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VIA FACSIMILE AND U.S. MAIL

Mr. Don Huebscher
Eau Claire Leader-Telegram
701 South Farwell Street
Eau Claire, WI 54701

Dear Mr. Huebscher:

This letter is in response to a letter of May 13, 2008, in which Mr. Tom Giffey asked the Attorney General's Office to respond to several questions about the requirements of Wisconsin's open meetings law with regard to decision making and record keeping for closed session meetings of a governmental body. At the request of Mr. Giffey and yourself, I am providing an expedited response to those questions, with the caveat that this shortened time frame does not permit a complete analysis. If you should require a more detailed discussion of these matters, you may resubmit the written request and a response will be prepared in the ordinary course of business of this office.

The first question asks whether governmental bodies are required to record minutes of closed session meetings. Under section 19.88(3) of the Wisconsin Statutes, a governmental body is required to create and preserve a record of all motions and roll call votes at its meetings. That requirement applies to both open and closed sessions. Written minutes are the most common method that bodies use to comply with the record keeping requirement, but that requirement can also be satisfied if the motions and roll-call votes are recorded and preserved on a tape recording.

As for the substantive content of a record under section 19.88(3), the record of any roll-call vote should include the vote of each member on the proposal in question. Although the statute does not indicate how detailed the description of a motion must be, the general legislative policy of the open meetings law is that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business." Sec. 19.81, Wis. Stats. In light of that policy, it seems clear that a governmental body's records should provide the public with an intelligible description of the essential substantive elements of every action or determination made by the body on any item of business. In addition, other statutes outside the open meetings law may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. *See, e.g.*, secs. 61.25(3) (village clerk); 62.09(11)(b) (city clerk);

59.23(2)(a) (county clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb), Wis. Stats. (board of review).

The second question asks whether it is permissible for a governmental body in closed session to make decisions by consensus, without taking a formal vote and without creating any record of such decisions. Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a particular decision is made by consensus or by some other method, section 19.88(3) still requires the body to create and preserve a record of that decision.

Furthermore, as already noted, such a record should include an intelligible description of the essential elements of every action or determination made by the body on any substantive item of business. Under standard principles of parliamentary procedure, a deliberative body should not make such decisions unless a formal motion has been presented to the body. Even if a body chooses to make some decisions without formally stating a motion, however, that does not excuse the body from the requirement of preserving a complete and intelligible record of each of its substantive actions. Of course, the most prudent way of satisfying that mandate is for the body to simply follow basic parliamentary principles by requiring that all substantive actions and determinations be brought before it by motion and that all such motions be duly recorded.

It is nonetheless possible that there may be some decisions or determinations that are so minor, subsidiary, or incidental in nature that section 19.88(3) would not require a body to create a separate record of them. Neither the courts nor this office have previously addressed that question and no conclusions can be reached without considering the specific facts about the actual decisions at issue. Regardless of where the outer limits of the record-keeping requirement under section 19.88(3) may lie, however, it is clear that every action or determination made by a governmental body on any substantive item of the body's business lies well within those limits. Accordingly, a body must create and preserve an intelligible record of the essential elements of all such decisions regardless of the decision-making method used and regardless of whether a formal motion has been presented to the body.

Sincerely,

Thomas C. Bellavia
Assistant Attorney General

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