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Wisconsin Supreme Court
PO Box 1688
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August 5, 2022

Re: Rule Petition 21-06, In re Amendment of SCR Chapter 68 Relating to Court Security, Facilities, and Staffing

Honorable Justices of the Wisconsin Supreme Court:

I am writing to address the court's request for explanations for certain proposed changes in Rule Petition 21-06 regarding proposed amendments to Supreme Court Rule (SCR) Chapter 68.

Sections 4, 15, and 19.

Section 4 of the petition proposes deleting a comment to SCR 68.01, which states that Chapter 68 was not intended to address issues presented by 2011 Wisconsin Act 35 or regarding the constitutional right to bear arms. Related to this, Section 15 of the petition proposes deleting another comment on the topic of firearms. The petition also proposes the creation of a new section in Section 19, directing local committees to develop a procedure for allowing the possession of firearms by those who are statutorily authorized to do so. The court has asked whether the proposed changes sufficiently address the constitutional right to bear arms.

The comments at issue in Section 4 and Section 15 of the petition were written prior to the enactment of 2011 Wisconsin Act 35. The committee deemed these comments no longer necessary because 2011Wisconsin Act 35 created Wis. Stat. § 175.60, which provides clarity regarding carrying concealed weapons in the courthouse. Specifically, Wis. Stat. § 175.60 (16) (a) 6. prohibits individuals from carrying a concealed weapon in the courthouse, and Wis. Stat. § 175.60 (16) (b) provides exceptions to that prohibition for judges, district attorneys, assistant district attorneys, and licensees whom a judge has permitted in writing to carry a weapon.

Accordingly, SCR 68.05 (4) (j) of the petition is proposed to encourage counties to establish a procedure to handle requests by licensees to carry weapons in the courthouse. For example, a county may want to have a policy regarding the process by which a licensee will obtain permission from a judge to carry a concealed weapon, which would allow permission to be more rapidly verified by security personnel and reduce entry delays for the licensee.

The constitutional right to bear arms is beyond the scope of Chapter 68. The function of Chapter 68 is administrative and these sections simply ask counties to address firearms questions within the framework of Wis. Stat. § 175.60.

Section 5

Section 5 proposes amending SCR 68.03 (2). The court has asked whether there should be a cross-reference regarding relocation to a remote location (S. Ct. Order 21-03) and encourages the petitioners to monitor the videoconferencing petition (20-09A) to ensure consistency.

The committee does not find it necessary to cross-reference the other rules mentioned related to videoconferencing or holding court in a remote location because they are beyond the scope of this section. SCR 68.03 addresses the physical space of the courthouse and is not intended to address how proceedings are conducted. Relocation of court as referenced in SCR 68.03 is a planned, temporary relocation of all court facilities and functions due to remodeling or construction. In contrast, the relocation of court referenced in Wis. Stat. § 757.12 is an unplanned relocation due to an emergency. Additionally, the committee believes it is not necessary to cross-reference Chapter 885 because this section already requires that courtroom design consider audio-visual and acoustical adequacy.

Section 7

Section 7 proposes an amendment to a comment to SCR 68.03 (2) that would add the following additional language:

> Committees created under this rule generally are not subject to requirements of the Wisconsin Open Meetings Law. However, if public officials in attendance generate a quorum of a different public body, open meetings guidelines for that body must be followed.

This comment is based on case law and a letter from the Wisconsin Department of Justice to Winnebago County officials, dated July 6, 2016 (attached). The letter notes that a meeting of a governmental body occurs when two requirements are met: there is a purpose to engage in government business, and the number of members present is sufficient to determine a government body's course of action. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987). No action need be taken at the meeting; a body is engaged in governmental business even when its members gather simply to hear information on a subject within their authority. *See State ex rel. Badke v. Village of Greendale*, 173 Wis. 2d 553, 573-74 (1993).

The Wisconsin Supreme Court has held that the open meetings law does not apply to bodies and committees created by the Supreme Court and falling within its superintending power. *See State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287 (1976). However, this comment is proposed so that public officials consider whether the meeting of a court security committee that includes a number of non-court government officials necessitates compliance with Wisconsin's open meetings laws.

This proposed comment could be amended to add the relevant case citations:

> Committees created under this rule generally are not subject to requirements of the Wisconsin Open Meetings Law. *See State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287 (1976). However, if public officials in attendance generate a quorum of a different public body, open meetings guidelines for that body must be followed. *See, e.g., State ex rel. Badke v. Village of Greendale*, 173 Wis. 2d 553, 573-74 (1993) and *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987).

Section 71

Section 71 proposes amending a comment that currently follows SCR 68.10 (5) to follow SCR 68.10 (6).

The committee intended for this section to be broad in order to allow flexibility for placement of cameras and the remodeling and construction of courtrooms. Petition 21-06 proposes the addition of the following sentence to the comment, and the committee now suggests the addition of the "remote or in person" to the sentence at issue to address the increased use of videoconferencing proceeding:

> Any filming and photographing of <u>remote or in-person</u> proceedings must comply with SCR Ch. 61 Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings.

As stated in the comments referencing Section 5 above, in considering this section of the Petition, the committee does not believe further modification is necessary to address S. Ct. Order 21-03 or Rule Petition 20-09A, the amended videoconferencing petition. The technical requirements related to the use of videoconferencing to conduct proceedings is outside the scope of this section.

Section 78

Section 78 recommends eliminating notice to the Director of State Courts of significant construction and remodeling projects as currently provided for in SCR 68.13 (1). The reason this change was proposed is to reflect the existing practice as to how notice is provided and how information is disseminated.

Pursuant to SCR 68.03, the chief judge of the district must approve new, remodeled, or relocated court facilities and occupation of those facilities, subject to review by the Supreme Court. Section 11 of the Petition, which proposes a new 68.04 (4) (c), reflects how this information is currently reported in practice: the court security committee submits reports to the District Court Administrator regarding construction, remodeling, or security improvement activities.

The Director's role is administrative in maintaining and reporting this information, but approval occurs at the district level. The Director receives notice of such projects through other avenues, and therefore, it is not necessary that judges in the county also notify the director of such projects.

The petitioners request that the court adopt the proposed amendments in Petition 21-06 to update Chapter 68.

Respectfully submitted,

Michael O. Bohren

Hon. Michael O. Bohren
Waukesha County Circuit Court

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July 26, 2016

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Dear Mr. Ceman and Mr. Bodnar:

Please accept this letter as the Wisconsin Department of Justice's (DOJ) response to Mr. Ceman's February 23, 2016 email correspondence to DOJ Division of Legal Services (DLS) Administrator David V. Meany in which you requested DOJ investigate possible "systemic violations of Wisconsin's Open Meetings laws" in Winnebago County. This letter also serves to respond to Mr. Bodnar's June 27, 2016 letter regarding the same matter.

Mr. Ceman relayed that over approximately the last four years, the Winnebago County's Judicial Courthouse and Security Committee (JCSC) has been regularly attended by a quorum of two subcommittees of the Winnebago County Board of Supervisors (County Board): the Judiciary and Public Safety Committee (JPSC) and Facilities and Property Management Committee (FPMC). The JCSC is a courthouse security committee formed pursuant to SCR 68.05. Mr. Ceman stated that no notices or agendas for these meetings were published in advance.

Mr. Bodnar wrote that the JCSC includes both the chairperson of the County Board and the District Attorney as members pursuant to SCR 68.05(1)(b) and (f), respectively. According to Mr. Bodnar, a long-standing practice in the county is that the Circuit Court judge acting as chairperson of the JCSC appoints the chairpersons of both the JPSC and

FPMC.[1] Both the JPSC and FPMC are made up of five County Board members. The chairman of the JPSC is also a member of the FPMC, and the chairman of the FPMC is also a member of the JPSC. The County Board chairman acts as *ex officio* member of both subcommittees. According to Mr. Bodnar, both subcommittees only have the authority to make recommendations to the County Board.

Mr. Ceman stated that he spoke with Mr. Bodnar who agreed that for over four years, a quorum of both subcommittees attended the JCSC meetings without notice. This was done in accordance with Mr. Bodnar's advice that the JCSC was exempt from the requirements of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, since the JCSC was created by rule of the Wisconsin Supreme Court. Mr. Bodnar stated that this advice was largely based on a 2012 email correspondence from Assistant Attorney General Thomas C. Bellavia and a 2012 email correspondence from District Court Administrator Jon J. Bellows, relaying information provided to him by Marcia Vandercook of the State Court Operations Office. Mr. Ceman stated that he informed Mr. Bodnar that the exemption applies to the JCSC not the quorum of the JPSC and FPMC in attendance.

To resolve the alleged violations, Mr. Ceman stated that he proposed that the two subcommittees reconvene to hold the discussions and votes from the past four years with proper notice and an agenda. Furthermore, Mr. Ceman proposed that the subcommittee members should be replaced with new members from the County Board to ensure there was no "rubber-stamping" of past decisions. Mr. Ceman said it appeared that his proposed resolutions were rejected.

Mr. Ceman also wrote 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. The boiler-plate notice essentially states that any county board subcommittee may have a quorum at any county meeting. Mr. Ceman stated that he believes this is a systemic problem.

In Mr. Ceman's letter, he also informed DOJ that Mr. Bodnar raised the issue of a potential conflict of interest with the District Attorney's Office investigating and potentially prosecuting these alleged violations. Specifically, accusations have been leveled against District Attorney Christian Gossett, who was a part of the JCSC meetings in question, that the initial investigation into this matter was for retaliatory purposes because the DA's Office does not agree with the JCSC's decisions. Mr. Ceman acknowledged that the DA's Office has a stake in this matter and that all ten attorneys in the DA's office opposed the JCSC's decision related to the expansion of the county courthouse.

As a result of this potential conflict of interest, Mr. Ceman requested that DOJ investigate. Mr. Ceman believes the issue presented is one of statewide importance for two

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[1] Unlike the County Board chairperson and the District Attorney, neither of the subcommittee chairpersons are required to serve on the JCSC. In addition to requiring certain individuals to serve as members of a county's security and facilities committee, the rule permits "[s]uch other persons as the committee considers appropriate" to serve. SCR 68.05(1)(L).

reasons: (1) The JSCS expanded its membership beyond the Supreme Court mandated members to include members of other governmental bodies that could advance the JCSC's agenda without complying with the open meetings law's notice requirements; and (2) the recently adopted boiler-plate language on all notices is a means to circumvent the open meetings law, thereby allowing "county business to be conducted at random without any practical notice to the public."

Mr. Bodnar stated that the County Board subcommittee members have made a good faith effort to comply with the open meetings law, and they reasonably believed their actions complied with advice received from the Attorney General's Office. Furthermore, according to Mr. Bodnar, the Office of Corporation Counsel has made an effort to assure compliance with the law following the DA's Office's complaint. Finally, Mr. Bodnar wrote that the law in this area is not completely clear.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *See State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, 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.

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d81 (1976). The Supreme Court created a rule requiring the presiding judge for each county to appoint a security and facilities committee. SCR 68.05. The Supreme Court designated the composition of the committee and its tasks. *Id.* Therefore, as a body created by a rule of the Supreme Court, generally, such a security and facilities committee is not subject to the open meetings law's requirements. However, the open meetings law still applies to other governmental bodies should a sufficient number plan to attend or regularly attend a meeting of a security and facilities committee and the subject matter is within their body's realm of authority. The Supreme Court stated,

> [W]hen, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a 'meeting' within the meaning of the open meeting law, unless the gathering is social or chance. We also conclude that the meetings at issue in this case were clearly not social or chance gatherings. The [governmental body's] members' attendance as a group at the . . . project meetings was a regular occurrence, with expectations among the members that at least one-half or more of their membership would be in attendance. These factors remove their attendance from the 'social or chance' gathering exception of the open meeting law. These were not social or chance gatherings. Their attendance as a group did not occur on a sporadic basis, was not haphazard, irregular, nor spontaneous. Notice of these meetings was required.

Badke, 173 Wis. 2d at 577.

Mr. Bodnar stated that the *Badke* decision concerned members of a governmental body attending a meeting of another governmental body. Mr. Bodnar believes there is confusion among members of governmental bodies as to whether *Badke* is completely applicable when members of a governmental body attend meetings of non-governmental bodies. This apparent confusion would call into question whether a violation of the law exists when members of the subcommittees attend a meeting of the JCSC, which is not subject to the open meetings law. However, this confusion is clarified when one applies the *Showers* test.

Based on the facts presented, the JCSC discusses matters within both subcommittees' realm of authority. A quorum of both the JPSC and FPMC—three members of each of the five member subcommittees—regularly attend meetings of the JCSC. As such, the members' attendance is not a social or chance gathering. Therefore, a number of members of the JPSC and FPMC sufficient to determine the bodies' actions (what recommendations to make) are present at a meeting at which the purpose is to conduct governmental business. Regardless of whether or not the JCSC is subject to the open meetings law, based on the facts presented, the convening of members of the JPSC and FPMC at JCSC meetings meets both *Showers* test requirements. As a result both subcommittees must follow the requirements of the open meetings law, including providing proper notice of their meetings.

It should be noted that it is not the JCSC's responsibility to provide such notice and ensure such compliance with the open meetings law. Each governmental body is responsible for ensuring its compliance with the law. The chief presiding officer of a governmental body or such a person's designee is required to provide public notice of a meeting. Wis. Stat. § 19.84(1)(b). Therefore, in the scenario presented, the chief presiding officer or such person's designee for both the JPSC and FPMC would need to provide notice.

As you both know, 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. Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* A boiler-plate notice on a particular governmental body's agenda that states that any county board subcommittee *may* have a quorum in attendance at that particular governmental body's meeting is not sufficient notice. Such a notice is not reasonably likely to apprise members of the public and the news media of the time, date, place and subject matter of a meeting because it does not provide notice of an actual meeting of a governmental body. It merely communicates the time, date, place and subject matter of a *possible* meeting of any number of governmental bodies.

In some cases, the use of boiler-plate notice is meant to balance the requirements of the law with the practical difficulties involved with governmental bodies that consist of a number of members and various subcommittees. However, as stated previously, the open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. The use of boiler-plate notices is not in keeping with the open meetings law's declaration of policy. This type of notice of a possible meeting is not the fullest and most complete information regarding governmental affairs to which the public is entitled.

Mr. Bodnar raises the question of how the subcommittees can provide proper notice for a meeting for which neither subcommittee has control over the agenda. However, the answer may be found in the JCSC and both subcommittees' shared concern with ensuring compliance with the open meetings law. For example, based on this shared concern, the JCSC and both subcommittees can work to ensure that the subcommittees are provided with an agenda prior to the JCSC meetings such that they can provide notice compliant with the open meetings law.

In a case such as the present one, separate notices for both the JPSC and FPMC are not required. A single notice may be used. However, such a notice must clearly and plainly indicate that a joint meeting will be held and give the names of each of the governmental bodies involved. The notice must also be published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Providing proper notice in this way is compatible with the conduct of government business.

I spoke with Mr. Bodnar regarding this matter. As he wrote in his letter, he has educated the governmental body members on the requirements of the law. Mr. Bodnar's letter indicates that the body members in this case are concerned with ensuring compliance with the law. However, Mr. Bodnar discussed the practical difficulties of managing the many members of the various governmental bodies and ensuring that they comply with the law. The bottom line is that members of every governmental body have a legal obligation to ensure compliance with the open meetings law. An unwillingness or inability to follow the law opens the body's members to the penalties detailed in the law's enforcement provisions. *See* Wis. Stat. § 19.97.

In his correspondence, Mr. Ceman detailed his proposed cures for any open meetings violations that occurred. The cures were for the two subcommittees to reconvene and hold the discussions and votes of the past four years anew with proper notice. Under the enforcement provisions of the open meetings law, an action taken at a meeting of a governmental body held in violation of the law is voidable, upon action brought by the Attorney General or the district attorney. Wis. Stat. § 19.97(3). "However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement [of the law] outweighs any public interest which there may be in sustaining the validity of the action taken." *Id.* A recommendation to void four years' worth of decisions is not one to be made without a thorough understanding and weighing of all relevant facts. Based on the information provided, DOJ will not make a recommendation as to how to cure any potential violation.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available through the Wisconsin Department of Justice Office of Open Government website (https://www.doj.state.wi.us/office-open-government/office-open-government-resources). DOJ provides the full Wisconsin Open Meetings Law, maintains the Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

As you both know, under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. DOJ has looked into this matter at Mr. Ceman's request and completed a thorough review of the information provided by Mr. Ceman and Mr. Bodnar. Based on this review and on the indication that members of the governmental bodies involved are serious about ensuring compliance, DOJ believes this explanatory letter addresses the matter in an appropriate fashion. As such, DOJ respectfully declines to pursue an enforcement action in this matter at this time.

It should be noted, for members of the general public, that if a district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving a verified complaint, the individual who filed the verified complaint may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Of course, a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

DOJ appreciates your concern for government openness and transparency and compliance with the open meetings law. We hope you share our dedication to the work necessary to preserve Wisconsin's proud tradition of open government.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

Cc: The Honorable Karen L. Seifert