executive Committee's approval of a final scope statement, it appears that a scope statement was finalized at some point before requests for proposals were solicited. The minutes of the August 6, 2008, meeting of the Subcommittee on Purchase of Program Evaluation/Management Audit Services ("Subcommittee") reflect that the Subcommittee heard presentations from several consulting firms in closed session, and adopted a motion in open session to recommend that the Executive Committee award the audit contract to Matrix Consulting Group, to be completed in two phases. The minutes of the August 7, 2008, meeting of the Executive Committee reflect that the Executive Committee considered the Subcommittee's recommendation in closed session, returned to open session, and adopted a motion awarding the audit contract to Matrix Consulting Group, contingent on successful contract negotiations.

You have provided me with what I understand to be a copy of the final scope statement for the audit, presumably created before the audit proposals were submitted. That scope statement describes the primary objective of the audit to review the status of the implementation of strategic plan recommendations provided by another consulting firm in 2004; specifically to include a review of operations, staffing, performance, technology, and physical work space. The scope statement included a list of "deliverables" to be produced as a result of the audit. The list included the following items:

- A report on the system-wide assessment which will include an executive summary of the findings and recommendations, as well as a plan for implementation, in both hard and electronic copy.
- Regular contact with an advisory committee to evaluate progress on the assessment and identify any areas of concern. The advisory group shall include, but not be limited to, County Board members, key Public Safety

Communications staff, community and agency partners, and advocacy groups.

- Formal presentations of the final report to the County Board or County Board committees.

Your inquiry pertains to the activities of the advisory committee. You state that the advisory committee consists of a fixed number of members, including the chairperson of the Dane County Board of Supervisors, the Fitchburg fire chief, and a number of other public officials. You state that the advisory committee met at least once in the fall of 2008, and did not provide public notice of that meeting.

The open meetings law provides that every meeting of a governmental body must be preceded by public notice and held in open session. Sec. 19.83(1), Wis. Stats. The law provides that at every meeting of a governmental body, all discussion and all formal or informal action of any kind must be initiated, deliberated upon, and acted upon in open session, except as provided in section 19.85. The definition of “[g]overnmental 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.” Sec. 19.82(1), Wis. Stats. This provision focuses on the manner in which a body was created, rather than on the type of authority the body possesses. Purely advisory bodies created by constitution, statute, ordinance, rule, or order are therefore subject to the law. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

The term “rule or order” has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Att’y Gen. 67, 68-69 (1989). This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department, or division. *See* 78 Op. Att’y Gen. 67.

The open meetings law defines “meeting” 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.” Sec. 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that the above statutory definition of a “meeting” applies whenever a convening of members of a governmental body satisfies two requirements: (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. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). The concept of “governmental business” refers broadly to any formal or informal action, including discussion or information gathering, on matters within the realm of a governmental body’s realm of authority. *Id.* at 102-03.

The descriptions of the advisory committee's functions provided by the audit scope statement and the statement of the recorder may or may not be inconsistent. The Department of Justice has no authority to resolve disputed facts if they exist. For purposes of this response, I assume that the audit scope statement accurately describes the composition and functions of the advisory committee. If that assumption is erroneous, the analysis which follows may not apply. The recorder's description of the advisory committee's function and activities is not specific enough to allow me to attempt to apply the open meetings law to that description.

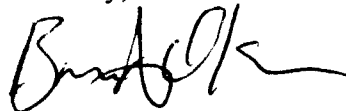
The Executive Committee is unquestionably a governmental body, because it was created by a Dane County Ordinance. Sec. 19.82(1), Wis. Stats. The Ordinances delegate to the Executive Committee the duty and responsibility to oversee audits conducted by contractors and to review the results of those audits. Ordinances, § 7.13(7). That authority necessarily includes the duty and responsibility to oversee the progress of audits, to review the preliminary results of audits still in progress, and to provide feedback to the auditor to ensure that the auditor's report is factually correct and appropriately evaluates the programs or activities that the auditor was engaged to evaluate. If the Executive Committee itself performed those activities, it would be required to provide public notice of all of the meetings at which it performed its oversight and review functions pertaining to an audit. Moreover, the Ordinances clearly give the Executive Committee authority to authorize an agent—whether a single individual or a group of individuals—to perform a portion of its audit functions. *See* Ordinances, § 3.03(4) and (7).

Based on the information available to me and my assumption that the Executive Committee approved or ratified the scope statement for the 9-1-1 system audit, and in the absence of any contravening information, it is my opinion that a court could conclude that the Executive Committee created the advisory committee and assigned its members the task of collectively exercising a portion of the Executive Committee's own duties and responsibilities; *i.e.*, that the advisory committee is a governmental body subject to the requirements of the open meetings law. Sec. 19.82(1), Wis. Stats. It is my further opinion that a court could conclude that if a quorum of the advisory committee met during the fall of 2008 to provide information or direction to the auditor, or received or discussed information provided by the auditor, that gathering met the definition of a meeting, section 19.82(2), and violated the open meetings law on that occasion by failing to provide public notice of that meeting, as required by section 19.83(1). As I noted at the outset of this letter, these opinions are based solely on the information identified in this letter, and it is possible that a more complete factual record would disclose information that could change the opinions expressed here.

Mr. Matthew DeFour
January 28, 2009
Page 5

The opinions contained in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1). Thank you for your interest in assuring full compliance with Wisconsin's open meetings law.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

BAO:ajw

c: Kevin C. Potter, Administrator
Division of Legal Services

Steven P. Means, Deputy Administrator
Division of Legal Services