

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

Date: April 30, 2015

OPINION 2015-002

TO: Alder Rebecca Kemble

FROM: Michael P. May
City Attorney

RE: Council Members, Political Meetings and the Open Meetings Law

You posed a question regarding participation by Alders in political meetings. In certain instances, you advised, a group of Alders will appear at the monthly meeting of political groups in Madison. In most instances, the items for discussion will concern statewide or national policy or legislative initiatives. On occasion, items for discussion may involve local initiatives, including those pending or likely to come before the Madison Common Council. You are concerned as to whether Alders may participate in such meetings without violating the Wisconsin Open Meetings Laws.

Short Answer

Depending on the circumstances, a gathering of Alders at these political meetings might violate the Open Meetings Law. The same concerns would apply to any social group where a sufficient number of Alders were present, and members of the Common Council should take steps to avoid situations that might violate the law.

Understanding the Concepts of Quorums and Negative Quorums

At the outset it is important to note that operational efficiency is not a goal of the Open Meetings Laws. "The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored." *State ex rel. Citizens for Responsible Development v. City of Milton, et. al*, 2007 WI APP 114 ¶6. The Wisconsin Open Meetings Law, Wis. Stats. secs 19.81-19.98, presumes that all meetings of governmental bodies are preceded by notice and are open to the public, with very limited exceptions.

The Open Meetings Law is violated whenever a public body holds a meeting without providing sufficient notice and public access to that meeting. There are three elements that determine whether a meeting has occurred: 1. There must be a public body; 2. A sufficient number of its members must be gathered such that they can determine the outcome of an item before the public body; 3. There must be an intent to engage in the

business of the public body. Governmental business may include an activity as benign as gathering information that may inform a later course of action.

Applying these elements to your hypothetical, there are reasons to be concerned and cautious. First, there is no question that the Common Council is a public body subject to the Open Meetings Laws. The Common Council is such a public body and so are the many subunits of the Common Council, such as the Board of Estimates (BOE) and Common Council Organizational Committee (CCOC).

Second, whether a sufficient number of Alders is present at these political meetings so as to trigger application of the Open Meetings Laws is a tricky question. I refer you to my previously issued Formal Opinion 2004-001, which may be found at:

<http://www.cityofmadison.com/attorney/documents/2004opinions/2004-001.pdf>

This opinion discusses the concepts of quorums and negative quorums. In that opinion, I stated:

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.

Formal Opinion 2004-001, "Negative Quorums, Email, and the Open Meetings Law" (July 19, 2004).

The deciding consideration is whether a sufficient number of members of a public body is present at a meeting or gathering such that if they act in concert they can determine the course of action of the whole public body. This can occur whenever a quorum or negative quorum is present. Council members will need to be vigilant and consider whether their presence as Alders or as members of other subunits (i.e., BOE, CCOC, Alcohol License Review Committee, etc.) may raise such implications.

Whenever one-half or more members of a public body are gathered (in person, by speakerphone/internet, by email/text messaging) a meeting will have been presumed to have occurred by operation of law. Wis. Stats. sec.19.82(2). The burden will be on the public body to establish that its gathering did not violate the law. This presumption may be rebutted by competent evidence establishing that the members did not discuss or conduct the governmental business of the public body during that gathering. That is why this office recommends that members of public bodies steadfastly refuse to engage in governmental business whenever quorums or negative quorums gather unless such a gathering occurs at a properly noticed and open public meeting.

The third element of a "meeting" is whether there is intent to engage in the governmental business of the body. This is also a difficult question; it can only be resolved by reviewing the agendas or discussions of these various political meetings. A meeting will occur whenever such gatherings encompass matters or affairs of the City of Madison and where a quorum or negative quorum of the Common Council is present. Such a meeting will violate the Open Meetings Law where such governmental business was transacted, including the gathering of information. Contrary to popular belief, the members present at such a meeting do not need to reach an implicit or explicit agreement to act or vote in a particular manner. An agreement to act in a

specific manner is merely strong evidence that the members met with the purpose to engage in governmental business. As I have cautioned above, gathering information can be a governmental purpose of a public body.

Violations of the Open Meetings Law can result in personal civil forfeitures (the City cannot reimburse those forfeitures) and a court may void any action taken during those meetings or as a result of any agreement reached to act in a concerted manner during such meetings. Wis. Stat. sec. 19.96-97.

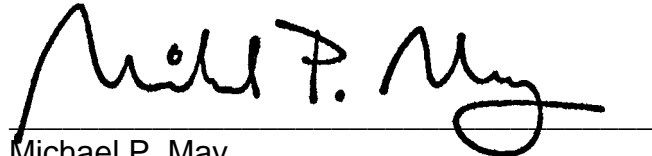
Avoiding Open Meeting Law Violations.

If Alders are presented with a situation that may constitute an illegal meeting, there are several steps that could be taken. First, members of the governmental body at issue could communicate before the meeting to be certain that less than a quorum or negative quorum attends the political gathering. Second, if a quorum or negative quorum is present and City of Madison business is about to be considered, some or all of the Alders could leave the meeting. Third, if the political body was agreeable and willing to have the meeting open to the public, the Common Council office could issue and post a notice of a possible quorum of the Council or other City sub-unit at the political gathering. This sort of notice, called a Badke notice after the case which discussed it, *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993), is common in the City and staff should be able to issue such a notice. The notice would have to list any City of Madison matters on the agenda of the political body and, as indicated above, the meeting would have to be open and accessible to the public.

While the context of a political group meeting makes the issues you asked about more likely to occur, Alders should be mindful of the Open Meetings Laws requirements across the spectrum of their personal and public lives. For example, if three alders are all members of the same social club and are members of the ALRC (three members may constitute a negative quorum), they should avoid discussing ALRC matters outside of an official ALRC meeting.

Conclusion

Depending on the number of Alders present at a political gathering, or any gathering outside of a formally noticed meeting, a violation of the Open Meetings Law may occur. Council members should be aware of how many Alders are present at a gathering, should not discuss City business if there is a chance gathering that might constitute a meeting, and should take other steps to avoid violating the Open Meetings Law if a quorum or negative quorum might be present.



Michael P. May
City Attorney

CC: Mayor Paul Soglin
All Alders
Maribeth Witzel-Behl

SYNOPSIS: Gatherings of City officials at political group meetings may, depending on the number present and other circumstances, constitute a meeting subject to the Open Meetings Law.