**Note to Commission**
**Email correspondence**

Attached is a letter that Roger Allen of the City Attorney's office sent me, saying that it "contains a very good explanation of the application of the Open Meetings Laws to email." If you don't have time to read the whole thing, read the conclusion in the second to the last paragraph, advising committees and boards to refrain from email communication on matters that are within the realm of the body's authority.

K. H. Rankin
November 13, 2007 KHRem

attachment

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Bruce A. Olsen
Assistant Attorney General
608/266-2580
olsenba@doj.state.wi.us
FAX 608/267-2223

October 3, 2000

Mr. Tom Krischan
S78 W22750 Terrace Drive
Big Bend, WI 53103

Dear Mr. Krischan:

Attorney General James E. Doyle has asked me to respond to your September 20, 2000, electronic mail message, inquiring about the application of the open meetings law to the use of e-mail as a means of communication by members of a governmental body.

Your e-mail states that you are the acting chairperson of the town of Vernon Technology Committee, which your letter suggests and which I presume to be either a subunit of the town board, or an advisory committee created by the town board. In either case, I presume that the technology committee is a governmental body subject to the open meetings law. You state that you propose to instruct the secretary of the committee to collect and archive all committee electronic mail, to bring readable copies of the collected mail to each meeting and to allow the public to inspect the printed messages. It is your hope that this procedure will satisfy the goals of the open meetings law, and still allow the committee to function by using electronic mail technology to inform members of problems, to express concerns and to share insights regarding subjects within the committee's realm of authority.

Because your e-mail raises important questions about the application of the open meetings law to electronic communications technologies, I am replying in the form of a letter, to increase the accessibility of this interpretation of the open meetings law. I applaud your effort to enhance the committee's effectiveness through technology, and your sensitivity to the committee's obligation to comply with the open meetings law. For the reasons which follow, however, I conclude that the proposal outlined in your letter creates serious risk that the use of electronic mail for the purposes you describe would violate the open meetings law as it has been interpreted by the courts and the Attorney General. I therefore strongly urge that the technology committee not use electronic mail to communicate on matters within the realm of its authority.

Electronic mail is one of several technologies that allow electronic written communication between individuals and groups of individuals separated by time and space. The typical features of electronic mail computer programs allow senders to distribute a message and

attached electronic files containing written, graphical or auditory information to an individual or a group of individuals. Such programs typically allow the recipient(s) of the message and attachments to reply to the sender only, to reply to all those who received the message and attachments or to forward the message and/or its attachments to others who were not originally involved in the correspondence. The elapsed time between sending and receiving an e-mail message is highly variable and depends on many technical factors. The typical time is measured in minutes, although times can range from seconds to hours. Once an electronic mail message is received, the recipient must open the electronic "envelope" containing the message and its attachments in order to perceive their content. An electronic mail message can be opened at the recipient's convenience.

Another type of electronic written communication is sometimes referred to as instant messaging. Participants are separated in space, but not by time, much like participants in telephone conference calls. Each participant connects to a specific electronic location, and has the ability to send and receive typewritten messages which are displayed on the computer screens of every person participating in the message exchange. Depending on the participant's typing speed and the length of the typed messages, these written communications have the potential to be as nearly instantaneous as spoken communication.

Under the open meetings law, a "meeting" of a governmental body occurs whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business, and (2) the number of members present is sufficient to determine the governmental body's course of action. Sec. 19.82(2), Wis. Stats. *See also State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). With respect to the first element, *Showers* stresses that "governmental business" refers to any formal or informal action, including discussion, decision or information gathering, on subjects within the realm of the governmental body's realm of authority. *Showers*, 135 Wis. 2d at 102-03. The members of a governmental body need not actually discuss the information they receive or otherwise interact with each other in order to be engaged in governmental business. *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 574-76, 494 N.W.2d 408 (1993).

With respect to the second *Showers* element, the number of members present must be sufficient to determine the course of the body's course of action on the business under consideration. The Attorney General has broadly interpreted the phrase "convening of members" in section 19.82(2) of the Wisconsin Statutes to include modern communication techniques that permit members of governmental bodies to effectively communicate and exercise the authority vested in the body, even where the participants are not physically gathered, such as telephone conference calls. 69 Op. Att'y Gen. 143, 144 (1980). Although most often the number of members required to convene a meeting will be a simple majority of the body's members, there are exceptions, the most relevant of which for purposes of this discussion is the concept of a "walking quorum." A "walking quorum" is a series of gatherings among separate

groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *Showers*, 135 Wis. 2d at 92. *See also State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976). The danger of a walking quorum is that it may produce a predetermined outcome and thus render a publicly held meeting a mere formality. *Conta*, 71 Wis. 2d at 685-88. Tacit agreement may be proved by reference to the circumstances that surround a series of gatherings.

Whenever the elements of a meeting are present, the open meetings law requires, among other things, that the governmental body (1) give advance notice of the meeting, (2) conduct all of its business in open session, unless an exemption to the open session requirement applies and (3) conduct its meeting in a place reasonably accessible to members of the public. Secs. 19.82(3) and 19.83, Wis. Stats.

It is against this backdrop of statutes and legal interpretation that I analyze the application of the open meetings law to e-mail and instant messaging communication. I begin with the easier analysis, instant messaging.

Instant messaging communication is very analogous to conference call communication. All participants in the communication are present in the communication environment at the same time. Each participant has access to all the information provided by every other participant during the communication. All communication between the participants can be monitored by non-members of the governmental body by, for example, making a centrally located computer a participant in the instant messaging communications. Using these features of instant message communication technology, it would be possible to conduct a meeting of a governmental body by use of that technology, and in conformity with the requirements of the open meetings law. The meeting notice would have to indicate the date, time and subject matter of such a meeting, and would have to designate a location where the public could view the computer display of the members' instant messages to each other, just as telephone conference call meeting notices designate a central listening spot equipped with a speakerphone for the public to monitor the meeting. As a practical matter, however, instant messaging technology is likely to be far less convenient for meeting participants than a telephone conference call would be.

Electronic mail is more difficult to analyze. In circumstances where electronic mail is used simply as a one-way conduit of information from one member of a governmental body to another member, it has the characteristics of a letter or a memorandum. It is the opinion of the Attorney General that the sending of a letter or memorandum to a quorum of a governmental body is not by itself the convening of a meeting. *See* correspondence to Kenneth J. Merkel, March 11, 1993, enclosed. Nor, without more, does the existence of a reply letter or memorandum from the recipient back to the sender make the completed communication a meeting. *Id.*

The sender of the electronic mail message, however, has no control over when the message is received or opened, and has no control over whether, when and to whom the recipient replies or forwards the message or its attachments. Because of these inherent features of electronic mail, there is a substantial risk that the transmission of an electronic mail message will result in the near-simultaneous exchange of information between members of a governmental body on a subject matter within the body's realm of authority. In such a circumstance, the closest analogue is the telephone conference call, which has been held to constitute a meeting subject to the open meetings law, including the requirement of prior notice. *See* 69 Op. Att'y Gen. at 144.

Between these two poles of clearly permitted and clearly prohibited uses of electronic mail is a vast area of legal and factual uncertainty. Although there are no Wisconsin cases in which a court has analyzed the application of the open meetings law to electronic mail, I anticipate that a court would consider a number of factors, including: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications. To the extent that these factors demonstrate a quality of exchange that more closely resembles a telephone conference call, it is likely that a court would find the communications to be a meeting, held in violation of the open meetings law because it was conducted without the required prior notice. To the extent that the factors demonstrate a quality of exchange that more closely resembles an exchange of correspondence, it is likely that a court would determine that a meeting has not occurred.

Because of the uncertainty inherent in analyzing these factors, and because the sender is unable to control the chain of events which may occur after an electronic mail message is sent, the Attorney General's Office strongly discourages the members of governmental bodies from using electronic mail to communicate on matters within the realm of the body's authority.

Thank you for your interest in assuring full compliance with the open meetings law. Please contact this office if we can be of further assistance to you.

Sincerely,

Bruce A. Olsen
Assistant Attorney General

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Enclosure
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