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Correspondence Memorandum

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To: Employee Trust Funds Board

From: David H. Nispel, General Counsel
 Dan Hayes, Attorney
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Subject: Wisconsin Open Meetings Law Training

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

For this training, we consulted two primary sources: 1) Wis. Stat. ss. 19.81 to 19.98 (Open Meetings Law) and 2) the Wisconsin Department of Justice’s (DOJ) “Wisconsin Open Meetings Law Compliance Guide.” While there are many key concepts of the open meetings law, this memorandum will focus on the following: 1) open session requirements; 2) closed session procedures; 3) the purpose requirement and the numbers requirement regarding a meeting; 4) convening of members; 5) a “walking quorum,” 6) the definition of a governing body; and, 7) the definition of a meeting. We will begin with the definitions of governing body and meeting.

Key Definitions

The open meetings law applies to every meeting of a governmental body. Wis. Stat. s. 19.82(1) defines a governmental body as:

[A] state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation, a local exposition district under subch. II of ch. 229; a long-term care district under s. 48.2895; or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.”

Pursuant to the above definition, the Employee Trust Funds Board, which is created by Wis. Stat. s, 15.16 (1), is a governing body. The various committees, as well as the TR Board and WR Board, also are governing bodies. Therefore, the provisions of the open meetings law apply to those bodies.

Reviewed and approved by John Voelker, Secretary



Electronically Signed 9/3/21

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Wis. Stat. s. 19.82 (2) defines a “meeting” as:

[T]he 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. If 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. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter”

In the *Showers* case, the Wisconsin Supreme Court discussed the “purpose requirement” and the “numbers requirement” in relation to whether a meeting occurred. The court stated that the definition of a “meeting” is satisfied when the members of a governmental body meet to engage in governmental business and there is a sufficient number of members present to determine the course of action of the body. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). As concerns the purpose requirement, the Court stated that governmental business refers to any formal or informal action, including discussion, decision making, and information gathering, about matters within the body’s area of authority. *Showers*, 135 Wis. 2d 102-103. For example, a governmental body is involved in governmental business when its members assemble just to hear information on a particular matter that comes within the body’s area of authority. In such a scenario, it is not necessary for the members to discuss the matter in question or interact with one another.

As concerns the numbers requirement, the Court in *Showers* stated the number of members present must be sufficient to determine a course of action by the governmental body on the matter being considered. It is important to understand that the power to determine a governmental body’s decision making can refer either to the affirmative power to pass a matter or the negative power to block a matter. For example, a gathering of one-half of the governmental body’s members could be enough to determine the body’s course of action if that is enough to stop a proposal. That concept is called a “negative quorum.” If a governmental body operates under a majority rule system, and one-half of the members of the body are opposed to the matter in question, then a “negative quorum” exists since that number is sufficient to prevent a majority being formed in support of the matter.

Board Member Interaction

At two recent ETF Board meetings, board members expressed particular interest in discussing the concepts of member interaction through telephone calls, interaction through other types of communications, walking quorums, and the applicability of the open meetings law to those concepts. As concerns member interaction with one another,

the phrase “convening of members” that is referenced in Wis. Stat. s. 19.82(2) is relevant to the discussion. When board members conduct official business while acting, without any communication with one another or participating in any other collective action, there is no meeting as that term is defined in the open meetings law.

However, the term “convening of members” is not limited to situations where members are gathered in the same location but may also include situations in which members are able to communicate with one another and carry out the authority vested in the board notwithstanding the fact they are not physically present together. The DOJ compliance guide indicates that a “convening of members” depends on how much the communication resembles a face-to-face exchange.

The DOJ Compliance Guide provides five different examples of a possible “convening of members.” Compliance Guide, at 10-13. As concerns written correspondence and specifically circulating a paper memorandum among members of a governmental body, that “may involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members,” DOJ has taken the position that such written correspondence generally does not constitute a “convening of members” under the open meetings law. Compliance Guide, at 10-11.

A second example involves telephone conference calls. If the conference call is held for the purpose of conducting governmental business and includes a number of members sufficient to determine the governmental body’s course of action on the matter in question, the call qualifies as a “convening of members.” The open meetings law applies to such a conference call.

Electronic communications, such as email, instant messaging, or social media platforms present several potential issues and may constitute a “convening of members.” Again, a principal question to be examined is whether the communications are more like an in-person discussion. If the communications are like an in-person discussion, the communications may constitute a meeting if they include a sufficient number of members to determine the action of the governmental body. Two members of a body that is “larger than four members may generally discuss the body’s business without violating the open meetings law” However, features like “forward” and “reply to all” present the possibility that the sender of the communication loses control over the number of recipients who have access to the original message from the sender and a quorum of the body receives the information. Compliance Guide, at 11.

No Wisconsin courts have applied the open meetings law to these kinds of electronic communications. “[B]ecause of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General’s Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body’s realm of

authority.” Compliance Guide, at 12. Notwithstanding the open meetings law, any government business communications, regardless of personal device use, are subject to the public records law.

A fourth example involves walking quorums. DOJ provides a succinct definition: “A ‘walking quorum’ is a series of gatherings among separate groups of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.” Compliance Guide, at 12. A significant danger is that a walking quorum will produce a predetermined outcome and render the public meeting a simple formality. DOJ advises that where there is no such tacit or express agreement, “exchanges among separate groups of members may take place without violating the open meetings law.” Compliance Guide, at 12.

The final example concerns multiple meetings. When a quorum of members of one governmental body (such as the Wisconsin Retirement Board) attend a meeting of another governmental body (such as the Employee Trust Funds Board) in order to engage in governmental business regarding a matter over which they have decision-making authority, two meetings occur. Notice must be given for each of those meetings. It is possible to have one notice as long as the necessary information about a joint meeting being held and the names of the bodies is provided. Compliance Guide, at 12-13.

When one-half or more of the members of a governmental body are present, the gathering is presumed to be a meeting. However, social or chance gatherings are exempt from the open meetings law, if those gatherings are not intended to circumvent the open meetings law requirements. The law is liberally construed to ensure the principle of ensuring public access to government business.

Open Session Requirements

Advance public notice must be given for all meetings of a governmental body. The open meetings law specifies when and how notice must be given as well as the content of meeting notices. The law also provides guidance on language to be used in agendas. All business of a governmental body must be in open session unless one of the exemptions to the open session requirement applies.

The meeting location must be reasonably accessible for the public, which includes such factors as physical accessibility, room size, and acoustics. While the public must be allowed to attend open session meetings, the law does not include a requirement to allow the public to speak. Whether or not a government body permits a public comment period is entirely up to the body. The open meetings law allows the public the right to record, film, or photograph a meeting, as long as the activity does not disrupt or otherwise interfere with the meeting.

Voting can be done by voice vote or a show of hands, but if a member of the body requests that the votes of each member be recorded then a roll call vote is necessary. A

body can make decisions by general consent but that should be done only for routine matters such as approving minutes or adjourning. Secret ballots may be used only for the election of officers of the governing body. A record must be made of all motions and roll call votes, whether the body is meeting in open or closed session. Typically, that record appears in the form of written minutes.

Closed Session Procedures

All meetings of a governmental body initially must convene in open session. Unless one of the exemptions provided in Wis. Stat. s. 19.85 (1) is applicable, all business of the body must be conducted in open session. If it is known at the time that public notice of a meeting is given, the notice must contain the subject matter of the closed session and identify the statutory exemption.

The procedures for convening in closed session also appear in Wis. Stat. s. 19.85 (1). Before going into closed session, the governing body must pass a motion by roll call vote to convene in closed session. And, before taking that vote in open session, the chief presiding officer of the body must announce the subject matter of the business to be discussed in closed session and the statutory exemption which authorizes the closed session. The announcement must be specific in order to sufficiently inform the members of the body what they are voting on.

A governmental body must limit its discussion to only the business stated in the closed session announcement. The ETF Board has often convened in closed session for the following reasons authorized by the above statute: 1) to deliberate about a judicial or quasi-judicial matter; 2) to conduct a performance evaluation of a public employee (the ETF Secretary); 3) for competitive or bargaining reasons; and 4) in order to confer with legal counsel.

As concerns who may attend the closed session, a governmental body is given wide discretion by the open meetings law. The body can allow anyone whose presence is needed for the consideration of the subject of the closed session. The courts have not provided clear direction about a governmental body voting in closed session. In light of that uncertainty, the Wisconsin Attorney General has advised that a governmental body vote in open session, unless doing so would adversely affect the need for the closed session.

Public notices of closed sessions of the ETF Board (and all the boards attached to the department) specify that the board will reconvene in open session following conclusion of the closed session. In open session, the board chair briefly announces the action taken in closed session. If a vote is necessary, that vote is taken in open session. The meeting is then adjourned.

Staff will be available at the Board meeting to answer any questions.