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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 12, 2004

Mr. Dan Benson
Milwaukee Journal Sentinel
Cedarburg Bureau
W66N200 Commerce Court
Cedarburg, WI 53012

Re: Your Various Questions Regarding the Use of E-Mail Transmissions by Public Officials Under the Open Meetings and Public Records Laws, Wisconsin Statute Chapter 19

Dear Mr. Benson:

Over the past two weeks or so, you have been in touch with the Department of Justice regarding questions about e-mail practices used by various officials in Ozaukee County. You have also provided this office with various news stories prepared by you, some sample e-mail transmissions and correspondence regarding this controversy. I am writing this letter to try to answer some of your questions and clarify what appears to be some misunderstandings about the Department of Justice's current interpretation of state law.

As of this time, the Department of Justice's Public Integrity Unit has not received a complaint about the e-mail practices of Ozaukee county officials. Our office has not conducted an investigation into those particular practices, nor do we have a complete set of any e-mail transmission records which may have been maintained by officials. Thus, we are not in a position to give you an opinion as to the specific practices covered by your various news accounts.

Nonetheless, this Department has gone on record on numerous occasions to advise elected officials about the need to treat e-mail exchanges carefully in order to comply with both the state's public records law and the open meetings law. I am happy to reiterate for you below, the basic advice we have given public officials, members of the public, and the media at various seminars our office sponsors statewide as well as in response to calls and letters requesting advice. I would note that this advice has been consistently applied by this office for at least the past three years or more, as documented in various publications produced by this Department for

the public and elected officials. It would also be fair to say that the following factors would be applied by the Department in decisions related to pursuing potential violations of the law.

The open meetings and public records laws have not been amended since before e-mail became such a popular and efficient means of communication. However, applying the basic principles in the law and the general policy intent, it is clear that e-mail communications must be conducted and preserved in a way that ensures the public can access information about how public officials conduct the public's business.

First, e-mail communications by government officials and employees are public records, just like letters, other documents, or computer data. Wis. Stat. § 19.32(2). Under the public records law, every governmental body must have a records retention policy published in a public place. Wis. Stat. §§ 19.33, 19.34. E-mail is subject to that policy and must be maintained according to whatever policy the governmental unit has adopted regarding records retention. Elected officials are the custodians of their own documents under the public records law because they are included in the definition of "authority" in Wis. Stat. § 19.32(1). Thus, if they choose to use e-mail as a form of communication, each elected official is responsible for maintaining those records so that they can be accessed according the governmental body's records policy. This would apply to home computers as well as office computers, if the topic of the e-mail is the business of the governmental unit, rather than personal communications. The same is true with respect to letters or files an elected official may keep at his or her home. While the governmental body may be well advised to adopt procedures and methods to make records retention easier and more consistent, the responsibility is that of the elected official to maintain his or her records consistent with the law.

Whether or not e-mail implicates open meetings law issues is a more complicated question and the answer depends heavily on the specific facts of each individual situation. The answer to the question can best be described as depending on whether or not the e-mail exchange more closely resembles "correspondence" or a "conversation." When e-mails are exchanged in close proximity in time to each other among a group of elected officials, they can become much more like a phone or personal conversation or meeting, than a group of letters. Instant messaging makes this all the more likely. However, the same problem could occur if people are responding quickly to each other or "forwarding" or "replying to all" in e-mails even without instant messaging.

An open meetings violation may occur if elected officials are instant messaging or contacting each other via e-mail within a close time frame if: 1) enough of them are involved in the messaging to determine the body's course of action, and 2) there is a purpose to engage in governmental business. An open meetings violation could also occur if a single official were to e-mail other officials in succession, asking for their support of a particular matter or position. If the sender (or others forwarding the sender's e-mail) were to reach enough officials to constitute

a quorum necessary to take the action contemplated in the e-mail, or to block a contemplated action, then a "walking quorum" or "negative quorum" violation may occur. *See*, the Wisconsin Supreme Court decision in *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1976), for a discussion of some of these issues.

Because of these concerns, we regularly advise public officials to use e-mail mindful of their responsibilities to avoid public records and open meetings violations. The underlying principle is pretty simple: e-mail is a valuable, time saving device for quick and incidental communication, but it should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny.

I hope this answers your general questions about e-mail use by public officials.

Sincerely,

Monica Burkert-Brist

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