



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857

August 4, 2005

Mr. John Dowling  
University of Wisconsin-Madison  
Department of Legal and Executive Affairs  
361 Bascom Hall  
500 Lincoln Drive  
Madison, WI 53706

Dear Mr. Dowling:

You asked in March 2004 for my informal opinion about the application of the open meetings law to the Oversight and Advisory Committee ("OAC") of the University of Wisconsin Medical School ("UWMS"). Over the ensuing months my office counseled you and others in your office as we attempted to establish a grant process that I believed conformed with this state's open meetings law. In December of 2004, before we reached such an agreement, the OAC awarded thirty-three grants. This office then received complaints from both the Insurance Commissioner and Freedom of Information Council that the grants awarded in December 2004 violated the open meetings law. Prior to initiation of investigation of those complaints, the OAC and UWMS agreed to discuss modifying its grant-awarding process to take into consideration not only the concerns of the complainants, but also those previously expressed by this office. This opinion pertains to this revised grant award process.

By way of background, the OAC was created to satisfy a requirement of the March 2000 order of the Wisconsin Insurance Commissioner pertaining to the conversion of Blue Cross & Blue Shield United of Wisconsin ("BCBSUW") from a tax-exempt to a for-profit corporation. The Insurance Commissioner's order permitted the conversion, subject to various conditions. Among other terms, the March 2000 order directed that the Wisconsin United for Health Foundation ("WUHF"), after selling the BCBSUW stock, distribute the proceeds of the stock sales in equal amounts to the UWMS and the Medical College of Wisconsin ("MCW") to be utilized to promote public health initiatives in communities around Wisconsin. The order directed the governing bodies of the two medical schools to form committees with diverse membership to oversee the expenditure of the 35% of the funds received from the stock sale for these public health initiatives. To ensure that the two medical schools were publicly accountable for the expenditure of the public health initiative funds, section 2(2) of the March 2000 order provided that the oversight committees had authority over the application of the funds allocated for public health purposes, and specifically required that the committees "shall conduct themselves in accordance with standards consistent with the Wisconsin public meeting and public record laws."

Mr. John Dowling  
Page 2

The UWMS has created The Wisconsin Partnership Fund for a Healthy Future ("Partnership Fund") to administer grants that are designed to support Wisconsin-based projects that develop community-academic partnerships specifically focused on health promotion, disease prevention, health policy and health disparities by addressing the State of Wisconsin's health plan and the Partnership Fund's mission, vision and guiding principles. The Partnership Fund will solicit requests for innovative grant proposals from various public or community health groups. In 2004, two types of competitive grants were awarded: planning grants and implementation grants. Planning grants were limited to \$25,000, and do not require the community group or local organization to partner with a UWMS faculty member. Implementation grants were limited to \$150,000 per year for up to three years. Implementation grants require the public or community health group seeking funding to partner with a UWMS faculty member.

The OAC is the UWMS's oversight committee called for in the March 2000 order of the Insurance Commissioner. Pursuant to the March 2000 order, the OAC consists of four community members, four UWMS members and one member appointed by the Insurance Commissioner. The OAC directs and approves funds for public health initiatives in collaboration with the UWMS. OAC members also review, monitor and report on funds committed for medical education and research.

In late 2004, UWMS completed the first round of competitive planning and implementation grants. The OAC evaluated 225 proposals from community and public health organizations. Twenty planning grants and 13 implementation grants were awarded. Following the completion of that first grant cycle, after complaints mentioned above were filed with this office, the OAC reviewed the procedures it uses in evaluating the qualifications of individuals selected to review grant proposals, and in evaluating the grant proposals submitted to it, has proposed some changes for the 2005 grant cycle. You have asked me to provide an informal opinion as to whether the proposed changes are consistent with the open meetings law.

For the 2005 grant cycle, the OAC proposes that grant applications will be reviewed under a multi-stage process. In the first stage, UWMS program staff will determine whether each grant proposal meets the Request for Partnership ("RfP") criteria for proposals. In the second stage, each proposal that satisfies the RfP criteria will be independently evaluated by three reviewers appointed from a larger list of more than thirty reviewers selected by the OAC. Each of the three reviewers will individually and independently make comments about the proposal, and score it using a point system that is disclosed to the applicants and emphasizes the Partnership Fund's priority for innovative proposals. In the third stage, UWMS program staff will organize and submit to the OAC a compilation of the three reviewers' scores and comments for each eligible grant proposal. In the fourth stage, the OAC will discuss the proposals, composite scores and comments and will make a recommendation to the Dean of the UWMS as to which grant applications to fund. After the final decision on which proposals to fund, the identities of the successful grant applicants will be announced to the public, along with the

pertinent details of the initiatives that will be funded. Because of the high level of interest in the initiatives to be funded by the Partnership Fund in 2004, the OAC received many more meritorious proposals than it was able to fund that year. The OAC expects that there will also be more meritorious grant proposals in 2005 and subsequent years than can be funded. Unsuccessful applicants for 2005 grants will be permitted to request and receive a summary statement regarding their proposal, including the reviewers' minimally edited comments and the average score received by their proposal. Unsuccessful grant applicants in any funding cycle may reapply for funding in any subsequent cycle. The OAC expects that some of the unsuccessful applicants in the 2004 round of grants will apply for funding in 2005.

For the 2005 grant cycle, the OAC proposes that it will evaluate and select the individuals to serve on grant review panels in open session, except in unusual cases where the OAC needs to consider information about the individual which would adversely affect the individual's reputation if discussed in public.

It is my informal opinion that the OAC must meet in open session to discuss the qualifications of individuals being considered to serve as grant reviewers, except that the OAC may, pursuant to Wis. Stat. § 19.85(1)(f), close a portion of such a meeting if a member of the OAC has actual knowledge of information that will have a substantial adverse effect on the reputation of a particular nominee, and knows that the information will be disclosed during the discussion of the nominee's qualifications.

The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

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 par. (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.

An example is where a state employee was alleged to have violated a state law. *See Wis. State Journal v. UW-Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990). This exemption, however, is not limited to considerations involving public employees, so it could potentially be invoked in circumstances like the OAC subcommittee's consideration of nominations to the master list of grant reviewers. For example, the Attorney General has concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation. At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. The exemption applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure

only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). 74 Op. Att'y Gen. 70, 72 (1985).

For the 2005 grant cycle, the OAC proposes that it will review and deliberate grant applications in open session, except when applications contain trade secrets or proprietary information of the applicant. Grant application forms for 2005 will contain a section in which the applicant can provide details about whether it considers its proposal to contain proprietary information and/or trade secrets over which it desires to maintain confidentiality. OAC staff and, if necessary, university legal counsel will then review those applications to confirm whether or not they indeed contain proprietary information and/or trade secrets that would authorize closed session review and deliberations. If it becomes necessary during the discussion of any particular grant to consider proprietary information or trade secrets contained in it, the OAC proposes to complete its discussion of the proposal's non-proprietary and non-trade-secret aspects, to table further consideration of that particular grant until all other grants have been reviewed, and to convene at the close of open session discussion of all grants a closed session under Wis. Stat. § 19.85(1)(e) to consider the proprietary and/or trade secret information contained in any of the proposals under consideration. The OAC proposes to return to open session after any closed session to vote on the various grant proposals before it.

Wisconsin Stat. § 19.85(1)(e) allows governmental bodies to convene in closed session for the purpose of "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." The members of governmental bodies must keep in mind that this exemption applies only when "competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). The exemption is restrictive rather than expansive. Mere inconvenience, delay, embarrassment, frustration or even speculation as to the probability of success would be an insufficient basis to close a meeting. By using the word "require," the Legislature placed a strong burden on a governmental body considering whether to close a meeting. Correspondence, February 12, 1979.

The OAC has strong, legitimate interests in obtaining the highest quality innovative grant proposals. The Partnership Fund's emphasis on soliciting innovative proposals necessarily means that it seeks proposals that contain original ideas. Grant proposals submitted to the OAC will often contain the UWMS faculty partner's secret research design, financial information of the partnering community group, privileged information, proprietary information protected by a nondisclosure agreement and proprietary information that belongs to an organization that is partnering with the grant applicant. The Partnership Fund instructs grant applicants to identify those portions of the grant proposal that contain such trade secrets, financial information and proprietary information. The OAC's evaluation of the merits of competing grant proposals will likely involve a discussion of information that the grant applicant has good reason to keep confidential because of its value to others who are also competing for grant funds. Moreover, because the OAC invites unsuccessful grant applicants to reapply during a subsequent grant

cycle after considering the reviewers' critical comments, unsuccessful grant applications continue to have competitive value to the applicants even after a particular grant cycle is completed. If an unsuccessful grant applicant's original ideas, trade secrets and proprietary information were disclosed to the public as part of the OAC's evaluation process, however, a competing UWMS faculty member or partnering community organization could simply copy the original idea and resubmit it during a subsequent funding cycle. Without an assurance by the OAC that it will keep confidential the portion of its evaluation that considers the original ideas, trade secrets, and proprietary information designated by the grant applicant, organizations whose proposals contain these features might decline to submit their proposals to the OAC.

It is my informal opinion that the competitive interests of the OAC in maintaining the fairness of the grant proposal evaluation process and in receiving the highest quality proposals, are sufficiently strong that the exemption of Wis. Stat. § 19.85(1)(e) authorizes OAC to evaluate in closed session the limited portions of a grant application relating to the applicant's original ideas, trade secrets or proprietary information. This conclusion is also supported by legislative policy in related areas. For example, Wis. Stat. § 16.75(2m)(f) provides that "[i]n opening, discussing and negotiating proposals, the department [of administration] may not disclose any information that would reveal the terms of a competing proposal." Similarly, regulations of the National Institutes of Health provide for closing the meetings of peer review groups that review grant applications and contract proposals. 69 Fed. Register, no. 2 at 277-78 (January 5, 2004), creating 42 C.F.R. § 52h.6(b). To ensure that the public is not deprived of information it is entitled to receive about the evaluation of grant proposals, the OAC's presiding officer and legal counsel must be diligent about confining the Wis. Stat. § 19.85(1)(e) closed session to a discussion of only those grant proposals that contain trade secrets or proprietary information, and must not allow the discussion to include any aspects of the grant proposal which were or should have been discussed in open session.

Based on its experience in the 2004 grant cycle, the OAC anticipates that one or more 2005 grant applications may require a discussion of performance-related or discipline-related information about the applicant's UWMS faculty partner. If it becomes necessary during the discussion of any particular grant to consider performance—or discipline-related information about the UWMS faculty partner, the OAC proposes to complete in open session its discussion of information for which a closed session would not be justified, to table further consideration of that particular grant until all other grants have been reviewed and to convene at the end of open session discussion a closed session under Wis. Stat. § 19.85(1)(c) to consider performance—or discipline-related information about the UWMS faculty partner. As with trade secret or proprietary information, the OAC would then reconvene to open session to vote on the grant proposals.

It is my opinion that the OAC may consider in closed session those limited portions of particular grant proposals that require the OAC to evaluate the performance of the UWMS faculty partner affiliated with the proposal. Wisconsin Stat. § 19.85(1)(c) authorizes a closed

Mr. John Dowling  
Page 6

session for “[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.” By partnering with a community organization to compete for grant funds, the faculty member has submitted himself/herself to the OAC’s jurisdiction. Four members of the UWMS serve on the OAC. Those faculty members may have relevant knowledge about the faculty partner’s ability, capacity or quality which would be an important factor in the OAC’s deliberations about whether to award a grant to the faculty member partnered with the grant applicant. Wisconsin Stat. § 19.85(1)(c) allows the OAC to convene in closed session for the limited purpose of considering data related to the faculty partner’s performance. As is the case with closed session discussion of trade secret and proprietary information, the OAC’s presiding officer and legal counsel must take steps to ensure that closed session discussion is limited to the subjects for which the closed session was called.

I hope the interpretations of the open meetings law in this letter are helpful to the OAC as it continues to solicit, evaluate and fund grant proposals designed to promote public health, in a manner that complies with the Insurance Commissioner’s directive to operate in accordance with the standards of the open meetings law.

Very truly yours,

  
Peggy A. Lautenschlager  
Attorney General

PAL:BAO:ajw