WHEN MUST BODY PROVIDE NOTICE UNDER OPEN MEETING LAW THAT ITS MEMBERS ARE ATTENDING OTHER MEETINGS?

By: Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

League attorneys have received many questions about correspondence sent from the Wisconsin Department of Justice's (DOJ's) Office of Open Government to Winnebago County[1] relating to whether it is necessary to provide notice under the open meetings law when more than half of a governmental body attends the meeting of another body that is not subject to the open meeting law. It should come as very little surprise to anyone that, assuming the subject of the meeting is within the responsibilities of that governmental body and is neither social nor chance, the answer is yes. Although DOJ correspondence is not equivalent to a formal or even an informal Attorney General opinion and does not have precedential value or persuasive value in a court of law, it is worth reviewing this correspondence and the underlying facts since DOJ brings actions to enforce the open meeting law and League attorneys have received many questions related to the correspondence. We agree with the DOJ Office of Open Government's conclusion that notice is required in such a situation. Before reviewing the correspondence, it's helpful to review the case of *State ex rel. Badke v. Greendale Village Bd.*[2]

Many local governments were taken by surprise 24 years ago, when the Wisconsin Supreme Court held in *Badke* that when one-half or more of the members of a governmental body attend a meeting of another governmental body to gather information about a subject over which they have ultimate decision-making responsibility, such a gathering is a "meeting" within the open meeting law and must be noticed as such, unless the gathering is social or chance. *Badke* also held that when a quorum of a governing body is present at a meeting of a second governmental body merely because all of the individual members of the quorum make up the membership of the second governmental body (e.g., a committee meeting with no governing body members who are non-members attending), additional notice is **not** required.

Badke involved a seven-member village board. Two trustees served on the plan commission. The plan commission was considering an application for a special use permit to construct a large apartment complex. The matter went to the plan commission for its recommendation, and then was to go to the board for final decision. The plan commission held four meetings. The village clerk gave notice of the plan commission meetings to the media and the public and mailed each trustee notice of the plan commission meetings and copies of the agenda for the meetings. A quorum of the village board, which regularly attended plan commission meetings, attended each of the plan commission meetings. The issue in *Badke* was whether the village board violated the open meeting law by not giving public notice of a village board meeting when a quorum of the village board attended the plan commission meetings on the proposed development.

Many local governments were taken by surprise 24 years ago, when the Wisconsin Supreme Court held in *Badke* that when one-half or more of the members of a governmental body attend a meeting of another governmental body to gather information about a subject over which they have ultimate decision-making responsibility, such a gathering is a "meeting" within the open meeting law and must be noticed as such, unless the gathering is social or chance.

In reaching the holdings set forth above, the court noted that the fundamental purpose of the open meeting law is to ensure the public's right to be fully informed regarding the conduct of governmental business, and that the open meeting law must be liberally construed in favor of open government. The court explained that interaction between members of a governmental body is not necessary for a meeting to occur and that listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decision making. The court's decision was also based on the rationale that information presented at the plan commission could influence the trustees' decision so that the trustees, in large part, would have made up their minds or been influenced

[1] Correspondence by Assistant Attorney General Paul Ferguson, Wisconsin Department of Justice Office of Open Government, to Scott A. Ceman and John A. Bodnar (July 26, 2016)
[2] 173 Wis.2d 553, 494 N.W.2d 408 (1993).

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by information they obtained at the plan commission meetings when the village board subsequently convened to consider the plan commission's recommendation and take final action on the matter. Furthermore, because the trustees obtained information at the plan commission meeting, the matter might not be presented in its entirety to the public. The court reasoned that the public would be more likely to attend the plan commission meeting if it was aware that information was being presented at the plan commission meeting that could form the basis for the board's decision.

The *Badke* decision prompted an outpouring of concern among local officials subject to the open meeting law and those charged with the responsibility of providing public notice of meetings of governmental bodies. The decision struck many as being wrong and as vastly complicating the noticing of meetings. Why was it a meeting of a governmental body if more than half of the members were present at the meeting of the second governmental body only for the purpose of attending the other body's meeting and the body did not have an agenda of its own? How should the meeting be noticed given that the governmental body in question did not have an agenda or would not be conducting business at the meeting? How would those responsible for noticing meetings know when members of their governmental body would attend meetings of other bodies and in what numbers?

League attorneys attempted to address some of these unanswered questions and suggested ways to notice these types of meetings,[3] and municipalities consulted with their municipal attorney to figure out what to do. Eventually the dust settled and the necessity of providing notice for *Badke*-type meetings became accepted and commonplace. However, the dust seems to have been stirred up a little recently by the correspondence from the Wisconsin Department of Justice's Office of Open Government addressing whether a *Badke*-type notice is necessary when more than half of a governmental body attends the meeting of another body that is not subject to the open meeting law.

The DOJ correspondence in question was written by Assistant Attorney General (AAG) Paul Ferguson and is addressed to Winnebago County's corporation counsel and a deputy district attorney for Winnebago County who asked DOJ to investigate what he alleged were "systemic violations of Wisconsin's Open Meetings law …." According to the facts set forth in the letter, a quorum of two subcommittees of the Winnebago County Board of Supervisors (County Board) regularly attended meetings of Winnebago County's Judicial Courthouse and Security Committee (JCSC) over the course of 4 years. The JCSC is a courthouse security committee formed pursuant to Supreme Court Rule (SCR) 68.05 and is not subject to the open meeting law.[4] No notices or meeting agendas were provided for those meetings. The county subcommittees are the Judiciary and Public Safety Committee (JPSC) and the Facilities and Property Management Committee (FPMC). The County Board chair and the District Attorney are members of the JCSC pursuant to SCR 68.05(1)(b) and (f), respectively.

[3] See LWM Governing Bodies 338. We suggested the following notice: Notice is hereby given that a majority of the (village board) (city council) (X committee) [will] [is expected to] [may] be present at the meeting of the [governmental body] scheduled for [date and time] to gather information about [x], a subject over which they have decision-making responsibility. This constitutes a meeting of the (village board) (city council) pursuant to *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis.2d 553, 494 N.W.2d 408 (1993), and must be noticed as such, although the (board) (council) (committee) will not take any formal action at this meeting.

[4] See *State ex rel. Lynch v. Dancey,* 71 Wis.2d 287, 238 N.W.2d 81 (1976).

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According to the county corporation counsel, it is long-standing practice in the County for the circuit court judge who chairs the JCSC to appoint the chairs of both county committees (JPSC and FPMC) to the JCSC. Both the JPSC and FPMC are made up of five County Board members. The chair of the JPSC is also a member of the FPMC and the chair of the FPMC is also a member of the JPSC. The County Board chair is, *ex officio*, a member of both committees. The deputy district attorney who asked DOJ to investigate said that after he expressed his concern over the JCSC not posting an agenda prior to their meetings, the county adopted a boiler plate notice on all their public notices stating that any county board subcommittee may have a quorum at any meeting.

In concluding that it was necessary for both the JPSC and FPMC to provide notices that half or more of the committees' members were attending the meeting of the JCSC, AAG Ferguson noted that the open meeting law provides that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. The open meeting law also requires that all meetings of governmental bodies be held publicly and be open to all citizens at all times unless otherwise expressly provided by law, and open meeting law provisions are to be liberally construed to achieve that purpose. A meeting occurs under *Showers*[5] when members of a governmental body are present in sufficient numbers to determine the parent body's business and are there for the purpose of engaging in governmental business which *Badke* clearly says includes information gathering. Ferguson noted the open meeting law applies to governmental bodies that are only advisory and that have no power to make binding decisions. Regarding the numbers requirement, Ferguson indicated determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.[6]

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Ferguson noted that JCSC discusses matters within both subcommittees' realm of authority and that a quorum (3 members) of each 5-member committee regularly attend meetings of the JCSC and that the meetings are therefore not social or chance.

Importantly, Ferguson noted that the two county subcommittees are responsible for providing notice of the meetings and ensuring compliance with the open meeting law, not the JCSC. Noting that every public notice of a meeting of a governmental body must set forth the time, date, place and subject matter of the meeting in such form as is reasonably likely to apprise members of the public and the news media thereof[7] and that separate public notice must be given for each

[5] See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 398 N.W.2d 154 (1987).
[6] The correspondence states that "Certainly a majority of the members of a governmental body constitutes a quorum." We note that this is incorrect for common councils with more than 5 members. See Wis. Stat. sec. 62.11(3)(b).
[7] Wis. Stat. sec.19.84(2).

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meeting of a governmental body,[8] AAG Ferguson concluded that the county's use of a boiler plate notice was inadequate because it did not reasonably apprise the public or news media about an *actual* meeting, but only a *possible* meeting. In response to the corporation counsel's question of how the subcommittees could provide proper notice for a meeting where they don't control the agenda, Ferguson suggested that the JCSC and subcommittees could work together to ensure the subcommittees were provided with an agenda prior to the JSCS meetings so that the committees could provide notice compliant with the open meeting law. AAG Ferguson said a single notice may be used provided it clearly and plainly indicates that the joint meeting will be held and gives the names of each of the governmental bodies involved. The notice must be published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved.

We agree with the DOJ Office of Open Government's conclusion. Shortly after *Badke* was decided, League attorneys opined in Governing Bodies # 339-A (10/4/1993), that if one-half or more of the members of a governmental body attend a meeting of a neighborhood or citizen's group to gather information about a subject over which they have ultimate decision-making responsibility, such a gathering, if it does not occur by chance, constitutes a meeting under the open meetings law and requires public notice. We opined that although the factual situation put a new spin on things in that the meetings being attended by the governing body were not the meetings of a second governmental body, that should not affect the outcome. We noted that sec. 19.82(2), Stats., defines a "meeting" as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body" and further provides that if one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. We cited *Badke*[9] for the proposition that interaction between members of a governmental body is not necessary for a convening of a meeting to have taken place, nor is interaction necessary for the body to have exercised its powers, duties, or responsibilities. Listening and exposing itself to facts, arguments, and statements constitutes a crucial part of a governmental body's decisionmaking. *Id*[10]. The determinative factors here would be that one-half or more of the members of the governmental body would be assembled for the purpose of exercising the responsibilities vested in the body.

We said because we can conclude from *Badke* that the attendance of the governmental body members at these citizen's meetings would be deemed a "meeting" of the body under sec. 19.82(2), it is necessary to provide the public with notice of the meeting to avoid violating the open meetings law. We suggested a notice that reads something like the following:

Notice is hereby given that a majority of the [name of governmental body] will be present at a meeting of the [insert name of group that is meeting] scheduled for [insert date and time] to gather information about [provide the subject matter], a subject over which they have decisionmaking responsibility. This constitutes a meeting of the city council pursuant to *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis.2d 553, 494 N.W.2d 408 (1993), and must be noticed as such although the [governmental body] will not take any formal action at this meeting.

About the author:

Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. Claire's responsibilities include supervising the legal services provided by the League, answering questions of a general nature for officials and employees of member municipalities, writing legal articles for the League's magazine and amicus briefs in appellate cases involving issues of statewide concern to municipalities, organizing an annual institute for municipal attorneys, and educating local officials on a variety of topics pertaining to their duties. In addition, she coordinates legal material for the League's web page. Claire joined the League staff in 1992.

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Legal Comment reviews *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis.2d 553, 494 N.W.2d 408 (1993) and correspondence from DOJ's Office of Open Government to Winnebago County which concludes that it is necessary to provide notice under the open meetings law when more than half of a governmental body attends the meeting of another body that is not subject to the open meeting law, assuming the subject of the meeting is within the responsibilities of that governmental body and the meeting is neither social nor chance.

[8] Wis. Stat. sec. 19.84(4).
[9] 494 N.W.2d at 415
[10] *Id*