

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

Date: April 25, 2016

MEMORANDUM

TO: Mayor Paul Soglin

FROM: Michael P. May, City Attorney

RE: The Government Reform Initiative and the Open Meetings Law

On March 16, 2016, Alderpersons Dave Ahrens and Mark Clear announced proposed changes to the structure of Madison municipal government. They called these changes the "Government Reform Initiative" and I will refer to them as the GRI.

The first major proposal would remove the Mayor's power to make aldermanic appointments to City committees. This authority would be moved to the President of the Common Council. The second major proposal would remove the Mayor from the Board of Estimates. Other proposals related to the names of committees and the terms of Council officers.

In announcing the GRI, the Alders' press release said the "reforms were spurred by discussion in a Council subcommittee on strategic plans and priorities...." An email said the "reforms build on the work of the Common Council Organizational Committee Subcommittee on Strategic Plans and Priorities."

The Common Council Organizational Committee (CCOC) Subcommittee on Strategic Plans and Priorities (the Subcommittee) consisted of three members (Alders Clear, Demarb, and Zellers) and three alternates (Alders Bidar-Sielaff, Cheeks and Phair). Those six Alders, together with Alder Rebecca Kemble, constitute the full CCOC at the time. When the GRI was announced, Alders Ahrens and Clear stated it was supported by the entire CCOC Subcommittee.

You asked that I investigate and report to you on whether any violations of the Wisconsin Open Meetings Law occurred in the development of the GRI.

SUMMARY OF CONCLUSIONS

As discussed below, I have two major sets of conclusions. First, as to violations of the Open Meetings Law that could be proven, I have concluded:

1. That there was one clear violation of the Open Meetings Law by the Subcommittee that was claimed to be inadvertent, did not seriously contribute to the development of

the GRI, and was terminated as soon as the participants realized a violation had occurred.

2. That despite the broad nature of the agenda and minutes of the Subcommittee, it does not appear that actions at those meetings violated the Open Meetings Law.

3. That certain activities outside the Subcommittee meetings may very well have violated the Open Meetings Law by creating a walking quorum; further investigation is needed if any enforcement action is to be pursued.

My second major conclusion is that I am troubled when I review the entire series of actions taken prior to the March 16 announcement of the GRI proposal. Madison has a long history of public scrutiny and input on major decisions; indeed, some argue the City is too committed to this open approach. In contrast to that history, I found that the GRI was initially developed through a distinct pattern of avoiding public scrutiny and acting contrary to the spirit if not the letter of the Open Meetings Law.

THE CCOC SUBCOMMITTEE

This Subcommittee was created by action of the CCOC on October 6, 2015. The minutes of that meeting state:

The CCOC Subcommittee to Develop a Council Strategic Plan and Priorities was created at this meeting. The charge to the committee included:

- 1. Formalize and clearly communicate the Council priorities identified at the Council discussion August 27, 2015.**
- 2. Develop an implementation strategy with City Staff, especially those working on Outcomes Based Budgeting and the Comprehensive Plan Update.**
- 3. Issue a final report explaining how the Council priorities would be integrated into city processes.**

The Subcommittee would meet for up to six months, and upon completion of their work, a report will be sent to the Common Council. If additional time is needed to meet its goals, an extension of this order by the Council President may be sought by the subcommittee.

**Members: Ald. Ledell Zellers, Ald. Denise DeMarb, Ald. Mark Clear
Alternates: Ald. Shiva Bidar-Sielaff, Ald. Maurice Cheeks, Ald. Matt Phair
Staff: Heather Allen, Council Legislative Analyst**

The charge to the Subcommittee does not mention anything close to the items that constitute the GRI. As noted above, its three members and three alternates are all members of CCOC.

The Subcommittee met on four occasions: December 14, 2015, February 1, 2016, February 29, 2016, and March 10, 2016. Copies of the agenda and minutes of those meetings are attached to this report as Appendix A.

The agendas and minutes of the Subcommittee use broad descriptions of topic areas. Neither the agendas nor the minutes have any reference to a change in the structure of the Board of Estimates or the appointing authority of the Mayor. For that matter, they do not address such minor issues as the renaming of committees. Like the charge to the Subcommittee itself, the agenda and minutes show nothing directly related to the proposed changes announced in the GRI, nor would the average reader think such proposals were being considered.

The agendas state, as required by law, that a quorum of the CCOC or the Common Council might be present at the meetings. The minutes reveal that there often was a quorum of the CCOC present.

A. The February 29 Subcommittee Meeting.

The February 29 meeting has an agenda item related to a “Chief of Staff” for the Council. This was the only meeting of the Subcommittee attended by Alder Ahrens, who was not a member of the Subcommittee. Although not reflected in the minutes, Alder Ahrens told me that he spoke at the meeting and opposed the idea of a Council Chief of Staff unless the Council got greater control of the policy agenda for the City. This led to a broader discussion of the capacity of the Council with several ideas being discussed. Ahrens said there were no votes or even an attempt at consensus. At the end of the discussion, the Subcommittee asked Alder Cheeks to pursue the Chief of Staff issue and Alders Ahrens and Clear to take up issues related to the Council’s authority and capacity.

B. The March 10 Subcommittee Meeting.

The Agenda for the final meeting of the Subcommittee on March 10 includes an agenda item for “Best practices for committees/committees/boards”. The minutes of that meeting state only that “The Subcommittee conferred and agreed that Alder Clear would bring forward proposals to improve Council governance and address commissions, committees and boards.” Alder Clear told me that this was in fact a more wide-ranging discussion of a number of issues related to committees, including some of the ideas later reflected in the GRI. After the discussion, the Subcommittee did not take any action, other than to direct Alder Cheeks to follow up on the Chief of Staff issue and Alders Clear and Ahrens to look at the other issues.

Of note, the Subcommittee disbanded at the close of the March 10 meeting. Alders Clear and Ahrens said the abolition of the Subcommittee was to facilitate discussions between members that otherwise would have been in violation of the Open Meetings Law.

Although the Subcommittee is charged with preparing and submitting a final report to the Common Council, I am not aware that any such report has been filed.

ACTIVITIES OUTSIDE THE SUBCOMMITTEE

I interviewed both Alder Clear and Alder Ahrens. I informed them the interviews were due to your request for an investigation as to whether the Open Meetings Law was violated, and that their responses would be reported to the Mayor and would not be confidential or privileged. I have not interviewed any other witnesses.

After the Subcommittee meeting of February 29 and before the meeting of March 10, Alders Clear and Demarb participated in a conference call with staff to the Subcommittee, Legislative Policy Analyst Heather Allen. Clear said that the conference call lasted about 10 minutes, and discussed procedural issues on how to move forward, although Clear did not remember all of the items discussed in the conversation. His recollection is that they did not discuss substance to any great degree. During this conversation, Clear realized that the discussion with 2 members of the Subcommittee constituted a quorum and, not having been properly noticed, was a violation of the Open Meetings Law. At that point the conversation was terminated.

Alder Clear reminded me that he recently approached me before a Common Council meeting to inform me "I may have made a boo-boo." I have a vague recollection of Clear's statement. Nothing further came of his statement. The Council met on March 1, the day after the February 29 Subcommittee meeting, and again on March 15, after the Subcommittee disbanded.

Clear states that there was no agreement at this time on how to go forward. The members of the Subcommittee recognized the awkwardness that not even two alders could discuss potential Subcommittee issues without a formal, noticed meeting, open to the public. This led to the abolition of the Subcommittee at the conclusion of its next meeting on March 10.

In addition to this activity, Alder Ahrens indicated that, between the February 29 and March 10 Subcommittee meetings, he talked with Demarb and Clear to get a better idea of what approach was to be taken. He then stated that he individually called Subcommittee members to sound them out on some of the ideas being discussed, ideas which ended up being in the GRI. He said this was done since Ahrens, not being a member of the Subcommittee, could discuss with individual members without making a quorum.

Between March 10 and March 16, Clear and Ahrens developed the press release and description of the GRI. Ahrens wrote the FAQ. Clear wrote the drafting instructions for ordinance amendments that went to the City Attorney. They both worked on the press release, which was seen by some others. Clear said that only Alder Demarb saw the documents before being released on March 16.

DISCUSSION

Every meeting of a public body is to be preceded by public notice of at least 24 hours, indicating the subject matter of the meeting. Wis. Stat. sec. 19.84. Every meeting is to be open to the public. Wis. Stat. sec. 19.83. The conference call between Alders Clear and Demarb constituted a “meeting” of the Subcommittee under the definition of Wis. Stat. sec. 19.82(2), and it was not preceded by the requisite notice, nor was it open to the public.

Therefore, this meeting was in violation of the Open Meetings Law. It could subject Alders Demarb and Clear to penalties under Wis. Stat. secs. 19.96-97, or sec. 3.71, MGO. A prosecutor would need to determine whether to pursue penalties for what Alder Clear asserted was an inadvertent violation where no formal decisions were made.

Between the February 29 and March 10 meeting, Alder Ahrens engaged in a pattern of contacting members of the Subcommittee to sound them out on some of the issues being considered. Under *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W. 2d 394 (1987), this very well could constitute an illegal meeting as a “walking quorum”. The *Showers* court, quoting from *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W. 2d 313 (1976), stated:

Lastly, the court addressed the problems that arise with the so-called “walking quorums,” i.e. a series of meetings of groups less than a quorum. Again, the court concluded that under the appropriate circumstances, the Open Meeting Law would apply:

“It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule.” *Id.* at 687.

137 Wis. 2d at 92.

In the Wisconsin Department of Justice *Wisconsin Open Meetings Law Compliance Guide* (2015), the Attorney General says (page 11):

The requirements of the open meetings law thus cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. Such a circumvention “almost certainly” violates the open meetings law.

It was not clear from my limited discussions with Alder Ahrens if the procedure used in this case violated the Open Meetings Law rule against a walking quorum, but it appears that it may have. A prosecutor could pursue this evidence to determine if a complaint should be filed. If these discussions continued after the abolition of the Subcommittee, there still may be a violation due to a walking quorum of the CCOC.

As to the lack of specificity in the agenda and minutes of the meetings of the Subcommittee, I do not believe that an Open Meetings Law violation occurred. While agenda are to be as specific as possible for the issue being discussed, it is not at all obvious that the discussions at these two meetings were anything beyond the usual, "that is an interesting topic but not on our agenda, so it should be pursued elsewhere." The agenda item for March 10 includes the discussion of committee structure, although the specificity is not such that one would think it included the Mayoral appointment process. The more public interest in an item, the more specific the agenda should be. *State ex rel. Buswell v. Tomah Area School Dist.*, 2007 WI 71, ¶ 28, 301 Wis. 2d 178, 732 N.W. 2d 804.

While I conclude there likely is no Open Meetings Law violation, the agenda for the Subcommittee would not suggest items such as changes to the Mayor's appointment power or the membership of the Board of Estimates were to be discussed. While use of the broad agenda items allowed the Subcommittee to discuss related issues without an Open Meetings violation, we continue to advise that committees should be as specific as possible in creating agenda.

ENFORCEMENT

Under the Open Meetings Law, a person may file a verified complaint with the District Attorney (DA), who may pursue enforcement actions, including imposing fines of \$25 to \$300 for each violation. The DA may pursue other remedies and may seek to void any action taken. Wis. Stat. sec. 19.96-97. If the DA refuses to act, the person filing the complaint may bring an action. A similar process allows filing a complaint with the State Attorney General, who also may enforce the law.

Madison has an ordinance, sec. 3.71, MGO, that mimics the Open Meetings Law and allows for the imposition of forfeitures of \$25 to \$300 for each violation, sec. 3.71(4), MGO. Our office has always had concerns about the ability of the City Attorney to pursue enforcement actions, particularly against members of the Common Council, given the ongoing legal relationship with the Council. If requested, we would examine whether we could pursue enforcement utilizing the screening procedures allowed under SCR 20:1.11(f).

CONCLUSION

I conclude that one violation of the Open Meetings Law took place when Alders Clear and Demarb discussed the business of the Subcommittee with no notice and no opportunity for the public to attend.

I conclude that another violation of the Open Meetings Law may have occurred when Alder Ahrens facilitated what appears to be a walking quorum of the Subcommittee, and perhaps of the CCOC.

I conclude that, although the agenda for meeting of the Subcommittee were not paragons of specificity for topics that were discussed, even if briefly, I do not believe there was a violation of the Open Meetings Law.

Aside from those issues within the technical strictures of the Open Meetings Law, I came away from this investigation with the distinct impression that some or all of the Alderpersons engaged in a pattern to frustrate the purposes and spirit of the Open Meetings Law. I became convinced that the goal was not open discussion, but doing just enough to avoid legal violations. Let us look at the pattern:

1. A Subcommittee is created that is essentially the same membership as the CCOC, but whose agenda and minutes will not be on the easily accessible website of Legistar committees. A person interested in the agenda must search for the Other Committee listings. This is not illegal, and while notice was given in compliance with the Open Meetings Law, the mere creation of the Subcommittee made it less accessible.

2. The charge to the Subcommittee never mentions the topics that end up being included in the GRI. Again, this is not illegal, and it may well have been that the topics ending up in the GRI were not contemplated at the time the Subcommittee was formed. The general nature of the charge should have made the members more attuned to expansion of the agenda.

3. The agenda to the Subcommittee meetings never identify the topics that end up in the GRI. As I conclude above, these broad topics allowed the Subcommittee to stray without a legal violation. More descriptive topics would have given greater notice.

4. Although not reflected in the minutes, the participants admit some of the topics that are included in the GRI were discussed at least preliminarily at the Subcommittee meetings.

5. Two members engaged in a clear Open Meetings Law violation by having a Subcommittee meeting without notice or public access. These are not new Alders who may still be learning the rule for open meetings, but veterans who have both served as President of the Common Council.

6. Another Council member not on the Subcommittee may have engaged in a walking quorum violation of the Open Meetings Law, admitting that the purpose of his poll was to avoid an open meeting.

7. The Subcommittee is disbanded with the distinct purpose of avoiding Open Meetings Law issues.

8. The GRI is developed and unveiled within 6 days of the abolition of the Subcommittee.

Regardless of whether enforcement actions are pursued against those who may have violated the Open Meetings Law, the development of the GRI shows a disregard for the public's right to know about a major proposal to change the operations of City government. This is not consistent with Madison's history of openness.

There are several ironies here. Alders Clear and Ahrens could have developed the GRI proposal privately, without involving others and without reference to the Subcommittee, and the Open Meetings Law would not be implicated. After the above actions that are problematic to the goal of open government, the Council held a special, public discussion on April 12, 2016, to air the entire new proposal, something that could have been done in CCOC or its Subcommittee earlier. And, of course, these activities took place right around the annual "Sunshine in Government" week.

Some aspects of the GRI proposal have become politically charged between the Mayor's office and other members of the Council. My criticism of the method these proposals were developed is not meant to reflect either way on the merits of the proposals. They may or may not be good public policy; some of the changes have been introduced as ordinance amendments and are going through the normal review process. This report looks only at the procedure by which the GRI was first developed as it relates to the Open Meetings Law.

APPENDIX A

NOTICES AND MINUTES OF THE CCOC SUBCOMMITTEE