

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

July 19, 2004

OPINION NO. 04-001

TO: Alder Brenda Konkol, Common Council President
Common Council Organization Committee

FROM: Michael P. May, City Attorney

SUBJECT: Negative Quorums, Email, and the Open Meetings Law

You have asked my opinion on the calculation of negative quorums, the use of email, and application of the Open Meetings law to those issues. These concepts are best understood against the policy that lies at the heart of both the Public Records Law and the Open Meetings Law.

The Policy Behind Both The Public Records and Open Meetings Laws

Both the Public Records Law and the Open Meetings Law are based upon the belief that an informed public is essential to the health of a representative government. Thus, to the maximum extent possible, consistent with the advancement of public interests, the public is entitled to observe government in action. This right of inspection extends to observing meetings where decisions are made or information gathered and to review of the records which government creates or maintains. See secs. 19.31 & 19.81, Wis. Stats., and secs. 3.42 and 3.44, MGO.

Definition of a Meeting

A meeting occurs any time enough members of a governmental body gather for the purpose of exercising the powers, duties or authority of that governmental body. Sec. 19.82(2), Wis. Stats. Meetings occur under such circumstances even when the body is simply gathering information and not exercising any decision-making authority. All such meetings must be preceded by public notice of the agenda and must be open to the public. Violation of these requirements can lead to the imposition of civil forfeitures. The City may not reimburse any official who is sentenced to such a penalty. 66 OAG 226 (1977).

Negative Quorums

The concepts in the preceding paragraph are easy enough to understand when a majority or a quorum of a body gathers and engages in discussion about matters within its authority. However, there are less obvious times when the Open Meetings Law will apply. As stated above, these laws apply whenever a sufficient number of members of a governmental body gather for the purpose of exercising the powers, duties and/or authority of that body. As applied by the Wisconsin Supreme

Court in *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W. 2d 154 (1987), the laws apply any time that enough members of a body gather such that they can determine the outcome of an item or the course of the body's actions. This concept thus applies to any gathering of members such that if they acted in concert, they could block passage of an item or prevent a course of action. This number of members is often referred to as a "negative quorum."

The best example of a "negative quorum" arises when an item requires a super majority (i.e., a two thirds majority) in order to be passed or approved. If more than one third of the members of such a body gather and discuss the item, they are engaging in a meeting under the Open Meetings Laws. Such a meeting would be illegal if not preceded by a proper notice and if not accessible to the public. Aside from the Open Meetings Law, such a meeting would violate the Madison General Ordinances as section 3.27(3)(a) requires the adjournment of any meeting where a body fails to achieve a quorum of its membership within fifteen minutes of its scheduled meeting time.

The number of a body's members that may constitute a "negative quorum" is often difficult to determine in advance of a vote or action on an item. In 1992, the Attorney General's Office informed the City that the size of a "negative quorum" may be determined only upon knowing the size of the body that is later assembled to officially act on the matter in question. As a matter of caution, this office has therefore advised that it is safest to determine what may constitute a "negative quorum" by first determining the most conservative (smallest) number of members who could meet and constitute a quorum. A negative quorum would be that number of members who, through voting against the item or through abstention, could prevent passage of the item.

Thus, we have advised, and now offer our opinion, that a negative quorum may exist whenever there is a gathering of 50% or more of the quorum of the parent body. For example, if you have a seven member committee, the quorum for action by that committee is 4. In that circumstance, if there were only a bare quorum present at a meeting, any 2 members could effectively block action by the committee. If those two members had previously met in an unnoticed gathering to discuss the business to come before the committee, those members violated the Open Meeting law.

The difficulty is that one doesn't know if there has or has not been a violation of the Open Meetings Law until the parent committee meets. If you look at the example above, if the full committee is at the subsequent meeting, then the meeting of the two members did not violate the Open Meetings Law. This problem of a "floating negative quorum" is the reason we advise caution: no group constituting 50% or more of the quorum of any governmental body should meet without proper notice. Until the state Supreme Court modifies the test set out in *Showers*, this is the proper approach to take.

The following chart shows this *Showers* type limitation:

| Size of Governmental Body | Quorum | Smallest Possible Negative Quorum (for majority votes) |
|---------------------------|------------|--|
| 7 or less | 4 or less | 2 |
| 8 - 11 | 5 - 6 | 3 |
| 12 and larger | At least 7 | At least 4 |

Email as a Meeting

The problems raised by the negative quorum are complicated by the regular use of email. Email not only is a public record, but it has the characteristics of both a formal written letter or memorandum and, if used in rapid succession, of a "written" telephone conversation.

Telephone conference calls may be used for governmental meetings, if properly noticed. 69 OAG 143, 144 (1980). To the extent an initial e-mail results in a quorum—or a negative quorum—of a governmental body responding to the other members of the body, such an email could very easily be found to constitute a meeting. If not noticed, it would be in violation of the Open Meetings Law. This legal concern is discussed in a League of Municipalities legal comment from the February 2001 issue of *The Municipality*.

To avoid such results, we are recommending that any email that is sent to even a negative quorum of a governmental body contain a clear disclaimer at the top of the email. We suggest language such as the following:

"NOTE: THIS IS INTENDED TO BE A ONE-WAY ELECTRONIC MEMORANDUM. DO NOT REPLY. This is an electronic memo, and is not to institute a discussion of any of the matters in the memo. Do not reply or reply to all. Any response should be by new email to the sender only. Do not forward this email to another."

Persons receiving the email should follow these instructions. This language is needed only for emails that are sent to the negative quorum or more of a governmental body.

If you have any questions regarding the matters set out in this opinion, feel free to contact me or Assistant City Attorney Roger Allen.

Michael P. May
City Attorney

MPM:RAA:pah

cc: Mayor Cieslewicz
City Clerk
Department/Division Heads
Common Council Members

CAPTION: A "negative quorum" may exist when 50% or more of the quorum of a governmental body meets, and such a meeting may violate Wisconsin's Open Meeting Law. Since successive responsive emails may constitute a meeting, a disclaimer and procedure to avoid violation of the Open Meetings Law through use of email is recommended.