
M E M O R A N D U M - A D V I S O R Y O P I N I O N

DATE: August 16, 2018

TO: Mayor Tony Penterman, Sally Kenny, Kaukauna Common Council

FROM: Kevin Davidson, City Attorney

RE: Discussion of items not specifically described on Agenda

Over the past several months, newly seated Common Council for the 2018-2019 session has demonstrated a desire to test the boundaries of public notice requirements for items of Council discussion in bringing matters to the floor under the generic agenda heading "Miscellaneous business." While everyone has been sensitive to the potential violations, and, at least during those meetings for which this Office was in attendance, correctly either inquired about the propriety of bringing topics to the floor, or have expressly stated that the topic was not intended for contemporaneous discussion under the current meeting, the potential to engage in discussion and debate impromptu has been a substantial concern and places the Common Council at significant risk of violating Wisconsin's open meetings statutes.

Equally important in assessing this risk is recognition that members of the public frequently express an opinion that the Kaukauna Common Council does not conduct business transparently.

In response to this recognized heightened risk, this office has reviewed the statutory requirements, along with supporting resources including the Wisconsin Attorney General's Office advisory opinions and the League of Wisconsin Municipalities resources. (Reference materials attached for review.)

RECOMMENDATION:

The generic agenda item listed as "Miscellaneous business" should not be included on Common Council Agenda's, and no business that has not been specifically identified on an Agenda be discussed or raised at meetings of the Common Council.

To remain in strict compliance with the open meetings law, all items of new business should be placed on an agenda as directed by the Mayor, and should not be first brought to the floor prior to being noted as an agenda item. Appropriate channels for requesting an item be placed upon an agenda would be a direct request to the Council President, a direct request to the Mayor, or brought through the appropriate department head for the subject matter, i.e. Planning, Engineering, Public Works, etc.

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Open Meetings Law FAQ 8

Is the regular use of public meeting notices that contain a non-specific agenda item like "such other matters as are authorized by law" or "miscellaneous business" or "such other matters as may come before the board" consistent with the notice requirements of the Wisconsin Open Meetings Law?

No. The Wisconsin Open Meetings Law requires that every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. sec. 19.84(2). The requirement does not compel a detailed agenda. However, the public is entitled to the fullest and most complete information compatible with the conduct of governmental business. Therefore, the notice should be specific.

Specific notice requires that when a member of the governmental body knows in advance of the time notice is given that a matter may come before the body, that matter must be described in the meeting notice. 66 Op. Att'y Gen. 143, 144 (1977). The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att'y Gen. 68, 70 (1977).

Past attorney general opinions said that governmental bodies could discuss matters not specifically set forth in the meeting notice and not known to the chief presiding officer if the notice contained broad umbrella clauses such as "such other matters as are authorized by law" or "miscellaneous business," but cautioned that such a procedure should be used with restraint. 66 Op. Att'y Gen. 143 (1977). In a March 5, 2004 informal opinion letter which addressed a different but related issue regarding non-specific agenda items, the Wisconsin Attorney General stated that "[g]eneral subject matter designations such as 'miscellaneous business,' or 'agenda revisions,' or 'such other matters as are authorized by law' should be avoided." Given these admonitions against the use of non-specific agenda items and the basic notice requirements under the open meetings law, the regular use of them on agendas is not consistent with the open meetings law.

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Governing Statute - Wis. Stat. § 19.84 (2):

19.84 Public notice.

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

Opinions of the Attorney General, Volume 66, 1977, page 95-96:

Question Presented: Is the Board limited to agenda items or can it revise or add to the agenda if that step is included as an agenda item, i. e. 'agenda revisions'?"

Formal opinion of the Attorney General's Office: The board is not necessarily limited to agenda items. The use of an agenda item entitled "agenda revisions" is minimal compliance with the law unless it represents a subterfuge to avoid the law. However, this practice should be avoided. Where members know specific items in advance of the meeting, they should be communicated to the presiding officer who should give notice of the supplemental agenda in the manner described above. Matters of importance or of wide interest should be postponed until more specific notice can be given. See 66 BAG 68 (1977). Section 19.84(2), Stats., refers to the content of the required notice: "(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." (Emphasis added.) The notice should be as specific and informative as possible. See discussion at 63 OAG 509, 5 1 1 (1974) and 66 OAG 68 (1977).

Informal Opinion Letter of the Attorney General, March 5, 2004



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

March 5, 2004

Mr. Charles A. Rude
Mayor
City of Lake Geneva
Post Office Box 340
Lake Geneva, WI 53147

Dear Mayor Rude:

I am responding to your February 9, 2004, letter inquiring about the application of the open meetings law to city council agenda items called "Staff Comments" "Alderman Comments," and "Mayor Comments." You state:

Each staff member, i.e., the City Administrator, Director of Public Works, City Clerk and City Attorney are given an opportunity to comment about such things as forthcoming events or other informational matters. Each Alderman, as well as the Mayor, have the same opportunity. There can be no action discussion, or vote of any kind, on any comments made, whether by Staff Members, Aldermen or the Mayor.

There has been a complaint that allowing such comments is a violation of the Open Meetings Statute, since no specific agenda item other than "comments" is listed. I would appreciate your review of the matter, and letting me know if we are inadvertently violating the statute by following this practice.

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2). The notice need not contain a detailed agenda, but because the public is entitled to the fullest and most complete information compatible with the conduct of governmental business, the notice should be specific. This requires that when a member of the governmental body knows in advance of the time notice is given that a matter may come before the body, that matter must be described in the meeting notice. 66 Op. Att'y Gen. 143, 144 (1977). The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att'y Gen. 68, 70 (1977).

In formulating descriptions of the subject matter of a meeting, the chief presiding officer should keep in mind that the public is entitled to the best notice that can be given at the time the

Mr. Charles A. Rude
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notice is prepared. A good rule of thumb is to ask whether a person interested in a specific subject would be aware, upon reading the meeting notice, that the subject might be discussed. For example, the court of appeals has held that the subject matter designation "licenses" was specific enough to apprise members of the public that a liquor license would be considered for approval. *State ex rel. H.D. Ent. v. City of Stoughton*, 230 Wis. 2d 480, 486, 602 N.W.2d 72 (Ct. App. 1999). Cf. *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, 252 Wis. 2d 628, ¶¶ 13-17, 643 N.W.2d 796 (meeting notice that a Joint Review Board would deliberate a resolution was sufficient to notify the public that the board would take action on the resolution). General subject matter designations such as "miscellaneous business," or "agenda revisions," or "such other matters as are authorized by law" should be avoided. The Attorney General advised in an informal opinion that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. I-5-93, April 26, 1993.

1997 Wisconsin Act 123, effective May 2, 1998, created Wis. Stat. §§ 19.83(2) and 19.84(2) to allow governmental bodies to receive information from members of the public if the public notice of the meeting designates a period of public comment. The law also allows a governmental body to discuss, but not to act on, any matter raised by the public during a comment period. Although discussion of a general public comment item is permissible, it is advisable to defer extensive discussion and action on such an item until specific notice of the subject matter of the proposed action can be given. By following this practice, a governmental body will accommodate the two somewhat competing public policies raised by public comment periods: first, the laudable public policy that governmental bodies benefit by hearing from the constituents they serve; second, the open meetings policy that members of the public are entitled to the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1).

Applying these principles, it is my opinion that the practice you describe is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful. Wisconsin Stat. §§ 19.83(2) and 19.84(2) allow citizens to present information to governmental bodies on subjects not included in the meeting notice because citizens do not have access to the body's process for creating meeting notices. The members of governmental bodies and the officials of the governmental unit are not so limited. They have regular opportunities to suggest meeting subjects to the presiding officer responsible for establishing the agenda. If, for example, a member of the body knows in advance of the time the meeting notice is given that there are "forthcoming events" about which the public may be interested, that matter must be described in the meeting notice. 66 Op. Att'y Gen. at 144. In my opinion, the subject matter "forthcoming events" would be minimally adequate to satisfy the requirements of the open meetings law when such matters are raised at the body's meeting.

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The practice of allowing members of the body and governmental officials to present non-specific "informational items" to the members of the body is even more troublesome. Information by definition relates to a particular subject matter. That subject matter is capable of description in a way that is "reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2). There is no good reason why the subjects of the informational items cannot be identified in a meeting notice more specifically than "Staff Comments" or "Alderman Comments" or "Mayor Comments." The city's current policy prohibits discussion, action and voting on any subject addressed in staff, alderperson and mayor comment periods. The city's policy does not appear to limit the amount of information on a subject that a staff member, alderperson or the mayor can provide to the common council during such a comment period. If only a small amount of information is communicated during one of these comment periods, members of the public who are interested in the subject but not present at the meeting because the subject was not part of the meeting notice would be deprived of only a small amount of the information to which they were entitled. On the other hand, if substantial amounts of information are communicated during the comment periods, the interested public is deprived of a substantial amount of information. At the extreme end, an alderperson or the mayor might provide enough information on a subject during one of the comment periods that the members of the body have all the information they need to take action on the subject, eliminating the need for any discussion of the matter at a subsequent meeting where the noticed subject is brought up for action. In that circumstance, the public is deprived of all of the information to which it is entitled.

Thank you for inquiring about the open meetings implications of the city's current practice. I encourage you to alter that practice to eliminate the staff, alderperson and mayor comment items in the meeting notice. I encourage you to substitute for those comment periods a subject designated as "forthcoming events" for those items currently subsumed in the comment periods. I further encourage you to eliminate the practice of allowing staff, alderpersons and the mayor to communicate information on subjects without designating those subjects in the meeting notice.

Very truly yours,


Peggy A. Lautenschlager
Attorney General

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