



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 10, 2008

Mr. Roy Dieck
713 Hickory Street, Apt. 4
Antigo, WI 54409

Dear Mr. Dieck:

I am writing in response to your December 5, 2007, and January 1, 2008, requests for clarification of my September 12, 2007, letter to you regarding alleged open meetings violations by members of the Antigo common council. The answers to the four questions you recently pose are contained in the September 12 letter, a copy of which I enclose for your reference. To assist your consideration of the matter, however, I will directly respond to your questions again in this letter.

1. You ask: "Who is responsible to investigate if a complaint is filed in a matter such as this?" The matter you refer to is the alleged practice of some members of the Antigo common council to gather at a local establishment "for a beer" immediately following the adjournment of common council meetings.

Local law enforcement is responsible for investigating allegations of open meetings violations that are primarily of local concern—as your concern is. Local law enforcement may include a city police department or a county sheriff's department. When a complaint is made to a district attorney, the district attorney has discretion as to which local law enforcement agency he or she asks to conduct the investigation.

2. You ask: "If the council goes 'out for a beer' following a meeting, and a complaint is filed, is a simple denial sufficient to prove business was not discussed?"

I interpret your question to assume that a quorum or at least one-half of the members of the common council are present at the gathering you describe. In such circumstances, the law presumes that the members are present "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 complaining party and/or the district attorney have the burden to prove the basic fact that one-half or more members of the common council were present at a gathering on a particular day. Once that basic fact has been proved, the statutory presumption and Wisconsin's rules of

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evidence impose on every member who was present at the gathering and who has been charged with an open meetings violation the burden of proving that the nonexistence of the presumed fact (*i.e.*, that he or she was *not* present for the purpose of exercising the common council's responsibilities) is more probable than the existence of the presumed fact. Sec. (Rule) 903.01, Wis. Stats.

The amount of evidence that a common council member would need to establish that he or she was not present for the purpose of exercising the common council's responsibilities, authority, power, or duties cannot be stated with certainty. It is up to the trier of fact—a judge or a jury—to determine where the greater weight of the evidence lies. For example, if a common council member were to deny that any governmental business was discussed at the gathering and a complaining party or a district attorney presented no evidence to controvert that assertion, a trier of fact might decide that the council member had rebutted the presumption. However, a trier of fact could also decide, based on the council member's demeanor on the witness stand or other evidence that casts doubt on the member's credibility, that the presumption has not been rebutted, even if there were no direct evidence controverting the member's assertion that no governmental business was discussed. Similarly, if a common council member were to deny that any governmental business was discussed at the gathering, but another patron of the establishment were to testify that he or she overheard the members discussing a particular item of governmental business, a trier of fact might well decide that the council member had not rebutted the presumption.

3. You ask: "Is it assumed that council business will be discussed in a situation like this and the members must offer proof that business was not discussed[?]" I have answered this question in the paragraphs above. Based on the assumption that the "situation" involves a gathering where at least one-half of the members of the common council are present, the answer is "yes."

4. You ask: "Is the burden of proof resting on the one who filed the complaint that council business was discussed?" I have answered this question in the paragraphs above. The complaining party and/or the district attorney have the burden to prove the basic fact that one-half or more of the members of the common council attended a particular gathering. If a sued member of the body produces some evidence to rebut the presumption that he or she was present for the purposes of exercising the body's responsibilities, authority, power, or duties, the complaining party or district attorney has the burden of persuading the trier of fact that the greater weight of the evidence establishes that governmental business was conducted, notwithstanding the contrary evidence produced by the member.

Thank you for your continuing interest in assuring compliance with Wisconsin's open meetings law. As I indicated in my September 12, 2007, letter, the Department of Justice's best advice to the Antigo mayor and alderpersons is that they should avoid gatherings attended by at

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least one-half the members of the Antigo common council, unless those gatherings comply with the notice requirements of the open meetings law.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olsen", with a long horizontal flourish extending to the right.

Bruce A. Olsen
Assistant Attorney General

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Enclosure

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September 12, 2007

Mr. Roy Dieck
713 Hickory Street, Apt. 4
Antigo, WI 54409

Dear Mr. Dieck:

Your July 5, 2007, letter to Assistant Attorney General Paul Barnett has been forwarded to me for response. You ask the Department of Justice to review and investigate the allegations you made against several members of the Antigo City Council, and to comment on the response you received from the Langlade County District Attorney when you filed your complaint there.

On June 14, 2007, you wrote a letter to the district attorney alleging that on June 13, 2007, six individuals—including four members of the Antigo City Council—met at the Fifth Avenue Lounge immediately after the regular monthly city council meeting.¹ Your letter stated that three of those who were present are members of the city council's six-member Finance-Personnel-Legislative Committee. Your letter stated that this committee decides a major part of the city council's operations. You noted that section 19.82(2) of the Wisconsin Statutes 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," and that the statute further provides that "[i]f one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Your letter did not describe the subjects of the conversation among the committee members that evening.

¹The six individuals you identify as present at the June 13, 2007, gathering at the Fifth Avenue Lounge are Mayor Mike Matousek, Sam Hardin, Vern Cahak, Tim Kassis, Rebecca Larson, and Bob Noskowiak. You identify Mayor Matousek, Tim Kassis, and Rebecca Larson as members of the Finance-Personnel-Legislative Committee. The City of Antigo's website identifies all of the individuals you claim were present as alderpersons, with the exception of the mayor. See <http://www.antigo-city.org/elected.cfm>.

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The district attorney responded to your letter on June 22, 2007. The district attorney noted that the definition of "meeting" in section 19.82(2) specifically excluded "any social or chance gathering or conference which is not intended to avoid [the open meetings law]," and concluded that the June 13, 2007, gathering "would be considered a social gathering."

I respectfully disagree with the district attorney's conclusion that your June 14 letter fails to sufficiently allege a presumptive violation of the open meetings law by members of the Finance-Personnel-Legislative Committee. I have discussed this matter with him, and he has agreed to reconsider his response to your complaint.

You should be aware that the decision to seek a forfeiture penalty against conduct believed to be an open meetings violation is one entrusted to the broad discretion of the prosecutor. *State v. Karpinski*, 92 Wis.2d 599, 607, 285 N.W.2d 729 (1979). Factors to consider include the availability of prosecutorial resources, the expense of litigation, the likelihood of success, the priority that can be given to a particular type of prosecution in light of the overall mission of the office, the nature and extent of the harm resulting from the violation, and the extent to which a similar result might be obtained without litigation. You should also be aware that district attorneys also have the option of addressing violations of the open meetings law through more informal means such as warning letters. If you file a complaint and the district attorney declines to commence an enforcement action within 20 days, then you can initiate your own action pursuant to section 19.97(4). If you prevail in such an action, the court may award your actual attorney fees and other necessary costs.

In addition to the concerns you have expressed about the three members of the Finance-Personnel-Legislative Committee, based on the information you have provided and in the absence of any contravening information, it is my opinion that members of the common council put themselves at unnecessary risk of having to defend against allegations of open meetings law violations when they attend such gatherings after city council meetings.

The City of Antigo maintains a website that includes an electronic copy of the city ordinances, <http://www.municode.com/resources/gateway.asp?sid=49&pid=12596>. Section 2-32(a) provides that the common council consists of nine members. Section 2-43(a) provides that a quorum of the common council consists of six members. Section 2-48(h)(4) provides that, except as otherwise provided by law, a majority of the votes cast shall be necessary for all council action, provided a quorum has voted. Section 2-35(a)(1) creates the Finance, Personnel, and Legislative Committee, and provides that its members are the mayor and five alderpersons. Section 2-523(b) provides that a simple majority of the members of a committee constitutes the quorum of the committee.

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The Wisconsin Supreme Court has held that the open meetings law applies whenever a gathering of members satisfies two requirements: (1) there is a purpose to engage in governmental business, and (2) the number of persons present is sufficient to determine the course of the body's action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). In circumstances where a body consists of an even number of members, and where the body acts under a simple majority rule, one-half the number of members plus one are required to affirmatively act, but the votes of only one-half the number of members is sufficient to block action. A gathering of a sufficient number of members to block action is called a "negative quorum." The open meetings law applies whenever such a group gathers for the purpose of conducting governmental business. *Showers*, 135 Wis. 2d at 101-02. Thus, where a governmental body consists of an even number of members and operates under a simple majority rule, a gathering of one-half of the body's members constitutes a negative quorum. Moreover, by reason of the definition of "meeting" in section 19.82(2), a gathering of one-half of a body's members is also presumed to satisfy the "governmental business" test.

Applying these principles to the facts you describe, the law would presume that the three members of the Finance, Personnel, and Legislative Committee violated the open meetings law on June 13 when they gathered at the Fifth Avenue Lounge. The burden would be on those three members to establish that they were not gathered for the purpose of exercising the committee's powers, duties, or authority; *i.e.*, that they did not discuss any governmental business that was within the realm of the committee's authority. Unless and until those three members can prove that they discussed no aspect of the committee's business that evening, I would disagree with the district attorney's conclusion that the gathering was a social gathering.

Although your letter specifically alleges only that the mayor and alderpersons Kassis and Larson violated the open meetings law, the negative quorum concept and the governmental business presumption in section 19.82(2) establishes a presumptive violation of the open meetings law by all five alderpersons who attended the June 13 gathering. The common council operates under a simple majority rule decision-making method. Although six members of the common council are required to be present in order for there to be a quorum to conduct the common council's official business, five members are sufficient to determine the course of the common council's action when a six-person quorum is present. Thus, the five alderpersons present at the June 13 gathering satisfy *Showers*' "numbers" test. Moreover, because five alderpersons comprise more than half the membership of the city council, section 19.82(2) presumes that they are gathered for the purpose of engaging in the "governmental business" of the city council. City council members who gather in numbers sufficient to comprise a majority of the city council or a majority of a committee of the city council bear the burden to prove that the group did not discuss any subject that is within the realm of the governmental body or bodies represented by the gathering. The Department of Justice's best advice to the mayor and the five alderpersons you identify is that they should avoid gatherings like the one on June 13.

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Thank you for bringing this matter to my attention and to the attention of the Langlade County District Attorney.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olsen", with a horizontal line extending to the right.

Bruce A. Olsen
Assistant Attorney General

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c: Ralph Uttke
District Attorney
Langlade County

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