CITY OF WAUWATOSA
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COMMITTEE OF THE WHOLE

Tuesday, May 20, 2008 – 6:00 p.m. – Council Chambers

PRESENT: Alds. Birschel, Hanson, Herzog (7:02 p.m.), Jay, Krol, Maher (6:45 p.m.), McBride, Meaux (7:07 p.m.), Nikcevich, Purins, Walsh – 11

EXCUSED: Ald. Donegan, Treis

ABSENT: Alds. Ewerdt, Stepaniak

ALSO Mayor J. Didier; J. Archambo, City Admin.; A. Kesner, City Atty.; B. Aldana

Ald. Krol in the Chair called the meeting to order at 6:05 p.m.

Review of the Legal Issues surrounding Open Records, Open Meetings Ethics and Meeting Procedure for Common Council Members

Open Meetings Laws

Mr. Kesner gave the committee an overview of the Open Records, Open Meetings and Ethics laws as well as meeting procedures. He referred to what are known as "Sunshine Laws" in other parts of the country. Wisconsin has its own version. In fact, Wisconsin was one of the leading states to create Sunshine Laws. He noted that the City of Wauwatosa has taken further steps to follow the Open Meetings, Open Records laws. He cited examples such as many of the committee meetings being broadcast and posting the agendas and minutes on the city web site which are not required under the Open Meetings laws. These things have been done to make information more accessible to the public. He stressed that it is important for the public to know that decisions are being made in public and are based on public information.

Mr. Kesner acknowledged that sometimes it feels hard to get things done as a Council when the members have to be careful about who they talk to and what they talk about outside of the official meetings. He stressed that the law is designed to have all of the government's business done in public. He further stressed that all meetings are subject to Open Meetings law. Even small gatherings and walking quorums which might not be thought of as official meetings are subject to Open Meetings law. Some Council members may also be appointed to other groups such as the Wauwatosa Economic Development Corporation (WEDC). There is debate as to whether these meetings are subject to the Open Meetings law as well.

He reiterated that all meetings must be publicly held and accessible to the public. There must also be Americans with Disabilities Act (ADA) accessibility. He pointed out that language informing the public of ADA compliance is included on the agendas. He added that off site meetings are not always encouraged especially if they are outside of the jurisdiction of the Council members and not accessible to the public. Meetings should be held in the public buildings of the City of Wauwatosa. These meetings must be open to all the citizens at all times except if they contain a notice for a possible closed session.

Mr. Kesner stressed that in accordance with Open Meetings law any public meeting has to have an agenda and only the agenda items can be discussed. In some communities, there have been complaints that agenda items are too broadly worded. Agenda items have to portray clearly what is being discussed.

Agendas must also be posted in 3 different places. He noted that the internet is not considered an official posting location because there are still people that don't have computers. Agendas are required to be posted 24 hours in advance of the meeting scheduled to be held. The city posts preliminary agendas on Fridays for the Tuesday Common Council and Council committees. Final agendas for these committees are posted on Monday before 5:00 p.m. Other meetings are usually posted about a week in advance. Minutes do not have to be verbatim; however they are required to contain the names of those attending, the motions and the votes at a minimum. The City of Wauwatosa tries to go above and beyond the minimum by summarizing any discussion during the meeting. This is with the exception of discussion that is held in closed session.

Ald. Walsh asked if the televised meetings are stored off site. He also asked why some meetings are taped while others are not and who determines that. Mr. Kesner noted that the DVD copies of the televised meetings are stored in the Library. He explained that the Employee Relations Committee is not televised because it is in a room that has no equipment and that committee tends to deal with union negotiations, employee issues and closed session work. The Legislation, Licensing & Communications Committee meetings are not taped while the Operator licenses are being discussed because of the personal nature of those discussions. Other public legislative issues are televised. These decisions were made by the Common Council in the past. He stressed that cities are not required to video tape under the Open Meetings law; however, in the City of Wauwatosa televising of committee and Council meetings is done as much as possible.

Mr. Kesner stressed that convening the members of the governing body for the purpose of exercising duties and responsibilities does not include social gatherings or conferences. The number of members present is sufficient to determine the governmental body's action. Members of the body should not go out drinking and socializing and continue to talk about city business. If the members are meeting for something other than official business it must be noted that a majority of the Common Council may be present, but they do not intend to conduct a meeting or take action. He added that if all the Council members always attend the Plan Commission meetings and listen to the discussion during the meeting there would be no need to discuss the item at the Council meeting. He stressed that on a regular basis a majority of Council members showing up at meetings that are not specific to their duties and responsibilities is not allowed.

Ald. Maher asked if Council committees fell into this category. Mr. Kesner responded that Council committees are subject groups of the Common Council, but there still needs to be some care brought in that regard as long as attendance is not on a routine basis and interfering with the work of that committee.

Mr. Kesner cautioned that just being involved in a gathering could be a violation such as a "walking quorum". The Attorney General's definition was a series of gatherings less than quorum size whose attendees agree to act uniformly. Lining up votes and planned systematic communication results in a "walking quorum". In the end, a controlling number of people have been lined up. This should be avoided. This kind of meeting can also happen through phone calls and emails.

Mr. Kesner described a controlling body or negative quorum. This is when more than half the body gets together to vote against something. Back and forth communications between members creates meetings. Members need to be very careful about using email. Emails are a public record. A one way message or memo is okay. The city of Wauwatosa saves every email. Any time members are using emails for interactive conversations this takes on the form of a meeting. He stressed the importance of creating meetings that are open to the public.

Ald. Purins asked if blogs and new web tools would be considered public. Mr. Kesner responded that some are like that, but using them could be opening a Pandora's Box. It would be easy to get into a lot of forum issues and first amendment issues and could get out of control as has happened in other places.

Ald. Krol asked if all the emails were archived. Mr. Kesner responded that they were; however if a Council member chooses to use a different email address from the city's email address, that Council member is the custodian of their own records and responsible for archiving them.

Mr. Kesner cautioned against whispering in meetings. The Milwaukee County Corp. Counsel is the local enforcement agency for Open Meetings law in Milwaukee County. Council members should refrain from whispering and passing notes because these activities could generate a complaint from the public. If the members are starting to reach a quorum in number or a negative quorum and not talking to the public this would be in violation of the Open Meetings law.

Mr. Kesner noted that closed sessions may only be held for specific purposes. The fact that there will be a possible closed session needs to be noted on the agenda in advance. Closed sessions require specific subsections of the state statute and also require a record of the votes. A majority vote is needed to go into closed session and only the specific item can be discussed. The members must come back into open session to vote on the item and they can only convene into open session if it is noted in the motion.

Mr. Kesner noted that there is one exception that has been approved by the Attorney General's office. The members may go into closed session without notice when talking about national or homeland security. Members may not go into closed session for the ratification of a collective bargaining agreement. The penalties for these violations are not less than $25 and up to $300 not reimbursable by the community.

Mr. Archambo cited the example of a developer who wants to talk to each of the Council members. Mr. Kesner stressed that a developer is not a member of the governing body. It is alright if the developer wants to talk to a small enough group of Council members, but passing messages back and forth can become a walking quorum. He advised that members call him to ask for legal advice if they have any questions. Mr. Archambo added that a negative quorum of a committee can potentially block an item. Mr. Kesner cautioned that the committees make recommendations and they have to be careful with that, but committees are not decision making bodies.

Open Records Laws

Mr. Kesner commented that with regard to Open Records law, the city has good systems in place to be able to respond to open records requests. The public policy is similar to Open Meetings law. All persons are entitled to the greatest access to their government and it is an essential function of government. Sometimes the law is abused, but it is an integral part of the job of the employees of the City of Wauwatosa. Open records requests do not have to be made in writing and the requestor does not have to identify themselves. They do have to be specific as to what they want and the request cannot be overly burdensome. If a requestor wants to have a court action then they need to submit a written request. Even though the person does not have to identify themselves, it is helpful in case the department needs to get in touch with the person about any particulars regarding the request. City staff is good about helping people with this.

Mr. Kesner stressed that city officials are the legal custodians for maintaining their own records. Even though everything might be saved that does not mean they are all open records. Public records are the records of public business and public records have to have a custodian. Elected officials have to find a way to preserve letters members receive, emails, etc. Public records also have to be in their original format. Each elected official is not responsible for the records of any other elected official. A public record is any material that is created or kept about the official function of the governmental duties. Drafts, preliminary notes, video or audio recordings are not considered public records and do not have to be preserved forever. Public records need to be provided in their original format. Published material available for sale is not considered a public document.

Mr. Kesner noted that the custodian must respond to the public records request. A denial of the public records request must be specific and must be legally correct. Electronic records are different from paper records. Enforcement of these laws will be made by the District Attorney and penalties for non-compliance will be not less than $100 and if the request is intentionally ignored the penalty would be $1,000.

Ethics

Mr. Kesner commented that the issue of ethics in government has a long history. Governing ethically strengthens the citizens' confidence in public officials and makes sure public officials will not profit from being in public office. The city follows the state statutes in this regard. The use of public office for private benefit is a violation. Public officials cannot solicit anything of value that could be seen as a reward for political action. They cannot accept gifts that are related to holding public office. This is a conflict of interest. A county employee or retiree does not have to vote on anything that involves the county.

Ald. Herzog asked about a Council member that has a client appearing before a committee. Mr. Kesner noted that there is a difference between active clients and former clients. He cautioned members not to accept items or services because of their position and don't accept money. The penalties for these violations is a $1,000 fine.

Ald. Krol asked what if a member of a church was coming before a committee for approval of an item. Mr. Kesner answered that generally church members would not be required to recuse themselves unless they are involved in that particular issue.

Meeting procedures

Mr. Kesner noted that there are two sources of procedural rules. One is Section 2.02.050 of the municipal code with the fall back being Robert's rules of order. Using Robert's rules of order exclusively is usually designed for much larger bodies. The other source is the order of precedence of motions within that same section of the municipal code. He noted that a motion to adjourn or table an item is not open for discussion and there can be no debating a motion to close debate. He added that these procedural rules should be used by both the committees and the Council with the Chair setting the tone.

Ald. Maher asked about a committee's ability to prevent an item from going to the Council floor. Mr. Kesner replied that committees have the ability to place an item on file, but it still goes to the Council.

As his closing remarks, Mr. Kesner read from George Washington's Rules of Civility and Decent Behavior.

The meeting adjourned at 7:34 p.m.

Carla A. Ledesma, City Clerk

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