

From: Hurley, Peggy <Peggy.Hurley@legis.wisconsin.gov>
Sent: Monday, May 10, 2021 10:26 AM
To: Rep.Brandtjen <Rep.Brandtjen@legis.wisconsin.gov>;
Rep.Sanfelippo <Rep.Sanfelippo@legis.wisconsin.gov>; Rep.Murphy
<Rep.Murphy@legis.wisconsin.gov>; Rep.Rozar
<Rep.Rozar@legis.wisconsin.gov>; Rep.Tusler
<Rep.Tusler@legis.wisconsin.gov>; Rep.Thiesfeldt
<Rep.Thiesfeldt@legis.wisconsin.gov>; Rep.Spreitzer
<Rep.Spreitzer@legis.wisconsin.gov>; Rep.Emerson
<Rep.Emerson@legis.wisconsin.gov>; Rep.Subeck
<Rep.Subeck@legis.wisconsin.gov>
Cc: Savage, Bill <Bill.Savage@legis.wisconsin.gov>
Subject: Open Meetings Law question

Good morning Chair, Vice Chair, and Members of the Assembly
Committee on Campaigns and Elections,

At last week's informational hearing, the question was raised as to whether Wisconsin's Open Meetings Law was implicated when the mayors of five cities met via teleconferencing to discuss the "Elections Administration Planning Grant" that had been accepted by the Racine Common Council. After reviewing the materials submitted at the hearing, it appears that the meetings among the mayors were not subject to the Open Meetings Law. However, the question is close enough that it is advisable to request an Attorney General's Opinion on the matter.

Generally, the Open Meetings Law applies when a "governmental body" meets for the purpose of exercising the responsibilities, authority, power, or duties delegated or vested in the body. [s. 19.83, Stats.] A governmental body is defined, in relevant part, to mean a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order ... or a formally constituted subunit of any of the foregoing." [s. 19.82 (1), Stats.] "Rule or order" is to be liberally construed to include any directive, formal or informal, creating a body and assigning it duties. This includes directives not only from formal

governmental bodies, but also from certain governmental officials, such as mayors. [78 Wis. Op. Att’y Gen. 67, 69–70 (1989).]

The key question, then, is whether the Racine Common Council created a governmental entity with specific authority and duties when the Council approved the city’s acceptance of a planning grant and directed its mayor to work in cooperation with four other cities to submit a joint grant proposal.

The Wisconsin Supreme Court has held that “[w]here a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are "created by . . . rule" under § 19.82(1) and the open meetings law applies to them.” *Krueger v. Appleton Area School District Board of Education*, [2017 WI 70](#), [376 Wis. 2d 239](#), [898 N.W.2d 35](#). However, I have seen nothing in the materials submitted that suggest that the Racine Common Council adopted a rule appointing the five mayors to a committee or conferring on them the power to take collective action.

In order for the meetings to be covered by the Open Meetings Law, the group of five mayors must constitute a “governmental body.” Although the mayors represented cities that submitted a joint grant proposal, in my opinion they did not constitute a board, commission, or committee created by any statute, ordinance, rule, or order.

It is possible to conclude that the mayors were acting on authority granted to them by the Racine Common Council, and that they constituted a separate governmental entity doing official business. Some of the materials suggest that the Racine Common Council authorized joint action and that it anticipated a formal group, consisting of specifically identified actors, to take official action. The acceptance, by the four cities, of \$10,000 in order to act in concert with each other to pursue a joint grant could be considered evidence that they accepted the directives of the Racine City Council and were acting pursuant to its grant of authority. If this interpretation prevails, then the Open Meetings Law would apply to meetings held by the four mayors to work cooperatively toward submitting a joint grant proposal.

However, the Racine Common Council does not have authority to require the mayor to participate or to take any particular actions. It appears the mayors were not required to report back or otherwise answer to the Council; considering them a subunit or committee of the City of Racine seems to stretch the boundaries of what constitutes a governmental entity.

While the five mayors did take collective action in submitting a joint grant proposal, it appears they did so on their own authority and agreement, and not according to any charge or authority conferred upon them by the Racine Common Council. In order to constitute a governmental body, “there must be a constitutional provision, statute, ordinance, rule, or order that caused a governmental body to exist where none existed before. In order to cause a body to exist, the relevant directive must confer upon it the collective "responsibilities, authority, power or duties" that are necessary to a governmental body's existence under the open meetings law.” *Krueger* at ¶ 25

Further, as explained by the Court in *Krueger*, “the creation of a governmental body is not triggered merely by ‘any deliberate meetings involving governmental business between two or more officials.’ [Showers, 135 Wis. 2d at 98](#). Loosely organized, ad hoc gatherings of government employees, without more, do not constitute governmental bodies. ... Rather, an entity must exist that has the power to take collective action that the members could not take individually.” *Krueger* at ¶ 26 The mayors could have decided to prepare an individual voting plan and submit individual grant proposals; their decision to apply jointly does not appear to be a function of any governmental charge or appointment. For these reasons, I do not believe that the Open Meetings Law required their teleconferences to be open to the public. However, an Attorney General’s Opinion on the matter would provide more definitive guidance and could be used to determine whether to take additional action or seek more information.

Please let me know if you have any questions or if I can otherwise be of assistance to you.



Peggy J. Hurley

Staff Attorney, Wisconsin Legislative Council

608.504.5724 | peggy.hurley@legis.wisconsin.gov

One East Main Street, Suite 401, Madison, WI 53703