

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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October 7, 2005

Mr. Orville Seymer
P.O. Box 371086
Milwaukee, WI 53237

Re: *Alleged Open Meetings law Violation by Members of the Kewaskum
School Board*

Dear Mr. Seymer:

As you know, Attorney General Peggy A. Lautenschlager has assigned your referral to me for review. I have completed my inquiries. This letter reports on my findings and conclusions.

The facts as I understand them are as follows. The Kewaskum School Board consists of seven elected members. In an email dated May 6, 2005, to Board attorney Paul C. Hemmer, former Kewaskum School Board President Jean E. Goeden stated that "Neal and I have discussed the officer elections. We are giving Gordie the Presidency, Tammy the VP, Me as clerk . . . and Beth as Treasurer. I told them all we have to show unity" (ellipses in original). "Neal" apparently refers to Neal Weare and "Gordie" to Gordie Dickman, both School Board members. A short while later, Ms. Goeden forwarded this email to the other six members of the School Board.

The next morning, Ms. Goeden sent an email to Board members Beth Steiner and Tammy Weyer. In this email, Ms. Goeden asked that Ms. Weyer nominate her for clerk and that Ms. Steiner nominate Ms. Weyer for vice president. Ms. Goeden further reported that "Neal" will place "Gordie's" name in for presidency. This email also repeatedly urged "unity" and recounted a conversation with Mr. Dickman in which Ms. Goeden urged him that "we" (presumably the school board) "have to think of the School District and show the leadership team, we the board are UNITED. . . ." (emphasis and ellipses in original).

These emails also apparently include references to a pending personnel matter. These references are redacted from both emails. We are informed by the School Board's attorney that the calls for unity are in reference to the personnel matter. However, in our judgment, a reader

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of the emails could reasonably conclude that the call for unity applied as well to the upcoming officer elections, regardless of the sender's intent.

We understand that no further emails were exchanged between or among School Board members regarding the officer elections.

We are also informed that officer elections were discussed among some of the Board members in the weeks prior to the May 9, 2005, meeting. In particular, Ms. Goeden asked Mr. Dickman whether he would accept the office of president. Mr. Dickman asked whether Ms. Steiner would accept the presidency and she declined. Mr. Dickman also solicited Ms. Weyer's acceptance of the office of vice president and she agreed. Ms. Goeden made a separate inquiry of Ms. Weyer as well.

Each of these conversations, whether in person or by telephone, occurred one-on-one. No other Board member was present or participated. Nor is there any evidence that a quorum of the Board (at least four members) agreed to act uniformly with respect to officer elections in general or the election of any specific officer in particular.

According to the minutes of the May 9, 2005, School Board meeting, Mr. Weare nominated Mr. Dickman for president. Another Board member, John Kenworthy, nominated himself. Mr. Dickman won by a 5-2 vote. Mr. Weare also nominated Ms. Weyer for vice president, Ms. Weyer nominated Ms. Goeden for clerk and Ms. Goeden nominated Ms. Steiner for treasurer. Each of these nominees was elected on a unanimous vote.

The Open Meetings Law requires that public notice be provided of all meetings of a governmental body and that each meeting be held in open session unless a closed session is justified under one of several enumerated exemptions. Section 19.83(1) of the Wisconsin statutes; *see* section 19.85(1) of the Wisconsin statutes for a list of the exemptions. A "meeting" occurs whenever there is a gathering of members of a governmental body for the purpose of engaging in governmental business and the number of members present is sufficient to determine the body's course of action. Section 19.82(2) of the Wisconsin statutes; *see also State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). "Governmental business" is broadly construed to refer to any formal or informal action, including discussion, deliberation, decision and information gathering, on any matter within the scope of the governmental body's authority. *Showers*, 135 Wis. 2d at 102-03.

There is no doubt that the election of School Board officers is a matter within the School Board's authority and therefore a gathering of Board members to discuss officer elections is for the purpose of conducting governmental business. Thus, the first element of a meeting is satisfied here.

The second element requires that a sufficient number of members be present to determine the governmental body's course of action. This is easy to determine where a discrete number of a governmental body's members are present at a single location. This determination may become more complicated where members are not physically located together but nevertheless are in communication with each other. Thus, the Attorney General has construed the phrase "convening of members" in section 19.82(2) of the Wisconsin statutes to include modern means of communication that effectively allow individual members to communicate and exercise the body's authority even though the members are not physically present together. For instance, a telephone conference call may qualify as a meeting subject to the requirements of the Open Meetings Law if enough members participate to determine the course of action. 69 Op. Att'y Gen. 143, 144 (1980). On the other hand, the Attorney General has opined that circulating a memorandum soliciting support among other members of the governmental body favoring a particular course of action (there, dismissal of a high ranking employee) did not constitute a meeting. *See* correspondence to Kenneth J. Merkel (March 11, 1993) (copy enclosed). This conclusion was based on the observation that "convening" or "gathering," terms used in section 19.82(2) of the Wisconsin statutes to define a "meeting," would not typically include communicating by memorandum. The Attorney General also relied on the fact that the public would not be deprived of information about the workings of government since the memorandum is subject to production under the public records law. Merkel correspondence at 2.

In more recent informal opinions, the Attorney General's office has addressed even more sophisticated means of communication such as instant messaging and email. Whether the use of these forms of communication qualifies as a meeting depends on whether the nature of the communication more closely resembles a conference call or a memorandum or letter. There is no hard and fast rule that governs this analysis and no court case has addressed the question. Factors to consider which this office has identified in deciding whether email communications resemble a meeting or mere correspondence include (1) the number of participants involved; (2) the number of communications on the particular subject matter; (3) the time frame within which the communications occurred; and (4) the extent to which the email communications resemble a conversation. *See* correspondence to Tom Krischan (October 3, 2000) at 4 (copy enclosed); *see also* correspondence to Dan Benson (March 12, 2004) (copy enclosed).

As noted, a meeting occurs when the number of members present is sufficient to determine the governmental body's course of action. By statute, a presumption that a meeting is taking place exists whenever at least half of the governmental body's members are present or participate. Section 19.82(2) of the Wisconsin statutes. However, Wisconsin's courts recognize two additional situations when a gathering of fewer members may still constitute a meeting under the Open Meetings Law. The most relevant of these exceptions is the "walking quorum." A walking quorum constitutes a series of gatherings among separate groups of members of a governmental body, each less than a quorum or majority, who agree, tacitly or explicitly, to take official action in a certain way (such as to all vote the same on a particular issue) in sufficient

number to reach a quorum. *Showers*, 135 Wis. 2d at 92. The danger of a walking quorum is that it may produce a predetermined outcome, thus rendering a publicly noticed meeting a mere formality. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685-88, 239 N.W.2d 313 (1976).

Given modern means of communication, the series of gatherings that may constitute a walking quorum can consist of sequential emails or telephone calls as well as in person collections of individuals. Thus, for example, a walking quorum may occur when an email from one board member to one or two others is then forwarded to other board members and, during this process, the senders and recipients all agree on a particular course of action. The use of emails by elected government officials poses a particular danger of creating a walking quorum because of the ease and convenience of use as well as the fact that the sender cannot control the further dissemination of the email to others. Accordingly, this office has advised that officials avoid using emails to conduct "private" debate and discussion on matters of public import which properly should take place at a publicly noticed meeting. Benson correspondence at 3.

Applying these principles to the facts uncovered here, it is my opinion that, while not free from doubt, the emails from Ms. Goeden did not violate the Open Meetings Law. In particular, the May 6, 2005, email to Attorney Hemmer reported on a discussion between Ms. Goeden and Mr. Weare. Together, these two School Board members cannot control Board decision-making even if they agreed on a specific course of action, including who to vote for as officers. What makes the analysis of this email more complicated is that it was subsequently forwarded to all Board members. Although the action of forwarding this email could reasonably be construed as an attempt to influence how the other Board members should vote on officers, there is no evidence that any further email exchange among the Board members followed this email. Thus, the forwarded email is more like circulating a memorandum and advocating a particular course of action, which was held by the Attorney General not to violate the Open Meetings Law, rather than a discussion among Board members on the election of officers.

The May 7, 2005, email from Ms. Goeden to two other Board members is similar in nature. First, because less than an actual quorum of the School Board was involved in sending or receiving this email, no meeting could have occurred unless the email was subsequently sent to at least one other Board member and we have no evidence that this took place. Second, even construing it as urging unity on voting for officers, this email, like the other, is more like a memorandum or correspondence that advocates a certain position rather than constituting an electronic discussion and agreement on how to vote on officers.

This second email is problematic when considered in conjunction with Ms. Goeden's email statement that "Neal will be placing Gordie's name in for the Presidency." If a walking quorum can occur through a series of small group gatherings or a series of emails, then it follows that a walking quorum might take place through a combination of small group gatherings and emails. Thus, viewing Ms. Goeden as the hub of a wheel, her separate communications about

Mr. Dickman's nomination with either Mr. Dickman or Mr. Weare (assuming that one of them informed her of the plan for Mr. Weare to nominate Mr. Dickman for president) and with two other Board members could violate the Open Meetings Law because a total of four Board members, constituting a majority of the seven-member Board, have participated in a series of communications on a matter of Board business. However, in the absence of additional evidence of other communications, email or otherwise, very close in time to the second email from Ms. Goeden, particularly from either Ms. Steiner or Ms. Weyer indicating their view on the proposed course of action, it is my opinion that a court would likely conclude that no violation occurred.

The School Board suggests that a violation of the Open Meetings Law did not occur because, though asked by Ms. Goeden to nominate Ms. Weyer for vice president, Ms. Steiner did not. However, this rationale was rejected in *Showers*, when the Supreme Court held that the presence of members from two opposing factions, neither of which contained enough members to control the parent body's course of action, sufficed to constitute a meeting because the total number of members present had the potential to determine the outcome, notwithstanding their opposite positions. *Showers*, 135 Wis. 2d at 103. Thus, in this situation, simply because one of the email participants might have disagreed with another participant's position on a proposed nomination, or ultimately did not follow through in a manner consistent with agreement on the proposal, does not immunize an electronic gathering of Board members from being recognized as a meeting subject to the Open Meetings Law.

It is also my opinion that no Open Meetings Law violation occurred in connection with the various conversations between different Board members about possible nominations. The evidence indicates that no series of conversations among small groups of Board members, that included one or more common members, made up a majority of the Board. Rather, one can link at most three Board members (Ms. Goeden, Mr. Dickman and Ms. Weyer) to a single topic (Ms. Weyer's candidacy for vice president) and this linkage assumes that Mr. Dickman and Ms. Goeden were aware of the other's contact with Ms. Weyer.

One could argue that conversations seeking the solicitation of nominations is not materially different from a memorandum seeking support to remove a public employee. However, the Attorney General's opinion involving the memorandum relied on the statutory definition of a meeting and concluded that a memorandum is not a convening or gathering of members. A face to face or telephone contact between or among Board members for the purpose of discussing nominations is such a convening or gathering. Thus, reliance on the Attorney General's opinion regarding communications by memorandum to justify multiple small group gatherings or conversations at which potential nominations are discussed would be misplaced.

In closing, I think it worthwhile to reiterate, as this office has before, that elected government officials like the members of the Kewaskum School Board must take great care in their use of modern means of communications. Email, text messaging and conference calls are

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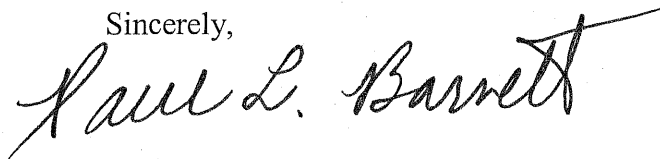
all very efficient and productive ways of conducting business. However, when it is *government* business that is being conducted, the Open Meetings Law demands, subject to specific exceptions, that this business be conducted in open session of the governmental body and with prior public notice of the fact. Government officials, like the School Board members here, subject themselves to close scrutiny and perhaps prosecution if they fail to closely abide by the requirements of the law. Although we have concluded that no violation occurred here, it should be evident that greater care needs to be taken by these officials to ensure that no violations will occur in the future.

I am providing a copy of this correspondence to the School Board's attorney with a request that he distribute copies to all members of the School Board for their benefit.

Finally, please be advised that you have the right, if you choose to exercise it and disagree with the disposition of this matter by the Attorney General, to initiate your own action pursuant to section 19.97(4) of the Wisconsin statutes. If you prevail, the court may award your actual attorneys fees and other necessary costs.

Thank you for the opportunity to address this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Paul L. Barnett". The signature is written in dark ink and is positioned above the printed name and title.

Paul L. Barnett
Assistant Attorney General

PLB:kw

Enclosures

c: Paul C. Hemmer, Esq.
Attorney for the Kewaskum School Board

bcc: Kelly Kennedy