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THE SCHOOL BOARD AGENDA

FROM "A" TO "Z"

April 26, 2019

Presented by Kirk D. Strang

Direct Toll Free Phone: (844) 626-0906
Email: kstrang@strangpatteson.com

GREEN BAY OFFICE: 205 Doty Street, Ste. 201, Green Bay, WI 54301 • Toll Free: 844-833-0830
MADISON OFFICE: 660 W. Washington Avenue, Ste. 303, Madison, WI 53703 • Toll Free: 844-626-0901
OSHKOSH OFFICE: 43 W. 6th Avenue, Oshkosh, WI 54902 • Toll Free: 844-833-0830

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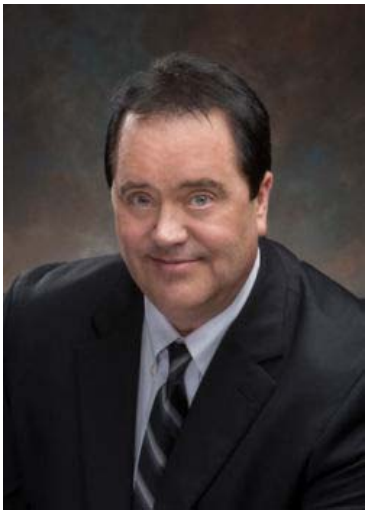

Kirk D. Strang

Attorney Shareholder
Madison
Direct Toll Free Phone: (844) 626-0906
Email: kstrang@strangpatteson.com

Denise D. Richardson
Office Administrator/Legal Assistant
Direct Toll Free Phone: (844) 626-0904

Practice Areas

- School and Higher Education Law
- Labor and Employment

Education

- B.A., University of Wisconsin Madison (Political Science and History)
- J.D., University of Wisconsin Madison (Law School)

Kirk has extensive experience in school and higher education law, as well as labor and employment law issues.

Kirk is one of Wisconsin's leading school and higher education attorneys, representing school districts, technical colleges, and other higher education institutions in all aspects of their operations. He advises school and higher education clients on all of the issues related to their status as governmental bodies, including open meetings, public records, search and seizure, and public contracting and bidding. He also advises schools and higher education institutions on the range of issues that are unique to educators and educational institutions, including pupil rights and discipline, pupil services, employment relations, administrator and teacher contracting, pupil transportation, regulation of co-curricular activities, open enrollment and residency, and other matters that are central to educational institutions' day to day operations.

Kirk also works with small and large private companies.

Kirk is also been recognized by Best Lawyers in America in education and labor law, and as a Wisconsin Super Lawyer in schools and education law, as well as labor and employment law. He maintains an active labor and employment practice, advising employers on the full range of labor and employment relations issues, including collective bargaining and contract negotiations, claims of unfair and prohibited labor practices, family and medical leave, grievance and interest arbitration, employment policies and handbooks, unemployment and worker compensation, employment agreements, disability claims and accommodation, and other substantive areas that are central to human resources management and employment relations.

In addition to his transactional work, Kirk continues to practice at the agency, circuit court and appellate court levels, and has made multiple appearances before our Wisconsin Supreme Court.

Kirk regularly presents legal information to and training for groups around the state on education and labor and employment law issues. Kirk provides regular programming and training for the Wisconsin Association of School District Administrators (WASDA), the Association of Wisconsin School Administrators (AWSA), the Wisconsin Association of School Business Officials (WASBO), the Wisconsin Association of School Superintendents Assistants (WASSA), the Wisconsin School Attorneys Association (WSAA), and the Wisconsin Technical College District Boards Association (WTCDBA). He also actively and regularly participates in programs and seminars sponsored by our firm for clients and friends, and provides programming and training for clients at their request.

Kirk is a contributing author of the State Bar of Wisconsin's treatise on "Public Sector Labor Law Relations in Wisconsin." He has also advised the School Administrators' Alliance on legislation and legislative issues affecting our public schools. Kirk also chaired the State Bar of Wisconsin's annual employment law program for 13 consecutive years.

Credentials

- 2017 WASDA Award of Special Recognition for Service to Wisconsin
- 2013 Leader in the Law, Wisconsin Law Journal
- Wisconsin Super Lawyer, Schools and Education, Employment and Labor
- Best Lawyers in America, Education Law and Labor Law – Management
- Top Lawyer: Madison Magazine
- Member, State Bar of Wisconsin Continuing Legal Education Committee (1999-2005)
- Member, State Bar of Wisconsin Board of Directors - Labor & Employment Law Section (1998-2001)
- Wisconsin Academic Decathlon Board of Directors
- CESA Foundation Board of Directors
- Former President, Wisconsin School Attorneys Association
- General Counsel to the Wisconsin Technical College District Boards Association

THE SCHOOL BOARD MEETING NOTICE

I. NOTICE REQUIREMENTS

A. Every Meeting Of A Governmental Body Must Be Preceded By Public Notice And Initially Convened In Open Session. Wis. Stat. § 19.83.

Exemption from notice requirements: Formally constituted subunits may meet without notice during a meeting of the parent body, during a recess of the parent body, or immediately after a meeting of the parent body, for the purpose of discussing or acting on a matter which was the subject of the parent body's meeting, and where the presiding officer of the parent body publicly announces the time, place, and subject matter of the subunit's meeting in advance, at the parent body's meeting. Wis. Stat. § 19.84(6).

B. Public Notice Of All Meetings (Open And Closed) Has To Be Given To The Following Parties:

1. To the public;

2. To those news media who have filed a written request for such notice;

3. To the official newspaper, or if none exists, to the news media most likely to give notice in the area.

NOTE: Posting the meeting notice on your school district's web site is helpful to informing the public, but does not do anything to comply with the open meetings law.

C. Notice Contents

1. Time

2. Date

3. Place

4. Subject Matter:

   a. The notice must be in a form that is reasonably likely to apprise members of the public and the news media of the subject matter of the meeting. Therefore, whether the notice concerns open or closed session, the notice must give enough information so that members of the public can read the notice and know what the meeting is about.

   b. Rule of Thumb for Drafting Meeting Notices: Would a citizen interested in a specific subject be aware from the meeting notice that the subject might be discussed? *Wisconsin Open Meetings*

Law: A Compliance Guide, Department of Justice (2009).

c. The subject matter requirement is not relaxed merely because an item is not expected to be an action item at a meeting. The open meetings law requires public notice of any subject that will be discussed, regardless of whether any action will be taken or is contemplated.

5. Matters intended for consideration at a closed session.

E. Notice Time Limits

1. Generally, notice must be given at least 24 hours prior to the commencement of the meeting.

   a. Wis. Stat. § 990.001 (4)(a) requires that Sundays and legal holidays be excluded when the 24 hour notice period is calculated.

   b. There is no publication requirement for notices of regular or special meetings of the board of education (remember, there is a different type of "special meeting" that has the power of an annual meeting, and that type of meeting must be noticed under Class 2 notice procedures).

2. 24 hours' notice has to be given "unless for good cause such notice is impossible or impractical, in which case shorter notice can be given, but in no case may the notice be provided less than 2 hours in advance of the meeting."

F. Public Comment

The public notice of a meeting may provide for a period of public comment, during which the school board may receive information from the public. Wis. Stat. § 19.84(2). During a period of public comment, a governmental body "may discuss any matter raised by the public." Wis. Stat. § 19.83(4).

1. The open meetings law does not require that a school board provide for public comment period. The school board can do so, but does not have to do so.

2. The law only authorizes discussion and not other action.

   a. Therefore, a school board should refrain from deliberating or taking action on items that have been raised during public comment sessions and, if necessary, should place such matters on future agendas.

   b. Nevertheless, it is not true that a school board is prohibited from discussing a matter that is raised by a member of the public during the public comment period (although it is certainly safest to avoid doing so). The statute specifically authorizes discussion.

3. Governmental body members may not bring up items not specifically

designated on the agenda under a period of public comment. This may be interpreted as an attempt to circumvent the notice requirements of the Open Meetings Law.

4. School boards are not required to include their rules and regulations concerning periods of public comment on the meeting notice itself. Consequently, if your school board has rules that, e.g., limit the time citizens have to speak, subjects that they can address, or limit the period of public comment generally, the school board can enforce the rules at the meeting without reprinting them as part of the meeting notice itself.

5. Having a sign in sheet requiring that commentators provide their name if they wish to address the school board can be helpful. If commentators must be school district residents, requiring a commentator's address is also appropriate.

G. Separate Notice

Separate notice of each meeting must be given to the public at a time and date reasonably proximate to the time and date of the meeting. Wis. Stat. § 19.84(4).

H. Sub-Units Of A Parent Body

Sub-units of a parent body, such as a committee, may meet during the meeting of the parent body during recess, or directly after such meeting to discuss or act on matters that were the subject of the meeting of the parent body without public notice required under Wis. Stat. § 19.84. However, the presiding officer of the parent body must announce the time, place and subject matter of the committee meeting in advance at the meeting of the parent body. Wis. Stat. § 19.85(6).

NOTE: Don't try this at home. This procedure can be helpful if the situation is (1) absolutely critical, and (2) the school board will not be able to take equally critical action without input from a committee (as in school district's that have enacted overly strict policies that require some committee action or consideration as a predicate to board action). Nevertheless, some school districts include this statutory reference in footnotes to their agenda to give a sort of notice that something like this at least could happen.

I. Compliance With Notice

1. A school board is free to discuss any aspect of any subject identified in the public notice of the meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the subject identified in the meeting notice. *State of Wisconsin ex rel. Brian L. Buswell v. Tomah Area School District*, 2007 WI 71, ¶ 34. (*See* VII. B).

2. A school board does not need to follow the agenda in the order listed on the meeting notice unless a particular agenda item has been noticed for a specific time.

3. A school board is not required to address every item contained in the meeting

notice. A matter can be tabled or, less formally, the school board can agree not to take up a subject if it chooses to.

J. Dual Meeting Notices

Where a quorum of one governmental body regularly attends the meetings of another governmental body, and one or more of the members of the quorum is not also a member of the second governmental body, separate meeting notice should be given.

K. Meeting Notice Tips and Tricks

1. Use the meeting notice as the foundation for the school board's minutes.

2. Avoid boilerplate in meeting notices. If we know what the principal is going to address at her or his monthly report, we have to put the subject in the meeting notice. Saying "Principal's Report" every month will not be sufficient.

3. If you put your meeting notices in the newspaper, but the newspaper needs your agenda well in advance of the meeting, have the published notice state something like this:

> The final meeting notice may add to or modify the meeting notice as it appears here. Final meeting notices will generally be posted at least 24 hours before the meeting unless for good cause such notice is impossible or impractical to give. However, in no event will the final meeting notice be given less than 2 hours before a meeting takes place.

II. CLOSED SESSION

A. The Right To Close A Meeting Of A Governmental Body

1. Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the specific exemptions of Wis. Stat. § 19.85, Wis. Stat. § 19.85(1).

2. Only the elected or presiding officials may exercise the right to convene into closed session; the public does not have the right or power to close a meeting.

B. Requirements

1. The chief presiding officer must announce to all present the intention of going into a closed session. Wis. Stat. § 19.85(1).

2. The chief presiding officer must state the specific exemption or exemptions, by number, which allow such a closed meeting.

3. A motion, with a second and roll call vote must be recorded.

4. A majority vote to close the meeting is required.

5. If notice has been given of the intent to reconvene into open session in the announcement for the meeting at which the closed session is held, the chief presiding officer should also announce the estimated time at which the reconvened open session will commence.

C. Exemptions To The Open Meetings Law

A closed session may be held for any of the following purposes:

1. Judicial or Quasi-Judicial Matters. Deliberations concerning a case which is the subject of any judicial or quasi-judicial trial or hearing before the governmental body. Wis. Stat. § 19.85(1)(a).

2. Discharge/Discipline. Considering dismissal, demotion or discipline of a public employee provided the public employee is given actual notice of the evidentiary hearing prior to the final action being taken and the notice contains a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. Wis. Stat. § 19.85(1)(b).

3. Compensation and Evaluation. Considering the employment, promotion, compensation or performance evaluation of a public employee. The discussion must pertain to a specific employee, as contrasted with general policies which do not involve specifically identified employees. Wis. Stat. § 19.85(1)(c).

4. Crime Prevention. Considering specific applications of probation or parole or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).

5. Competitive or Bargaining Reasons. Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specific public business, whenever competitive or bargaining reasons require a closed session. Wis. Stat. § 19.85(1)(e).

    a. The burden is on the governmental body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Resp. Dev. v. City of Milton*, 2007 WI App. 114.

    b. Once a tentative agreement has been entered into with a bargaining unit, the governmental body must conduct its vote as well as its deliberations leading up to the vote on final ratification in open session. 81 Op. Att'y Gen. 139 (1994).

6. Personnel Matters. Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where Wis. Stat. § 19.85(1)(b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or

involved in such problems or investigations. Wis. Stat. § 19.85(1)(f).

7. Conferring With Legal Counsel. Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved. Wis. Stat. § 19.85(1)(g).

   NOTE: Once the governmental body has convened in closed session, it may discuss or consider only those subjects specifically allowed by the statutory exemptions and is limited to matters that the presiding officer has announced would be the subject of the closed session. Wis. Stat. § 19.85 (1).

D. Closed Session Notice Tips and Tricks

1. The subject matter rule applies to the closed session portion of the meeting notice too. Of course, more guarded language is generally used to make sure that the purpose of the closed session—confidentiality—is not undermined by the language of the notice itself.

2. When a pupil issue is involved, consider including Wis. Stat. §118.125 in the meeting notice too. This is the pupil records statute. By law, pupil record information is confidential and, accordingly, this statute provides a sensible basis for a closed session as well.

   For example, an expulsion hearing could be noticed by stating:

   > The Board of Education will convene in closed session, pursuant to s. 19.85(1)(a) and (f), and 118.125, Wis. Stats., to conduct a pupil expulsion hearing. The Board may remain in closed session pursuant to s. 19.85(1)(a) to deliberate following the hearing. The Board will take action in closed session.

3. Use the closed session notice as the basis for the closed session minutes.

4. List multiple subsections of Wis. Stat. §19.85(1) if they apply, particularly when more than one item is on the closed session agenda. Avoid having one matter define how the closed session notice is written to the exclusion of other matters that will also be considered.

5. Boilerplate that only references the language of the statute is generally unlawful. Thus, if a school board has a standard notice provision that says “The school board will convene in closed session under s. 19.85(1)(c) to discuss personnel and negotiations”, and the notice has this reference every month, this is a violation of the open meetings law.

6. Consider using s. 19.85(1)(a), Wis. Stats. if the school board will hear a case and then deliberate about it.

7. Previous Attorneys General have split on the issue of whether discussing groups of employees' compensation is a proper item for closed session.

8. Include s. 19.85(1)(e) when something remains to be negotiated between the school board and another party.

E. Reconvening Into Open Session

No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of a closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session. Wis. Stat. § 19.85(2).

F. Closed Session Minutes

1. The Open Meetings Law provides that minutes of all meetings (open and closed) must be prepared. Wis. Stat. § 19.88(3).

2. In closed session, it is common practice to be specific; however, there is no statutory requirement that the minutes be specific.

3. All actions must be preserved, recorded and open to public inspection.

G. Taking Action In Closed Session

1. Governmental bodies can take final action by voting in closed session. Motions and roll call votes of each closed session must be recorded and preserved and open to the public inspection to the extent prescribed by the Public Records Law. The record must show all motions made, who initiated and seconded the motion, how each member voted and all votes taken by the body.

2. Guidelines for determining the appropriateness of voting in closed session:

    a. The governmental body must have convened itself into a proper closed session.

    b. The same reason for convening itself into closed session must apply to the need to vote in closed session, i.e., to keep the action in confidence.

    c. Mere convenience in voting in closed session is impermissible. The better practice is to notice a meeting to convene in open session, adjourn to closed session and then reconvene into open session for action where voting in open session is preferred.

III. MISCELLANEOUS PROVISIONS

A. Exclusion Of A Member Of A Governmental Body

Attendance at a closed session is limited to the body, necessary staff and other officers, such as clerk and attorney, and other persons whose presence is necessary for the business at hand. If the meeting is of a subunit such as a committee, then the members of the parent body must be allowed in the closed session, unless rules of the parent body provide otherwise. Wis. Stat. § 19.89.

B. Secret Ballots, Votes And Records

1. Secret ballots.

   Unless the statutes specifically authorize, no secret ballot may be utilized to determine any election or other decision, except the election of a body's own officers. Wis. Stat. § 19.88(1).

2. Roll-call votes.

   If a member requests that the vote of each member be recorded, a voice vote or show of hands is not sufficient unless the vote is unanimous and the minutes reflect who is present for the vote. I-95-89 (November 13, 1989).

3. Record-keeping.

   The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. Other methods, such as tape recording, are also permitted.

   Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be. However, in light of the general legislative policy of the open meetings law that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business," Wis. Stat. § 19.81(1), it seems clear that a governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted.

   Wisconsin Open Meetings Law: A Compliance Guide, Department of Justice (2010).

C. Use Of Equipment In Open Session

The governmental body must make reasonable effort to accommodate any

person desiring to record, film or photograph the meeting. Wis. Stat. § 19.90. This requirement applies only to open session.

VI. ENFORCEMENT AND PENALTIES

A. Enforcement

Violations of the Open Meetings Law may be prosecuted by:

1. The Attorney General. Wis. Stat. § 19.97(1);

2. The District Attorney upon the verified complaint of any person, Wis. Stat. § 19.97(1); or

3. The individual who filed the complaint if the District Attorney fails to commence an action within 20 days after receiving a complaint. Wis. Stat. § 19.97(4).

B. Penalties

Members of a governmental body who knowingly attend meetings in violation of the Open Meetings Law or otherwise violate the Open Meetings Law by some act or omission are subject to a forfeiture of between $25 and $300 for each violation. This is a personal liability not reimbursable by the municipality or state agency. Wis. Stat. § 19.96.

1. "Knowingly includes positive knowledge and an awareness of the high probability of the existence of a violation. *State v. Swanson*, 92 Wis.2d 310 (1979).

2. Even if a "knowing" violation has occurred, a private individual who prevails in an open meetings action may be awarded attorneys' fees and costs in order to deter future violations unless "special circumstances" exist.

3. No definition of "special circumstances" exists. However, a good faith mistake on the part of government does not amount to "special circumstances" and will not necessarily avoid an award of fees and costs.

4. No member is liable for attendance at an unlawful meeting if that member makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.

C. Actions May Be Voided

Any action taken at a meeting held in violation of the Open Meetings Law is voidable if the public interest and enforcing provisions of the law is greater than the public interest in upholding the action. Wis. Stat. § 19.97(3).

VII. OPEN MEETINGS LAW – COURT DECISIONS AND ATTORNEY GENERAL OPINIONS OF INTEREST

A. *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. Of Educ.*, 2017 WI 70 (Opinion Issued June 29, 2017).

1. Relevant Facts:

Krueger, a parent of a child who attended the Appleton Area School District ("District"), requested that the District provide an alternative ninth-grade Communication Arts 1 course that would use a different reading list because he was concerned about the content of the reading materials.

The Superintendent asked two members of the District's Assessment, Curriculum, and Instruction (ACI) Department, Steinhilber and Bunnow, to respond to Krueger's concern. Steinhilber and Bunnow decided to conduct a review of the existing book list and formed a Review Committee. They formed the Committee based upon Board Rule 361 and the ACI Department Handbook.

Board Rule 361 specified that the Board, "as the governing body of the School District, is legally responsible for all educational materials utilized within the instructional program of the [District]." It also specified that "[t]he selection of educational materials is delegated to the professionally trained and certified personnel employed by the school system" and included the following procedure: "[c]urriculum revision is an ongoing process as defined in the Board approved Appleton Area School District (AASD) Assessment, Curriculum, & Instruction Handbook. This Handbook delineates the processes leading to Board approval for curriculum revision, adoption of new courses, and implementation of curriculum materials." The Handbook was created by the ACI Department and approved by the Board on January 13, 2003.

The Handbook specifies that curriculum review should be performed on a 6-year cycle, on a course-by-course basis, by committees formed for that purpose. The first step in the curriculum review cycle is to establish a committee for program review, which must be composed of at least seventeen (17) members. After the committee is formed through an application process, the Handbook provides that the committee must identify possible materials/resources and make selections to recommend to the Board for its approval.

The Committee consisted of eleven (11) teachers, three (3) Communications Arts Curriculum Support Specialists, one (1) Library Media Specialist, and one (1) High School Principal. Bunnow served as the Chair of the Review Committee. The Review Committee held its first meeting on October 3, 2011, and the full Review Committee met a total of eight (8) times.

The Review Committee did not revise the entire curriculum for Communication Arts, but performed many of the functions that the Handbook assigned to review committees. For instance, the Review Committee identified a list of potential books for the course, reviewed them in light of course standards, sought public input on the list, and voted on which books to include. The Review Committee selected a final list of books to recommend to the Board.

The Committee eventually made recommendations to the Board's Programs and Services Committee, which voted to approve the list and bring it before the full Board. The full Board approved the list on April 23, 2012.

Krueger requested to attend the Review Committee meetings, but the District informed him that the meetings were not open to the public. Krueger filed suit alleging that the Board and Review Committee violated the Wisconsin Open Meetings Law.

2. Trial Court and Court of Appeals Decision:

The trial court granted summary judgment in favor of the District, holding that the Review Committee was not a "governmental body" under the open meetings law because it was not created by a directive of the Board.

The Court of Appeals also held that that the Review Committee was not a "governmental body" subject to the open meetings law.

The Court of Appeals reviewed the definition of "governmental body" contained in Wis. Stat. § 19.82. This definition includes, in part, "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order…" The issue before the Court was whether the Review Committee was "created by" a "rule or order."

The Court relied, in part, on a letter from the state attorney general's office, Letter from Wis. Ass't Att'y Gen. Thomas C.

Bellavia to Joe Tylka (June 8, 2005). The Tylka letter stated that in order to constitute a "governmental body," the following requirements must be met: (1) the group in question must constitute a collective body, rather than a mere assemblage of individuals; and (2) there must be a directive creating the group in question.

Only the second requirement was at issue. The Court rejected Krueger's argument that the Review Committee was created by rule or order based on the Board Rule and Handbook because neither contained any provision under which the Review Committee was created.

The Court concluded that Steinhilber and Bunnow created the Review Committee on their own initiative, and also broadened the scope of the Committee's review on their own initiative. Moreover, the Superintendent merely asked them to respond to Krueger's request and was not further involved in developing any process. Therefore, the facts did not support a finding that the Review Committee was created by rule or order.

3. Ruling of the Wisconsin Supreme Court:

The Wisconsin Supreme Court reversed the Court of Appeals and held that the Review Committee met the definition of a "governmental body" under Wis. Stat. § 19.82(1).

The Court held that "[w]here a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are 'created by…rule' under § 19.82(1) and the open meetings law applies to them."

The Court reasoned that the Board's Rule provided that review of educational materials should be handled in accordance with the Handbook, which in turn "authorized the formation of committees within a defined membership and the power to review educational materials and make formal recommendations for Board approval."

The Court explained that in analyzing whether an entity meets the definition of a "governmental body," two (2) criteria are relevant: (1) the form it takes (it must take the form of a "state or local agency, board, commission, committee, council, department or public body corporate and politic") and (2) the source of its existence in a constitution, statute, ordinance, rule, or order (it must be "created by constitution, statute, ordinance, rule or order"). Under the latter

criteria, “the relevant directive must confer upon it the collective ‘responsibilities, authority, power or duties’ that are necessary to a governmental body’s existence under the open meetings law.”

In this case, the Review Committee was a “committee” under the Wisconsin Open Meetings Law because it had a defined membership “upon whom was conferred the authority, as a body, to review and select recommended educational materials for the Board’s approval.” In particular, the Court reasoned that “[t]he Board—acting through Rule 361 and the Handbook—provided that the members of review committees would exercise such authority collectively, as a body.”

The Court further reasoned that the Review Committee was created “by rule” because when the District employees formed the Review Committee, they relied on the authority delegated to them by Rule 361 and the Handbook. More specifically, “Rule 361 and the Handbook constituted a ‘rule’ because they were adopted by the Board to prescribe the procedures for District employees to follow in reviewing educational materials and presenting them to the Board for approval.”

Therefore, the Court reversed the decision of the Court of Appeals and remanded the case to the trial court.

4. Issues to consider in evaluating open meetings issues for administrative meetings.

    a. How is the administrative agenda formulated?

        i. Is the agenda item placed before the administrative team at the board’s initiative or by board direction to the president?

        ii. Is the agenda item before the administrative team by the president?

        iii. Is the agenda item before the administrative team through the contributions of members of the administrative team?

        iv. Is the agenda item before the administrative team through public input or based on pending student issues?

    b. What is the subject being considered by the administrative team?

i. Does the subject fall within the board's statutory powers or duties?

ii. Is the matter within the decisional authority of the administration to decide and implement without delegation of authority from the Board of Education?

iii. Has the matter traditionally been identified, decided, and implemented by the administration?

c. Has the board committed to a clear policy/management distinction in governance?

d. Who dictates the timetable on which a particular issue is considered by the administrative team?

e. Is the issue resolved by means that suggest collective decision making?

i. Does the administrative team vote on its decision?

ii. Does the administrative team reach or attempt to reach consensus on the issue in order to resolve it?

iii. Does the president take input from the administrative team, but independently decide how an issue is to be resolved?

f. Is the discussion meant to be an exchange of ideas as opposed to formulation of policy or decisions?

g. Is the provision meant to be addressed for the professional development of the participants?

h. How is any resulting report to the board "packaged"?

i. As an effective recommendation?

ii. As a report?

iii. As notification of decisions that the administrative team has made or is implement?

B. Opening Meetings Law – Wisconsin Department of Justice (DOJ) Explanatory Letter

On July 26, 2016, Paul M. Ferguson, Assistant Attorney General, Office of Open Government, prepared an explanatory letter in which he responded

to concerns raised by Scott A. Ceman, Deputy District Attorney, Winnebago County District Attorney's Office, and John A. Bodnar, Winnebago County Corporation Counsel, regarding possible violations of Wisconsin's Open Meetings law in Winnebago County. The explanatory letter does not constitute an informal or formal opinion of the Attorney General under Wis. Stat. § 165.015(1), but nevertheless provides insight on the Wisconsin Open Meetings Law.

1. Relevant Facts:

Winnebago County formed a Judicial Courthouse and Security Committee (JCSC) pursuant to Supreme Court Rule 68.05. For the last four (4) years, a quorum of two (2) different subcommittees of the Winnebago County Board of Supervisors have attended the meetings of the JCSC. One subcommittee is the Judiciary and Public Safety Committee (JPSC) and the other is the Facilities and Property Management Committee (FPMC). The subcommittees only have the authority to make recommendations to the County Board. No notices or agendas of the JCSC meetings were published in advance.

In order to resolve the alleged violations, Mr. Ceman suggested that the two (2) subcommittees reconvene to hold new discussions and votes covering the previous four (4) years with proper notice to the public. He also suggested that the members of the subcommittees be replaced with other County Board members.

Mr. Ceman noted that after he raised concerns, Winnebago County adopted boiler-plate language on all public notices stating that "any county board subcommittee may have a quorum at any county meeting." Mr. Ceman also noted that Mr. Bodnar had raised the issue of a conflict of interest with the Winnebago County District Attorney investigating the matter because the District Attorney was part of the meetings and disagreed with the JCSC's decisions. Therefore, Mr. Ceman requested that the Wisconsin Department of Justice (DOJ) investigate the matter.

2. Response of the DOJ:

The DOJ explained that a meeting occurs when a convening of members of a governmental body satisfies two requirements: (1) there must be a purpose to engage in governmental business; and (2) the number of members present must be sufficient to determine the governmental body's course of action. Under the first requirement, "a body is engaged in governmental business when its

members gather to simply hear information on a matter within the body's realm of authority."

The DOJ further explained that because the JCSC is a body created by the Court, it is not governed by the Wisconsin Open Meetings Law. However, "the open meetings law still applies to other governmental bodies should a sufficient number plan to attend or regularly attend a meeting of a security and facilities committee and the subject matter is within their body's realm of authority."

In this matter, both subcommittees had a quorum present at each JCSC meeting, and the JCSC discusses issues within the realm of authority of both subcommittees; therefore, both subcommittees must comply with the Wisconsin Open Meetings Law.

The DOJ noted that the subcommittees are responsible for ensuring proper notice of the meetings, not the JCSC, but a single notice for both subcommittees may be used. Moreover, the boiler-plate language that the County created did not meet the requirements of the Wisconsin Open Meetings Law. Rather, the public notice must include the time, date, place and subject matter of the meeting, including possible closed session matters.

Furthermore, with regard to Mr. Ceman's suggestion to "redo" four (4) years' worth of discussion and votes, the DOJ indicated that such action should not be done without a thorough understanding of the facts, but the DOJ did not make any recommendations as to how to cure any potential violation of the Wisconsin Open Meetings Law.

DOJ declined to pursue enforcement of the matter based on its review and based on the indication it received that members of the subcommittees were serious about ensuring compliance with the law. Finally, the DOJ indicated that it felt its explanatory letter addressed the matter appropriately, such that an enforcement action was not necessary.

C. *Sands v. Whitnall School District,* 2005 AP 1026 (Ct. App. 2006).

Sands was hired by the Whitnall School District as a supervisor/facilitator of the District's Gifted and Talented Education Program, and signed a contract commencing July 1, 2001, and ending June 30, 2002. The District alleged that Sands' job performance was unsatisfactory and that efforts to improve that performance were unsuccessful. Consequently, the School Board met in closed session on April 29, 2002, and May 13, 2002, and discussed Sands' employment with the District. The Board

subsequently met in open session on May 13, 2002, and voted not to offer Sands a contract of employment for the 2002-2003 school year.

On April 24, 2004, Sands filed suit against the District, alleging that the District failed to comply with s. 118.24, Stats., which requires that an "administrator" receive five months' preliminary notice of the District's consideration of nonrenewal and four months' notice of final nonrenewal. The District disputed the claim that Sands was an "administrator" within the meaning of the statute.

However, during the discovery phase of the case, the District refused to answer all or part of three interrogatories, which sought information concerning the content of the two closed sessions that had been held by the Board of Education. The Circuit Court granted Sands' motion to compel discovery and the District appealed this ruing to the Court of Appeals.

The Court of Appeals concluded that the closed sessions were held in compliance with state statutes and that, based upon the plain language of the statute, the substance of what was discussed at the closed meetings is not discoverable. The Court noted that the statute does not provide for exceptions to the non-disclosure principle that applies to the content of closed session discussions. The Court reasoned that, if it were to conclude that disclosure of the substance of the closed session is permitted, it would render the statute meaningless by undermining the need for closed sessions in the first place. In this regard, the Court noted that the mere filing of a lawsuit cannot open the door to what was once closed. The Court also rejected Sands' contention that separate closed session provisions concerning evidentiary hearings should have been followed and that, consequently, she should be given access to the closed session information, holding that if an evidentiary hearing is not held, those provisions do not apply.

As a result, the Court held that the privilege of non-disclosure is implicit in state statutes governing a closed session of a school board and, accordingly, discussions that occurred in closed session are not discoverable.

D. *State of Wisconsin ex rel. Brian L. Buswell v. Tomah Area School District*, No. 2005 AP 2998 (Sup. Ct. 2007).

In *State of Wisconsin ex rel. Brian L. Buswell v. Tomah Area School District*, 2007 WL 1695166, 2007 WI 71, Wis., Jun 13, 2007 (No. 2005AP2998) (*Tomah*), the Wisconsin Supreme Court established a standard for determining how specific meeting notices must be; however, that standard is both flexible and situational.

1. Factual Background.

In June 2004, the Tomah Board of Education ("Board") held two meetings regarding a new master contract with the Tomah Education Association ("TEA"). Prior to the June meetings, some community members expressed an interest in how the Board would hire athletic coaches and whether teachers would be given preference for those positions.

On June 1, 2004, the Board held a special meeting in closed session to discuss the new TEA master contract. The tentative agreement for the new contract included a hiring procedure for coaches that gave preference to TEA members over other applicants.

The public meeting notice for the meeting's agenda stated:

> Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. §19.85(1)(c).

During the June 1 closed session, the Board did not direct its negotiations committee to seek further adjustments to the contract and indicated that it would consider ratification in a subsequent open session.

On June 15, 2004, the Board held a regular meeting preceded by a public notice stating, in relevant part: "New Business — Consideration and/or Action on the Following: TEA Employee Contract Approval." At that time, the Board ratified the TEA master contract in open session.

Following the June 15 meeting, Brian Buswell filed a complaint alleging that the June 1 meeting notice was not "reasonably likely to apprise members of the public" of the subject matter of the meeting. In addition, Buswell claimed that the June 15 meeting notice was deficient because it did not state that the Board would act upon the new hiring policy for coaches.

2. The Supreme Court's decision.

The Supreme Court's majority opinion first overruled *State ex rel. H.D. Enterprise. II, LLC v. City of Stoughton*, 230 Wis.2d 480, 602 N.W.2d 72 (Ct.App.1999). In that case, a City Council agenda item regarding the granting of a liquor license was found to provide sufficient public notice, because it used the word "licenses" under the agenda heading of "new business." The Supreme Court reasoned that, because it is declared policy of the state that the

public is entitled to the fullest and most complete information regarding the affairs of government, a public meeting notice that only informs the public of the general topics to be discussed is not always “reasonably likely to apprise members of the public.”

The Supreme Court replaced the *H. D. Enterprise* rule with what it referred to as a “reasonableness standard.” This standard requires that a public entity account for the circumstances surrounding a particular issue to determine how much detail a notice must include. The Court indicated that, under this standard, factors such as the following need to be considered: (1) the time and effort that would be needed to provide more detailed notice and whether efficient operations of the entity would be compromised; (2) whether the subject is of particular public interest; and (3) whether the matter involves routine or novel issues, with routine matters requiring less specificity because the public can anticipate the matter to be addressed.

The Court then applied these three factors to the case before it, and determined that the notice for the June 1 closed session was not specific enough, but also concluded that the June 15 notice for the open meeting was sufficiently specific.

3. Considerations and questions arising under Tomah.

a. Questions raised by Tomah.

(1) The Court gave remarkably little guidance on how to apply its *Tomah* standard in other cases. Further, the three factors identified by the Court were not derived from its own precedent and, as a result, prior case law is not available to provide direct assistance in applying these factors.

(2) The Court's discussion on how to apply the factors identified is indefinite. How will an entity's awareness of items of particular interest or uniqueness be evaluated?

(3) The Court's application of the three factors to the facts in *Tomah* does not do much to clarify how this standard will be applied in the future. The Court suggests that the public was particularly interested in the selection policy for coaches. Assuming the Court's understanding of the public's level of interest was accurate, and assuming it would not have interfered with the District's operation to place the topic of the coaching contracts on the agenda, why then did the Court conclude that separate notice of the coaching issue was not required?

b. Considerations for public entities in applying the Tomah standard.

(1) **Open and closed sessions covered**. This case applies to open as well as closed sessions and, consequently, broad open meeting agenda items that have been commonplace in the past will likely have to be reviewed to ensure that the public has adequate notice of what is likely to be discussed. For example the Attorney General previously found a notice provision that stated "report of the Village Administrator" to be deficient. The Court's decision suggests that it may also find such notice insufficient, particularly where an administrator plans on discussing items that are unique or that are topics of public interest.

(2) **Boilerplate rejected**. Closed session agendas will need to at least cite the correct statutory subsection for a closed session and provide specific information regarding the subject to be discussed in the closed session. Making a boilerplate reference to the statutory language contained in the subsection of the statute that is cited will generally not be sufficient.

(3) **Content of closed session notice**. Closed session agendas generally must provide enough information so that a member of the public will understand why the matter is being discussed in closed session and why it properly falls under the statutory provision that has been cited. At the same time, closed session agendas cannot provide so much information that the confidential purpose of having a closed session is undermined.

(4) **Burdens/governmental efficiency factor likely minimal**. The Court's identification of the burdens associated with providing more detailed notice is a factor that should be relied upon with caution. First, it is not clear that reviewing courts will evaluate the burdens of providing more detailed notice in a manner that corresponds to that of school officials (indeed, in the context of public records cases, the courts have previously observed that responding to records requests is itself an important function of local government, and will likely see the formulation of meeting notices as similarly important). Second, this factor potentially has a double-edge, because when a public body cannot show that definable burdens or impositions on government efficiency are associated with providing notice on a particular matter, this may bolster claims that notice was not specific enough. Therefore, public bodies should assume that assembling meeting notices is an important, team effort that requires active participation by directors and administrators, and specific schedules for providing input.

(5) **Factors to consider**. Although the Court does not define how one determines whether a subject is a routine matter or, alternatively, a matter of particular public interest, we can identify factors and inquiries that help to apply this standard. They might include:

(a) Does the subject routinely appear as part of every board agenda or is it a special policy issue to be debated and resolved? It seems logical to conclude that ministerial, routine matters may not be "matters of particular public interest" to the same extent as policy issues confronting the board.

(b) Is the subject one that has had substantial media coverage?

(c) Is the issue a matter that has resulted in an appreciable level of communication from the public to administrators or the board?

(d) Does the matter involve significant expenditures?

(e) Is the issue one that has been presented by groups that have or are likely to have substantial constituencies?

(f) Is the board considering making changes in existing policy that have a relatively broad impact on students, or technical college constituents?

(g) Is it possible that final action might be taken on the matter at the meeting in question?

(h) Does the board enjoy broad discretion on the issue under consideration?

(i) Can the board reasonably anticipate the course of the board's discussion and action? The Court's opinion must be considered in light of already-established principles under the Open Meetings Law, such as the prohibition against walking quorums, negative quorums, etc. As a result, existing prohibitions against communications outside of public meetings will, in at least some cases, make more specific notice difficult to provide, because board members are expected to have their debates at the meeting itself, after public notice of the meeting already has been provided.

(j) Can members of the public understand how an issue under consideration might relate to them by reading the notice for the meeting? The corollary to this point is that notices that identify possible board action are, by their nature, generally more specific and more illuminating to members of the public that read the meeting notice.

NOTE: These factors and inquiries cannot be considered in isolation and certainly do not capture all of the issues that may arise in evaluating the sufficiency of public notice, but can help to determine whether matters are routine or, alternatively, matters of particular public interest.

E. *Pulera v. Town Bd. of the Town of Johnstown*, 2018 WI App 8, 2017 WL 6062050 (unpublished).

1. Relevant Facts:

The dispute arose from changes to an intersection within the Town of Johnstown. Plaintiff alleged that the Town Board failed to comply with the notice requirements of the Open Meetings Law with regard to a Town Board meeting held on October 8, 2017, and a Rock County Public Works Committee meeting held on October 11, 2017, that all three (3) Town Board Members attended.

Plaintiff argued that notice for two (2) Town Board meetings was deficient since it was not posted on the Town's website. Plaintiff further argued that because all three (3) Town Board members attended the Rock County Public Works Committee, it constituted a meeting of the Town Board which was not noticed.

2. Ruling of the Court:

The Court of Appeals quickly dismissed the plaintiff's claim regarding notice of the Town Board meeting on October 8, 2017. The Court stated that the unrefuted evidence established that the Town Board Clerk posted notice of the meeting more than twenty-four (24) hours in advance at three (3) locations where notices are customarily posted. The plaintiff conceded that posting the notice on the Town's website is not required by the Open Meetings Law. Therefore, there was no dispute of material fact and no basis to conclude that the Town's notice was insufficient.

Next, the Court considered whether the Town Board members convened a meeting when they all attended the Rock County

Planning Commission meeting. The Town conceded that no notice was posted before the meeting. Therefore, the only question was whether their attendance constituted a meeting under the Open Meetings Law.

The Court noted that the definition of a meeting is "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." The Court further noted that a meeting is presumed to be for the purpose of exercising the responsibilities, authority, power, or duties delegated to the body if one-half or more of the members are present. However, the definition of meeting excludes social or chance gatherings which are not intended to avoid the Open Meetings Law.

The Court reviewed the undisputed evidence and noted that one (1) Board Member testified that he attended the meeting because he believed the other two (2) would be working. A second Board Member decided to attend the meeting because rain prevented him from farming. The third Board Member stated that he was able to rearrange his work schedule and decided to attend the meeting last minute. All three (3) Board Members stated that they did not expect to see the other Board Members at the meeting.

The Court concluded that based on the Board Members' uncontroverted testimony, they had not planned to attend the meeting together. Therefore, their attendance at the Rock County Planning Commission meeting had been a chance gathering that did not constitute a meeting.

F. *State ex rel. Zecchino v. Dane Cty.*, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203.

1. Relevant Facts:

Plaintiff leased three (3) billboards near the Dane County Regional Airport. Plaintiff negotiated a lease renewal, which required County Board approval. The lease was rejected on a close 18-16 vote of the County Board. The plaintiff brought an action to invalidate the vote by claiming that a member of the County Board engaged in closed discussions by email to negatively impact the vote.

Plaintiff specifically alleged that Board Supervisor Paul Rusk contacted several other board supervisors by email and phone, in violation of the Open Meetings Law. The emails in dispute included:

a. A December 2nd email from Mr. Rusk to two (2) Supervisors asking "what do you think about doing away with these billboards?" and telling the other supervisors that he opposed the billboards. One of the supervisors responded that she did not have a strong opinion about the issue.

b. A December 3rd email from Supervisor Rusk to three (3) other supervisors telling them that he asked three (3) neighborhood associations for input and all three (3) opposed the billboards. Again, only one (1) supervisor responded by stating, "I support removal."

c. A March 3rd email to a constituent asking them to provide feedback at a committee meeting regarding the billboard lease. Another supervisor was courtesy copied on the email.

d. An April 4th email from Supervisor Rusk to a supervisor in which he asked her if she was "ok" voting against the billboard lease and that he was trying to conduct a "vote count."

e. Two (2) emails sent to constituents after the vote in which Supervisor Rusk wrote "we lost some votes who told me they were with us" and that "the Trump Card was the 1998 plan–that saved it. But…several didn't understand. But it secured my base–they had a strong argument to hang on."

Plaintiff argued that the emails were proof that Supervisor Rusk and the other board supervisors violated the Open Meetings Law by engaging in an illegal "walking quorum."

2. Ruling of the Court:

The Court of Appeals held that the plaintiff failed to state a claim upon which relief could be granted with regard to the open meetings allegations. The Court reasoned that the Wisconsin Supreme Court established the two (2)-part test for an open meeting violation in *State ex. rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77 (1987).

Under *Showers*, the elements of an open meetings violation are: 1) there is a purpose to engage in governmental business, be it discussion, decision, or information gathering; and 2) the number of members present must be sufficient to determine the parent body's course of action regarding a proposal.

The Court further reasoned that a "walking quorum" is a series of gatherings among separate members, each of which is less than a quorum, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. Therefore, the Court reasoned, an essential feature of a walking quorum is the element of agreement among the various members of a body to act uniformly in sufficient numbers to reach a quorum.

The Court concluded that Supervisor Rusk's emails did not reflect a tacit agreement between the supervisors to vote against the lease. The Court described Supervisor Rusk's emails as mostly one-sided and either asking for supervisors' opinion or providing his own. The Court further concluded that regardless of the email content, the plaintiff failed to show that a sufficient number of supervisors were involved to constitute a quorum. In total, only eight (8) of the thirty-four (34) supervisors were contacted. Therefore, eight (8) supervisors were insufficient to establish even a negative quorum of the board.

G. Notice of Open Meetings: City of Lake Geneva, (Letter of March 5, 2004, to Charles Rude).

The City of Lake Geneva asked the Attorney General to consider a practice that it observed in its open meeting notices, where city council agenda items were entitled, e.g., "staff comments," "alderman comments," and "mayor comments." These individuals were given an opportunity to comment about forthcoming events and other informational matters under these agenda provisions. The City was careful to take no action, have no "action discussion," or vote of any kind on matters that were raised under these headings. The Attorney General was asked whether this practice violates the open meeting law.

The Attorney General noted that every public notice of a meeting must provide the "subject matter of the meeting … in such form as is reasonably likely to apprise members of the public and the news media thereof." The Attorney General indicated that, because the most complete information "compatible with the conduct of governmental business" is required, "the notice should be specific." Accordingly, the Attorney General reasoned that when a member of a governmental body knows in advance of the time a public meeting notice is given that a matter come before the body or when the chief presiding officer of the governmental body is aware of such matters, those matters must be included in the meeting notice.

Consequently, when descriptions of the subject matter of a meeting are given through a public meeting notice, the public is entitled to "the best notice that can be given at the time the notice is prepared." While noting

that a subject matter designation such as “licenses” had been interpreted to be sufficient notice to the public that a liquor license would be considered, general subject matter designations such as “miscellaneous business,” “agenda revisions,” or “such other matters as are authorized by law” would not be acceptable. The Attorney General concluded that “it is my opinion that the practice you describe is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful.”

1. The Attorney General’s Opinion places a premium on advance board member communications.

    a. For formulating public meeting notices.

    b. For public bodies to manage meetings where individual board members may insist that particular issues be discussed.

        NOTE: Superintendents may wish to consider contacting board members before board meetings to determine if they are aware of specific matters that should be added to the agenda (e.g., e-mail). However, bear in mind that this procedure should allow for any final meeting notice to be completed and posted no less than 24 hours prior to the meeting (2 hours for any emergency additions to the agenda) and, in addition, comply with any established board procedures in formulating meeting notices (e.g., board chair determination of what is to be included in particular meeting agendas).

2. Superintendents that make an effort to provide meeting notices to the local newspaper may need to take greater care to advise the newspaper that the meeting agenda may be supplemented after the notice is published in order to comply with the open meetings law. Superintendents may even consider footnoting the meeting notice that appears in the newspaper (some notices must be submitted a substantial period of time before the meeting itself in order to meet the newspaper’s publishing deadlines) and specifically state that the meeting notice may be supplemented. However, care should be taken with the specific language used:

    a. A school district may wish to state that:

        This notice may be supplemented with additions to the agenda *that come to the attention of the board prior to the meeting*. A final agenda will be posted and provided to the media no later than 24 hours prior to the meeting or no later

than 2 hours prior to the meeting in the event of an emergency. (Emphasis supplied for discussion purposes only).

The benefit of this language is that it assures the media that any supplementation will be only with matters that come to the attention of the board after the original notice was formulated. However, this places a burden on board members to communicate effectively before the first notice is prepared, because the media and members of the public may react negatively if they learn that board members were aware of a particular agenda item, but simply neglected to include it in the agenda that was published.

b. A less demanding and more practical version of this language might be:

This meeting notice may be supplemented in order to comply with Wisconsin's open meetings law. If this notice is supplemented, the final notice will be posted and provided to the media no later than 24 hours prior to the meeting or no later than 2 hours prior to the meeting, in the event of an emergency.

3. Public comments sections of meetings do not provide flexibility under the Attorney General's opinion. Directors are also electors and citizens, and some might ask whether this means that a board member can simply raise issues during the "public comment" section of a board meeting (and, thereby, avoid the reasoning of the Attorney General's opinion).

However, the Attorney General specifically noted that the public comments section of meetings is authorized by statute to allow governmental bodies to hear from the constituents they serve, but also noted that these statutes make such an allowance:

> …because citizens do not have access to the body's process for creating meeting notices. The members of governmental bodies and the officials of the governmental unit are not so limited. They have regular opportunities to suggest meeting subjects to the presiding officer responsible for establishing the agenda.

The Attorney General concluded that allowing members of the body and governmental officials to present nonspecific "informational

items" is "even more troublesome," because information "by definition relates to a particular subject matter." Therefore, she concluded that there is "no good reason" why a board cannot include specific agenda items that are known to board members at the time the agenda is formulated.

H. Attorney General Opinion On Whether Administrative Team Meetings Are Subject To The Open Meetings Law. (*Informal Opinion to Joe Tylka* of June 8, 2005).

1. The Attorney General's reasoning.

The Attorney General was also asked recently to determine whether "certain meetings between the Superintendent … and the District's Management Team" are covered by Wisconsin's Open Meetings Law.

The District's school board had directed the superintendent to formulate recommendations to address the District's budget deficit. According to the requestor, the superintendent held two meetings with the management team as a result of that directive, although it was conceded that the management team regularly meets on a bi-weekly basis for other purposes.

The Attorney General indicated that two factors would have to be present to conclude that the management team's meetings qualified as meetings of a "governmental body" under the Open Meetings Law: (1) the group must constitute a collective body, rather than a mere assemblage of individuals, and (2) there must be a directive creating the group in question.

The Attorney General noted that the superintendent viewed the management team's meetings as meetings of "administrative staff," rather than meetings of a separate governmental body that has been vested with identifiable governmental powers and duties. However, she also observed that the management team engaged in an advisory process that resulted in a written memorandum, collectively issued, that made joint recommendations directly to the board regarding the District's budget deficit. Noting that the management team did not merely consult with the superintendent, but also acted as a collective body to formulate budget recommendations, the Attorney General concluded that it is "more likely than not" that a court would find the management team acted "as a separate, collective, advisory body to the board."

Turning to the second issue, the Attorney General noted that, when an individual governmental official creates an advisory body

pursuant to properly delegated authority, that advisory body is treated as if the governmental body itself had directly created it. However, she also noted that, in this case, the superintendent reported that no such directive had been given to him by the Board of Education. Instead, the superintendent maintained that the initiative to develop budget recommendations for the board originated with the members of the management team. She concluded that, if this were the case, the meetings in question were likely not held pursuant to a "rule or order," and thus would not be subject to the Open Meetings Law.