STATE OF WISCONSIN
Department of Employee Trust Funds
David A. Stella
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931

1-877-533-5020 (toll free)
Fax (608) 267-4549
http://etf.wi.gov

CORRESPONDENCE MEMORANDUM

DATE: March 6, 2010

TO: Employee Trust Funds Board
Wisconsin Retirement Board
Teachers Retirement Board

FROM: David H. Nispel, General Counsel

SUBJECT: Open Meetings Update—Attorney General Opinion on E-mail Communication

This memo is for informational purposes only. No Board action is required.

This memorandum is presented to inform Board members about a January 25, 2010, opinion by Attorney General J. B. Van Hollen. Board members are encouraged to place the attached copy of the opinion in their Governance Manual behind the tab labeled "Open Meetings and Public Records Law."

The Attorney General's opinion concerns the meeting practices of a five-member governmental body created by the City of Racine to review loan applications submitted by city residents for improvements to property located in the city. The governmental body engaged in the practice of taking votes by email outside the course of regularly- scheduled meetings and without sufficient notice to the public.

The three principal components of the Attorney General's opinion are:

1. A governmental body must give advance public notice of each of its meetings and must conduct all of its business in open session unless a specific exemption applies.

2. A governmental body almost certainly violates the open meetings law if it takes binding collective action by aggregating the email votes of its members using a method that allows no opportunity for public observation of the process.

3. A meeting notice that merely identified "Old Business" as a subject did not reasonably apprise members of the public that the governmental body would use that subject description to reaffirm an email vote conducted previously without any prior public notice of the email vote.

Attachment

Reviewed and approved by Robert J. Conlin, Deputy Secretary.

_____ _____
Signature Date

Board	Mtg Date	Item #
JI	3.18.10	3D

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

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

January 25, 2010

I—01—10

Ms. Stephanie Jones
The Journal Times
212 4th Street
Racine, WI 53405

Dear Ms. Jones:

You ask three questions regarding the meeting practices of a five-member governmental body created by the City of Racine to review loan applications submitted by city residents for improvements to properties located in the city, and to administer the loans made as a result of granted applications. The minutes of the body's meetings occasionally reflect that the body took action to confirm or to reaffirm the results of email votes of the body's members conducted outside the course of a regularly scheduled meeting. On at least one occasion, the body's reaffirmation of an email vote occurred under the subject heading "Old Business" in the body's meeting notice, without any additional description of the loan in question. Based on these facts, you ask three specific questions: first, whether the open meetings law allows governmental bodies to take action by email voting; second, whether the governmental body should provide advance public notice of its email votes; and third, whether a governmental body may reaffirm the results of an email vote conducted without prior public notice under the subject heading "Old Business."

Voting by email. The two most basic requirements of the open meetings law are that a governmental body must give advance public notice of each of its meetings and must conduct all of its business in open session unless a specific exemption applies. Sec. 19.83(1), Wis. Stats.

A "meeting" of a governmental body occurs when enough members of the body convene to determine the body's course of action and those members convene "for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Sec. 19.82, Wis. Stats.; *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). The "convening" of members of a governmental body is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Thus, the Department of Justice has advised that written communications transmitted by email may constitute the convening of members, depending on how the communications

medium is used. *See Wisconsin Open Meetings Law: A Compliance Guide* (August 2009), at 7-8 (*http://www.doj.state.wi.us/dls/OMPR/2009OMCG-PRO/2009_OML_Compliance_Guide.pdf*, last visited December 18, 2009).

The "convening" of members of a governmental body also extends to communications among separate groups of members of the body, each less than quorum size, where the members agree, tacitly or explicitly, to act uniformly in a number sufficient to reach a quorum. The courts have given the label "walking quorum" to these types of communications. *Showers*, 135 Wis. 2d at 92; *see also State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). The Department of Justice has advised that a walking quorum cannot be avoided by using an agent or surrogate to poll the members of a governmental body through a series of individual contacts. Such a scheme "almost certainly" violates the open meetings law. Clifford Correspondence, April 28, 1986 (individual, serial contacts of Investment Board members by board's legal counsel, for purpose of obtaining each member's vote, constituted an unlawful meeting) (copy enclosed). *See also* Herbst Correspondence, July 16, 2008 (use of administrative staff to individually poll a quorum of members regarding how they would vote on a proposed motion at a future meeting is a prohibited walking quorum) (copy enclosed).

Where the elements of a meeting are satisfied, the open meetings law requires that the meeting must have been preceded by public notice and must begin in open session. Sec. 19.83(1), Wis. Stats. The public notice must "set forth the time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. "Open session" is defined as a meeting "which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Sec. 19.82(3), Wis. Stats.

The email voting by members of the city governmental body in question amounted to the exercise of the body's responsibilities, authority, power or duties, and therefore was the conduct of governmental business. In addition, it appears that enough members participated in the voting to determine the course of the body's action. Moreover, it appears that the members voted with the understanding that the body's action would be determined by the number of votes in favor of or in opposition to the question that was the subject of the committee's vote. The members' apparent agreement to determine the body's course of action in this way fits the definition of a "walking quorum" type of "meeting" outlined in the *Showers* and *Conta* cases, to which the public notice and accessibility requirements of the open meetings law applied.

Public notice of email voting. There is no suggestion in the facts you have provided that the email votes occurred on a specific day, at a specific time, or in a specific place, or that any vote was preceded by a public notice that purported to identify the date, time, or place of the voting. In the absence of a meeting notice that provided time, date, and place information, members of the public could not have reasonable access to observe the body's exercise of its powers or responsibilities. Although it is not appropriate for me to speculate whether a

governmental body could create some type of email voting protocol and public notice that would satisfy the public notice and public accessibility requirements of the open meetings law, a governmental body almost certainly violates the open meetings law if it takes binding collective action by aggregating the email votes of its members in using a method that allows no opportunity for public observation of the process.

Use of "Old Business" subject designation. As noted, every meeting notice must give the "time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Sec. 19.84(2), Wis. Stats. Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all. Heupel Correspondence, August 29, 2006 (copy enclosed). Measured against this standard, the meeting notice which merely identified "Old Business" as a subject did not reasonably apprise members of the public that the body would use that subject description to reaffirm an email vote conducted previously without any prior public notice of that email vote.

I hope the information in this letter is helpful to you and thank you for your interest in compliance with the Wisconsin open meetings law.

Sincerely,

J. B. Van Hollen
Attorney General

JBVH:BAO:ajw

Enclosures

c: Scott R. Letteney
Deputy City Attorney
City of Racine