STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2006AP662

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BEAVER DAM AREA DEVELOPMENT CORPORATION, ERIC BECKER, JEFF KITCHEN, AL SCHWAB, MYRTLE CLIFTON, LES FRINAK, JR., JOHN LANDDECK, DOUG MATHISON, LAINE MEYER, TOM OLSON, GREG STEIL, RON THOMPSON, STEVEN BALDWIN, DUANE FOULKES, PHILIP FRITSCHE, NANCY ZIEMAN, GINA STASKAL, BRIAN BUSLER, AND JACK HANKES,

Defendants-Respondents.

APPEAL FROM A DECISION ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE RICHARD O. WRIGHT, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES RAISED ON APPEAL

1. Did the trial court adopt an appropriate legal standard for determining whether or not the Beaver Dam Area Development Corporation is a quasi-governmental corporation, as described in the Wisconsin Open meetings and Public Records Law, Wis. Stat. § 19.81 *et seq.* and 19.31 *et seq*., respectively?

The trial court answered this question by adopting various standards set forth in prior opinions of the

Wisconsin Attorney General. There is no case law interpreting the term "quasi-governmental corporation" in the context of the Wisconsin open meetings or public records law.

2. Is the Beaver Dam Area Development Corporation a quasi-governmental corporation subject to the Wisconsin open meetings and public records law?

The trial court answered this question "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin respectfully submits that this case is an appropriate candidate for both oral argument and publication. This case presents questions of important public policy involving the application of the open meetings and public records law to entities which are formed as private corporate entities but clearly perform important public and governmental functions. The Legislature clearly envisioned such a situation by applying the law to entities which it entitled "quasi-governmental corporations." However, that term is undefined by statute and has never been addressed by an appellate court in Wisconsin.

This case presents such an opportunity to this Court. By reviewing this declaratory judgment proceeding, this Court will determine what definitional standard should be applied to quasi-governmental corporations for the purposes of compliance with the open meetings and public records law. The questions at hand have important public policy implications for the people of the State of Wisconsin. This decision, by its very nature, will change and develop the law in the area of open meetings and public records law compliance.

For the above reasons, the State of Wisconsin respectfully requests both oral argument and publication under Wis. Stat. §§ 809.22 and 809.23(1)(a)1 and 5.

STATEMENT OF THE CASE

This is an appeal of a decision by the Circuit Court of Dodge County, the Honorable Richard O. Wright presiding by assignment, dismissing a complaint by the State of Wisconsin against the Defendant-Respondent, the Beaver Dam Area Development Corporation (hereafter "BDADC") alleging that the BDADC was a quasi-governmental corporation as set forth in the State of Wisconsin's open meetings and public records laws, Wis. Stat. § 19.82(1) and Wis. Stat. § 19.32(1), respectively. In the State's complaint, filed on July 15, 2004, the State sought a declaratory judgment that the BDADC was a quasi-governmental corporation and should be complying with the requirements of both the open meetings and public records laws and an order that BDADC comply with those laws in the future (R:2:5).[1] In an amended complaint dated December 17, 2004, the State added claims against the individual members of the BDADC's board of directors for forfeitures for alleged violations of the open meetings law for meetings held during the time period of January 2003 through the date of filing (R:18:11; A-Ap. 132).

After briefing and oral argument, the court issued a bench ruling on December 12, 2005, holding that the BDADC did not meet the definition of a quasi-governmental corporation and therefore dismissing the State's complaint against the BDADC, with prejudice. Upon motion by the State, the claims against the individual defendants were dismissed *without* prejudice. The transcript of the court's bench ruling is in the record at R:51 and in the State's Appendix at A-Ap. 101. The

[1] Throughout this brief, references to the record are set forth as R:document number:page number, and to the Appellant's Appendix as A-Ap. page number.

court's oral decision was reduced to a written order and signed by the court on January 30, 2006 (R:52; A-Ap. 116). This appeal followed.

STATEMENT OF FACTS

History and Structure of the Beaver Dam Area Development Corporation

The BDADC is a nonprofit corporation organized under the laws of the State of Wisconsin on January 31, 1997. Its exclusive purpose is to engage in economic development and business retention within the corporate limits and lands which could become part of the corporate limits of the city of Beaver Dam (hereafter "City") (R:52:2; A-Ap. 117).

The BDADC was not incorporated by any officers, employees, or officials of the City, nor was it created pursuant to any constitution, statute, or ordinance (R:52:2; A-Ap. 117). Nonetheless, upon creation of the BDADC and execution of a contract between the BDADC and the City, the City's own economic development department ceased to exist. Its former director, who had been a city employee, became the new Executive Director of the BDADC and so served until resigning effective January 1, 2005 (R:52:3; A-Ap. 118).

Pursuant to the bylaws of the BDADC, the mayor of the City and the chairperson of the City's Community Development Commission serve as *ex officio* members of the BDADC Board of Directors by virtue of their public office. The other ten members of the board have voting rights and are private citizens (R:52:3; A-Ap. 118).

From its inception until after this litigation was commenced, the BDADC's offices were located in the

City's municipal building.[2] No meetings of the BDADC were ever held in the municipal building. Under the terms of their contractual relationship, the City provides employees for support services as well as city-owned equipment, such as fax and photocopy equipment to BDADC (R:52:3; A-Ap. 118).

The Relationship Between the BDADC and the City

Shortly after its incorporation, the BDADC entered into a Cooperation Agreement ("Original Agreement") with the City on April 1, 1997. Under the Original Agreement, the City agreed to provide funding and other forms of assistance to the BDADC. In consideration for city funding, BDADC agreed to undertake programs and initiatives intended to encourage and stimulate economic development within the City (R:52:2; A-Ap. 117. From the time of its inception until after this litigation was commenced, the BDADC was included by the City on the City's website at the following address: http://www.cityofbeaverdam.com/EconomicDept/index.cfm (R:20:2 at ¶10).

On September 15, 2003, the Beaver Dam City Council approved a twenty-year Cooperation Agreement ("Current Agreement") with BDADC, replacing the Original Agreement which was to last through 2006. The Current Agreement provides that the City will cover all BDADC office expenses and increases BDADC's share of the City's room tax allocation from 75 percent in the Original Agreement to 90 percent. In addition, the City has obligated itself to make "other appropriations or funds" that the City may deem necessary to further economic development activities (Current Agreement, Article III; R:18:23; A-Ap. 144). This includes Tax Incremental Financing (TIF) monies for public improvements and land assembly. *Id*. The City also agrees to make "other contributions" to the BDADC,

[2] As of May 19, 2005, the BDADC moved to private office space in a building owned by one of its current board members (R:52:3; A-Ap. 118).

including office space, clerical support, copy machine, fax machine, telephone use, and postage (Current Agreement, Article IV; R:18:24; A-Ap. 145). Officials of the City have a right upon notice to inspect the BDADC's books and records and to place "program conditions" on the use of funds allocated to the BDADC by the City. (Current Agreement, Article VIII; R:18:23-25; A-Ap. 144-46).

At all times relevant to this case, the City has been BDADC's sole client and BDADC has had no ongoing business relationships with other entities as clients. During the time period of January through July, 2005, approximately 83.6 percent of the BDADC's income was from the City's room tax. The BDADC's sole sources of revenue are city funds and interest income. Consistent with the fact that the BDADC receives only city tax money for support, in the event of dissolution of the BDADC, any remaining assets of BDADC shall be transferred to the City, with the intention that the assets be used for economic development and business retention (R:18:20; A-Ap. 141).

Functions and Duties of the BDADC

Under the Current Agreement, the BDADC's Annual Management Plan must be submitted to the City (Current Agreement, Article VI; R:18:25; A-Ap. 146). A copy of the 2005 Management Plan is at R:42:2, tab 3.[3] It obligates the BDADC to negotiate financial incentives for businesses, and to work on dealing with infrastructure and government approval issues related to the attraction of businesses to the area. *Id.*

[3] Because the BDADC chose to designate most of its documents in this litigation as "confidential" pursuant to a protective order, those documents which evidence the nature of BDADC's work on behalf of the City are in a sealed portion of the record at R:42, tabs 2, 3, 4, and 5. Due to the confidentiality order, they were not attached to the brief. They are attached to the Affidavit of Monica Burkert-Brist dated October 5, 2005, in sealed envelopes.

A sample of minutes from the 2005 meetings of the BDADC document that the BDADC was negotiating on the City's behalf with respect to potential developments by Menards, Home Depot, tenants for the City's business park, and Marina properties (R:42:2, tabs 4 and 5).

A review of a sampling of documents maintained by the BDADC demonstrates that the BDADC was the entity responsible for negotiating a Memorandum of Understanding and amendments thereto with the Wal-Mart Corporation related to the development of a major distribution center in the Beaver Dam area. Some of the topics covered in this memorandum relate to utilities and fire protection. The Memorandum obligated the city to make numerous controversial and costly site improvements (R:42:2, tab 4). While the mayor, the chief elected public official, is the designated signatory of this document, the BDADC served as the negotiator on the City's behalf. As a result, none of the drafts, nor any of the underlying strategic decision-making related to negotiations with the Wal-Mart Corporation were conducted subject to the standards of the open meetings or public records laws.

LAW AND ARGUMENT

I. APPLICABLE STANDARD OF REVIEW.

This case involves the application of undisputed facts to a question of law involving the open meetings and public records law. There is no binding appellate precedent on the question. This Court therefore reviews this matter *de novo*. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459 (Ct. App. 1985); *Journal/Sentinel, Inc. v. Shorewood School Bd.*, 186 Wis. 2d 443, 450; 521 N.W.2d 165 (Ct. App. 1994).

II. BOTH THE OPEN MEETINGS AND PUBLIC RECORDS LAWS REQUIRE THAT THE LAW BE CONSTRUED IN FAVOR OF ACCESS BY THE PUBLIC TO INFORMATION ABOUT THE PUBLIC'S BUSINESS.

Under Wis. Stat. § 19.81, the Wisconsin Open Meetings Law, it is the declared "policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Toward that end, the open meetings law further states that the provisions of the open meetings and public records laws "shall be liberally construed" to achieve their purposes. Wis. Stat. § 19.81(4). Only enforcement of the forfeitures provided for violations of the law are strictly construed. *Id*. *See also, State ex rel. Hodge v. Town of Turtle Lake,* 180 Wis. 2d 62, 508 N.W.2d 603 (1993).

The reason for such a liberal construction of the open meetings law is its underlying policy, that "a representative government of the American type is dependent upon an informed electorate," Wis. Stat. § 19.81(1), and that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times," Wis. Stat. § 19.81(2). The Legislature's intent in enacting the open meetings law is reflected in the declaration of policy set forth above and is to be given weight when interpreting the law. *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

Similar public policy declarations and standards are set forth in the Wisconsin public records law, Wis. Stat. § 19.31 *et seq.* In Wis. Stat. § 19.31, the Legislature declared that the provisions of the public records law should be:

> construed in every instance with a presumption of complete public access, consistent with the conduct of government business. ***The denial of public access is generally contrary to the public interest, and only in an exceptional case may access be denied***.

The two laws are clearly complimentary in character and rely upon each other from a legal analytical standpoint. There are some definitional differences between the two statutes, however.

For example, under the open meetings law, the BDADC is subject to the notice and open meetings requirements if the BDADC fits within the definition of a "governmental body," set forth in Wis. Stat. § 19.82(1). The statute provides in pertinent part:

> "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; **a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation . . .** or a formally constituted subunit of any of the foregoing.

In this case, the question presented is whether or not the BDADC should be considered a "quasi-governmental corporation" as described in Wis. Stat. § 19.82(1) or whether it should be allowed to continue to operate as a wholly private entity shielded from public view. With respect to the applicability of the public records law to the BDADC, the question is whether or not the BDADC is an "authority" as defined in Wis. Stat. § 19.32(1). The definition of "authority" provides in pertinent part:

> "Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule or order; **a governmental or quasi-governmental**

> **corporation except for the Bradley center sports and entertainment corporation . . .** a nonprofit corporation which receives more than 50% of its funds from a county or municipality, as defined in s. 59.001(3) . . . or a formally constituted subunit of any of the foregoing.

A "record" subject to the public records law is then defined in Wis. Stat. § 19.32(2). Therefore, with respect to the applicability of both statutes, the inquiry before the Court is to determine whether or not, on the facts, presented, the BDADC should be considered a "quasi-governmental corporation."

The State's position is that the facts demonstrate that the BDADC is, in effect, a spin-off of what was once a governmental function run by a city office. The trend in local government activity is to increasingly yield public function to private entities, be they for profit or non-profit entities. The open meetings law and public records law both anticipated this type of problem; hence, the creation of a definition which requires that "quasi-governmenal" corporations be subject to the law's requirements.

The problem presented for all involved is that the statute leaves the entity of "quasi-governmental corporation" undefined, necessitating guidance from this Court as to an appropriate construction of the statutes. As is set forth herein, the State believes that the applicable legal standard, applied to the facts in this case, support a conclusion that the effect of the form, structure, and function of BDADC, under its contractual relationship with the City has transformed the BDADC's business into governmental business, about which the public has a right to be informed.

III. THE APPLICABLE LEGAL GUIDANCE SUPPORTS THE STATE'S CONSTRUCTION OF THE LAW TO THE FACTS PRESENTED.

There is very little legal authority construing the term "quasi-governmental corporation" as used in Wis. Stat. § 19.82(1). The open meetings law does not define the term and there is no Wisconsin case law interpreting the phrase in the context of these two statutes. Over time, various Attorneys General have been asked, and provided, formal opinions of the Attorney General construing specific fact situations to determine whether or not an entity is a governmental or a quasi-governmental corporation subject to the open meetings law. As can be expected, the outcome of each decision was heavily dependent on factual circumstances as well as the legal perspective of the incumbent Attorney General. For example, there are opinions applying to volunteer fire departments,[4] to a nonprofit corporation organized to run the Circus World Museum,[5] and to "friends" organizations such as the Friends of WHA-TV which supports state owned public television stations.[6]

In 1991, however, in an extensive opinion issued by Attorney General James E. Doyle, the Attorney General attempted to harmonize the state of then-conflicting precedent in these various former opinions by developing an analytical standard to apply when reviewing whether or not such entities should follow the open meetings law. Noting that the various opinions relied on different analyses and reached inconsistent conclusions, the 1991 opinion adopted a fact-specific test in holding that the definition quasi-governmental corporation includes private corporations which "closely resemble governmental corporations in function, effect, or status." 80 Op. Att'y. Gen. 129 (1991) (R:41:12-16;

[4] 66 Op. Att'y Gen. 113 (1977).
[5] 73 Op. Att'y Gen. 53 (1984).
[6] 74 Op. Att'y Gen. 38 (1985).

A-Ap. 166-70). This opinion used a fact specific analysis to hold that both the Milwaukee Economic Development Corporation (MEDC) and the Milwaukee Metropolitan Enterprise Corporation (MMEC) were quasi-governmental corporations which were subject to the open meetings law. As will be demonstrated further in this brief, these corporations were organized for the same types and purposes as the BDADC: to further the economic development and promote job creation in their respective communities. In the 1991 opinion, the Attorney General concluded that due to the arrangements the City had made with the corporations, the business of those entities had been "transformed" into governmental business, about which the public has a right to be informed" and that the public should not be deprived of "its right to knowledge about governmental affairs."

At the trial-court level, both the BDADC and the State relied on the standards set forth in this opinion and by so doing urged it on the court as an appropriate legal framework for the Court's analysis in this case. The 1991 opinion clearly states that "[w]hether a particular private corporation resembles a governmental corporation closely enough to be a 'quasi-governmental corporation' within the meaning of section 19.82(1) must be determined on a case by case basis, in light of all the relevant circumstances." 80 Op. Att'y Gen. at 136 (R:41:16; A-Ap. 170).

The opinion relied on numerous factors in concluding that the Milwaukee entities at issue were quasi-governmental corporations. The list of those factors is as follows: (1) whether the entity serves a public purpose; (2) whether most of its funding is from public sources; (3) whether or not governmental officials serve on the entity's governing board by virtue of their governmental offices; (4) the role of the government or of governmental employees in the day-to-day operations of the entity; (5) the location of the entities' offices; (6) the relationship between the entity and the government in terms of supplies, equipment, payroll arrangements, etc.;

and (7) contractual arrangements between the government and the entities to perform services or functions of an important public purpose and which utilize or administer public funds. 80 Op. Att'y Gen. at 136-37 (R:41:16-17; A-Ap. 170). No one factor is determinative: instead a totality of the relevant circumstances test is to be applied. *Id*.

A. The Facts of this Case Establish that BDADC is a Quasi-Governmental Corporation.

That the BDADC serves a public purpose and receives the vast majority of its funding from public sources alone does not *automatically* make it a quasi-governmental corporation. They are compelling factors to consider, however. Furthermore, at the time that this lawsuit was filed, the BDADC met all of the following criteria listed in the 1991 opinion as "relevant circumstances":

1. The Mayor of the City and Chairperson of the City Community Development Committee serve as directors on an ex-officio basis. They serve by virtue of their positions as city officials, not as private citizens (R:52:2; A-Ap. 117).

2. BDADC had only one employee who, prior to formation of the BDADC, worked directly for the City as the Economic Development Director (R:52:3; A-Ap. 118).

3. BDADC was housed from the time of its inception in the City's municipal building and the City provides office equipment and supplies and clerical support (R:18:3-4; A-Ap. 118-19). After the litigation

commenced, BDADC moved to private office spaces. *Id.*

4. BDADC provides services to the City of Beaver Dam pursuant to a contract through which the BDADC performs virtually all of the City's economic development stimulus activities, funded through an allocation of ninety percent (90 %) of the city's room tax revenue (R:18:23; A-Ap. 144).

It is the State's position, that in making all these arrangements, the City has transformed the BDADC's business into governmental business, about which the public has a right to be informed. The circumstances used to determine whether a private corporation is a quasi-governmental corporation in the most recent and most factually applicable Attorney General's Opinion support the State's position that the BDADC resembles a governmental corporation in function, effect, or status closely enough to constitute a "quasi-governmental corporation" within the meaning of Wis. Stat. § 19.82(1).

B. The Trial Court Erred by not Relying on the Standard in the 1991 Opinion.

Although in the transcript of the hearing and bench ruling at the trial-court level the Court indicated that it was incorporating the prior Attorney General's Opinions as a basis for its decision (R:51:6-7; A-Ap. 107-08), the actual reasoning used by the court does not appear to rely on the 1991 opinion described above. Instead, the court seems to have relied on earlier opinions which used as a benchmark the question of whether or not an entity was actually created by the governmental body by ordinance or some other formal delegation of authority. *See*, discussion by the court at R:52:8-9; A-Ap.109-10. In the court's bench ruling, there is little, if any discussion of the various factors used to determine "form, function and

purpose" as those terms were used in the 1991 Attorney General's Opinion involving the Milwaukee economic development entities. Instead, the court held that, in effect, the state needed to show the BDADC was basically a "ruse" to cover the City's decision-making (R:52:9; A-Ap. 110).

The State believes there are numerous problems with this approach. First, as noted above, the Opinions of prior Attorneys General are not all consistent with each other. This can in part be due to various factual scenarios presented but also due to varying legal philosophies and theories of the incumbent in office at the times they were issued. Second, the opinions most consistent with the trial court's reasoning in this case were the most outdated and the least factually on point to the case presented to the trial court. The court engaged in no apparent attempt to critically review the 1991 opinion, which is not only the most recent, but also the only one involving a private entity created to assist a city with economic development activities. The trial court simply unilaterally stated that, although the factors in the opinion were good law, the court would require a legislative amendment to include an entity such as BDADC under the law (R:51:9; A-Ap. 110). The State believes the Legislature has already done so.

The formal opinions of the various Attorneys General from the past thirty years demonstrate a change over time in the manner in which the term "quasi-governmental corporation" was construed in terms of compliance with the open meetings law. The BDADC clearly likes the definitional framework established in the earlier opinions. In the Palmyra Fire Department opinion, 66 Op. Att'y Gen. 113 (1977), Attorney General LaFollette stated that "unless it [a corporation] also is created directly by the Legislature or by some governmental body pursuant to specific statutory authorization or direction" it was not subject to the open meetings law. This also seems to be the standard adopted

by the trial court, though the court stated its intent to the contrary.

If the State believed that the earlier standard used by the trial court were still applicable, this issue would not be before the Court. The State does not, however, believe that to be the correct test. Instead, the State believes the correct legal standard to apply is the most recent and most factually applicable test—the test applied by Attorney General Doyle in the 1991 opinion concerning the City of Milwaukee's Economic Development entities. That opinion dealt directly with economic development corporations like the BDADC. It did not deal with volunteer fire departments or "friends" groups for public radio, or historical sites foundations. The 1991 opinion at 80 Op. Att'y Gen. 129 (1991), dealt specifically and directly with the operations of two purportedly private economic development agencies charged with the same kinds of duties BDADC is charged with accomplishing for the City of Beaver Dam. That opinion is the most complete, the most up to date, and applies the history of the prior opinions to a more current factual scenario.

One can legitimately argue in this case whether or not, using the criteria of the 1991 opinion, the BDADC fits the definition of a quasi-governmental corporation. But, the State believes this Court needs to take a stand which can serve as binding future precedent as to what the standard ***is***, and that the 1991 opinion is an appropriate methodology upon which to rely.

C. The 1991 Opinion is a Reasonable Standard to Adopt as a Methodology for Determining What Constitutes a Quasi-Governmental Corporation.

The State respectfully submits that the 1991 opinion is the most applicable and is entitled to the most

weight by the Court in reviewing the factual situation at hand. Although the latter does not revoke the prior interpretations, the wording of the 1991 Doyle opinion clearly indicates that the Attorney General's intention was to harmonize various prior interpretations on this subject. It is also the most complete and most recent analytical review of various factors applicable to what has been an increasing trend to use private nonprofit entities to conduct the public's business.

The 1991 Attorney General Opinion specifically rejected the earlier analyses in favor of a several factor test. In doing so, the Attorney General stated:

> Thus, prior attorney general opinions have reached inconsistent conclusions with respect to whether the term "quasi-governmental corporation" in section 19.82(1) is limited to nonstick body politic corporations created directly by the Legislature or some other governmental body or whether the term also includes corporations that were not created directly by a governmental body but have some other attributes that resemble a governmental corporation . . . **I am of the opinion that the term includes corporations that have other governmental attributes**.

80 Op. Att'y Gen. at 134 (emphasis added) (R:41:15; A-Ap. 169).

Furthermore, the 1991 opinion relied on updated legal standards from a respected, authoritative treatise on municipal law. The Attorney General's reasoning for reaching this conclusion is set forth in detail at 80 Op. Att'y Gen. 135-36 (R:41:15-16; A-Ap.169-70). In part, the analysis relied upon revisions to the section of McQuillin's treatise on municipal corporations' law which had been updated since it was used as authority in the prior opinions:

> I conclude that the term "quasi-governmental corporation" . . . includes private corporations which, for other reasons, closely resemble a governmental corporation in function, effect or

> status. This conclusion is supported by the section of McQuillin, *Municipal Corporations* cited in 74 Op. Att'y Gen. 38 (1985), which has since been revised to explain that:
>
> > The term "quasi-public [or quasi-governmental] corporation is not per se public or governmental. On its face, the term connotes that it is not a public corporation but a private one. But "quasi" indicates that the private corporation has some resemblance to a public corporation in function, effect or status."
>
> McQuillin, *Municipal Corporations* § 2.13 (3rd rev. 1987 & Supp. 1990).[7]

80 Op. Att'y Gen. at 135 (R:41:15; A-Ap. 169).

On this basis, the 1991 opinion adopted a fact-based set of criteria to evaluate when an otherwise private corporation can be so intertwined with the affairs of the government it serves that has transformed its business into governmental business. As the opinion noted: "The fact that the city has been able to find private corporations to acquiesce in such an arrangement cannot work to deprive the public of its right to knowledge about governmental affairs" and concluded that "any ambiguity the fact-based test creates . . ." can be avoided by resolving any question as to the applicability of the open meetings law ***in favor of complying with the law."*** 80 Op. Att'y Gen. at 137 (emphasis added) (R:41:16; A-Ap. 170).

[7] The complete textual section from the 1999 edition of McQuillin is in the record at R:49, as Exhibit 3 to the Second Affidavit of Monica Burkert-Brist.

IV. AT A MINIMUM, THE BDADC'S RECORDS RELATED TO THE CITY'S BUSINESS SHOULD BE OPEN TO PUBLIC SCRUTINY.

Even if this Court were to determine that the BDADC does not meet the definition of a quasi-governmental corporation as set forth in the open meetings and public records law, the records of the BDADC which relate to the City's business development activities should be open to public scrutiny under the public records law. Under the existing legal precedent applicable to the public records law, a record held by an agent of a governmental body is still a public record if it would be such a record in the hands of the governmental body itself.

In *Journal/Sentinel, Inc v. Shorewood School Board, supra*, 186 Wis. 2d at 451-55, the Court of Appeals held that a settlement agreement with a school district administrator which was prepared by an outside law firm on behalf of a school district was a public record even though it was maintained in the law firm's rather than the district's office files. The court stated:

> The school board appellants' argument thus resolves to whether a public body may avoid the public access mandated by the public records law by delegating both the record's creation and custody to an agent. Posing this question provides its answer: it may not. Indeed, § 19.36 (3) STATS. specifically provides that access is to be granted to "any record produced or collected under a contract entered into by the authority . . . to the same extent as if the record were maintained by the authority." Thus, in *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W. 2d 589 (1989), the court assumed without discussion that a report prepared by a private consulting firm at the request of a government agency was not excluded from the definition of record because the report was neither prepared directly by the agency nor kept in its custody.

Journal/Sentinel, 186 Wis. 2d at 453 (footnote omitted).

The Court of Appeals specifically held that the law firm was an agent of the school board for the purposes of negotiating and preparing the settlement agreement and that it would clearly have been a record if the School board had done the work and retained the document itself. The court further stated that:

> There is no doubt but that the "Memorandum of Understanding" would be a "record" under the public records law if it were either "created" or "kept" by the school board, its officers or employees. See, § 19.32(2) STATS. Delegating either of those responsibilities to outside counsel does not thereby remove the document from the statute's definition of "record."

Journal/Sentinel, 186 Wis. 2d at 454 (citation omitted).

Applying the undisputed facts of this case to the reasoning in both *Fox* and the *Shorewood School Board* cases, it is clear that the BDADC holds records related to the City's business and economic development activities as an agent under contract with the City. The work the BDADC does is pursuant to a contractual agreement. The kind of work it does pursuant to that agreement causes it to generate documents which, if in the City's possession, would clearly be public records. *See*, for example, the documents set forth at R:42 tabs 3-6, and R:49, Exh. 2.[8] Correspondence with the representatives of developers about the terms of a development agreement, documents related to negotiations for location of businesses in a city industrial park, circulation of proposed terms of a memorandum agreement to be signed by city officials, including the mayor: all of these are examples of what would in all normal situations be public documents if kept by the City at its offices. They do not lose their public status and the public certainly does not lose its interest in them simply because they are maintained in a nonprofit group's filing cabinet.

[8] These documents were designated "confidential" by the BDADC and therefore are in a sealed portion of the court record.

Therefore, even if this Court were to find that the open meetings and public records law does not apply to BDADC as an entity because it is not a quasi-governmental corporation, the State respectfully requests a ruling from this Court which holds that those documents created and/or maintained by BDADC pursuant to its agreements with the City be produced as records held by an independent contractor to whom public business and documents have been delegated.

CONCLUSION

This case presents important public policy questions about the public's access to information and documents when a governmental body "out-sources" its governmental responsibilities to a private nonprofit entity. The public's right to know about how negotiations are being conducted does not change because a city delegates the responsibility to an outside party. The trial court erred in concluding that as long as the City has ultimate approval authority, the public has no right to know about the work BDADC is doing on the City's behalf. Obviously, much of the work during the negotiation of controversial economic development projects involves matters of serious public interest. The entire purpose behind the open meetings and public records law is to shine a bright light on the workings of government at every level in our state. As the court stated in *Journal/Sentinel, supra*, 186 Wis. 2d at 459, "[a]ll officers and employees of government are, ultimately, responsible to the citizens, and those citizens have a right to hold their employees accountable for the job they do." If that work is, in turn, delegated to a private contractor, then the actions of those to whom the work is delegated should be

subject to public scrutiny. Only by access via the open meetings and public records law can such accountability be ensured.

Dated this 16th day of May, 2006.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,428 words.

Dated this 16th day of May, 2006.

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Monica Burkert-Brist
Assistant Attorney General

A P P E N D I X

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of May, 2006.

_____

Monica Burkert-Brist
Assistant Attorney General

INDEX TO APPENDIX

Please Note: Those portions of the attachments to the Affidavit of Monica Burkert-Brist (R:42) which are subject to a current protective order are still under seal and will need to be accessed via the record on file with this Court.