WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON APPLICABILITY OF OPEN MEETINGS LAW TO QUASI-GOVERNMENTAL BODIES

FROM: Ronald Sklansky, Senior Staff Attorney, and Dan Schmidt, Senior Analyst

RE: Overview of Wisconsin's Open Meetings Law and its Application to Quasi-Governmental Bodies

DATE: October 9, 2006

INTRODUCTION

The Joint Legislative Council established the committee and appointed the chair by a June 9, 2006 mail ballot and appointed a total of 14 members by mail ballots dated August 1 and August 28, 2006. The Joint Legislative Council established the following study assignment for the committee:

> The Special Committee is directed to: (a) review recent Attorney General opinions regarding the applicability of the Open Meetings Law to "quasi-governmental" bodies, such as economic development corporations, to determine whether the public policy set forth in those opinions is desirable; and (b) develop legislation to clarify the applicability of the Open Meetings Law to quasi-governmental bodies either by codifying those policies or by delineating the specific condition under which quasi-governmental bodies are subject to the Open Meetings Law.

THE OPEN MEETINGS LAW IN GENERAL

Wisconsin's Open Meetings Law is contained in ss. 19.81 to 19.98, Stats. Section 19.81, Stats., provides in part as follows:

> **19.81 Declaration of policy. (1)** In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete

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> information regarding the affairs of government as is compatible with the conduct of governmental business.
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> **(2)** …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 unless otherwise expressly provided by law.
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> …
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> **(4)** This subchapter shall be liberally construed to achieve the purposes set forth in this section….

Every meeting of a governmental body must be preceded by public notice and must be held in open session, except as otherwise specifically provided by law. The public notice of a meeting must set forth the time, date, place, and subject matter of the meeting, including that subject matter intended for consideration at any contemplated closed session, in a form as is reasonably likely to apprise members of the public and the news media thereof. Generally, public notice of every meeting of a governmental body must be given at least 24 hours prior to the commencement of the meeting. A meeting of a governmental body, upon a motion duly adopted, may be convened in closed session for one or more of 13 statutorily specified reasons. [See ss. 19.83 (1), 19.84 (2) and (3), and 19.85 (1), Stats.]

The definitions of terms used in the Open Meetings Law are important for determining the extent of its applicability. The term "meeting" is defined to mean the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body. In turn, the term "governmental body" is defined to mean, in part, 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 forgoing entities. [See s. 19.82 (1) and (2), Stats. These definitions have been in place at least since the recodification of the Open Meetings Law in Ch. 426, Laws of 1975.]

Finally, a member of a governmental body who knowingly attends a meeting held in violation of the law or who otherwise violates the law by some act or omission must forfeit without reimbursement not less than $25 nor more than $300 for each violation. [See s. 19.96, Stats.]

INTERPRETATION OF THE TERM "QUASI-GOVERNMENTAL CORPORATION"

There appear to be no reported Wisconsin judicial opinions interpreting the term "quasi-governmental" corporation with respect to the Open Meetings Law. However, the Attorney General has reviewed the meaning of the term on a number of occasions. The opinions include the following:

1. A volunteer fire department incorporated as a nonprofit corporation is neither a governmental nor a quasi-governmental corporation and is not a governmental body under the Open Meetings Law. Instead, the volunteer fire department is a nonstock, nonprofit entity. The fact that this type of private corporation provides fire service and is paid does not change the status of the corporation to a governmental or quasi-governmental corporation. Even if providing some public service, a volunteer

fire department is not a governmental or quasi-governmental corporation, unless it has been created directly by the Legislature or some governmental body under specific statutory authority or direction. [See 66 OAG 113 (1977).]

2. The Historic Sites Foundation, Inc. (HSF), a privately organized entity created to manage the Circus World Museum at Baraboo, is not a quasi-governmental body. The Attorney General made the following remarks:

> Section 19.81 (2) also expressly includes quasi-governmental corporations within its definition of a governmental body. There are no reported Wisconsin decisions that define the term "quasi-governmental." The word "quasi" is defined in *Webster's New Collegiate Dictionary* 700 (7th Ed. 1977) as: "1) having some resemblance…by possession of certain attributes" and, "2) having a legal status only by operation or construction of law and without reference to intent...." Using the dictionary definition, there seems to be little doubt but that the nonstock body politic corporations created by the Legislature to perform essentially governmental functions are quasi-governmental corporations. Corporations such as the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority were essentially created to achieve legitimate governmental functions by a means that could not be employed by state agencies because of constitutional constraints.
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> …
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> The activities of the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority are largely controlled by statute. Thus, these corporations and similar entities fall within the definition of a quasi-governmental corporation.
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> In contrast, the functions of the HSF cannot possibly be considered governmental. It exercises no sovereign power and does not engage in activity that is dependent on or controlled by delegation from the Legislature. The functions pursued by the HSF under its articles and by-laws are the same functions that any private nonstock corporation could engage in. Its powers are derived from the general laws of the state. The HSF is a private corporation with no governmental attributes. While the members of the Board of Curators (of the State Historical Society) are also directors of the HSF, they hold and administer the position of director as private citizens not as state officials.
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> It is therefore my opinion that the HSF is not subject to the requirements of the open meetings law.

[See 73 OAG 54, 56-57 (1984).]

3. A "friends" organization which provides financial and other support to public television and radio stations that are licensed to governmental units is not a quasi-governmental corporation for the purposes of the Open Meetings Law. The Open Meetings Law does not apply to an independent private

association or nonprofit corporation which has a public purpose in that it is providing financial support to a public radio or television station. [See 74 OAG 38 (1985).]

4. In 1991, the Attorney General was asked whether the Milwaukee Economic Development Corporation was a quasi-governmental corporation subject to the Open Meetings Law. The corporation provided economic development loans to private citizens with federal funds paid through the City of Milwaukee. Four of the nine directors of the corporation were city officials and four of the corporation's six officers were selected by Milwaukee at a salary set by Milwaukee. The principal office of the corporation was in the Department of City Development. Further, some of the corporation's staff were city employees. The Metropolitan Milwaukee Enterprise Corporation, a nonstock, nonprofit corporation, also was a subject of the opinion. This entity also made economic development loans from federal money paid through the City of Milwaukee. No director positions of this corporation were reserved for the city, but two of the directors were city council members and one was a city employee.

The Attorney General noted that prior opinions of the office reached inconsistent conclusions with respect to whether the term "quasi-governmental corporation" is limited to nonstock body politic corporations created directly by the Legislature or some other governmental body, or whether the term also includes corporations not directly created by a governmental body, but that have some other attributes resembling a governmental corporation. Here, the Attorney General concluded that the term includes corporations that have governmental attributes. In other words, the term is not limited to corporations created directly by a governmental body, but also includes a private corporation closely resembling a governmental corporation in function, effect, or status. Thus, the Attorney General held that a determination of whether an entity is a quasi-governmental corporation must be made on a case-by-case basis.

With respect to the two Milwaukee corporations, the Attorney General noted that while an entity serving a public purpose or receiving public funds is not automatically a quasi-governmental corporation, the analysis can change when directors and officers serve by virtue of their positions in a government, where day-to-day control is subject to governmental control, and where government buildings, supply, services, and staff are used. Consequently, under the circumstances prevailing with respect to the Milwaukee Economic Development Corporation and the Metropolitan Milwaukee Enterprise Corporation, the Attorney General opined that the two corporations resembled a governmental corporation in purpose, effect, and status closely enough to constitute quasi-governmental corporations. This conclusion was reached even though a majority of directors were private citizens, not directly affiliated with Milwaukee, and even though the articles and by-laws of the corporations could be amended. Taking note of the statutory direction to liberally construe the Open Meetings Law, the Attorney General stated: "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." The Attorney General stated that any uncertainty about the applicability of the term "quasi-governmental corporation" can be avoided "without undue burden by resolving any question as to the applicability of the open meetings law in favor of complying with the law." [See 80 OAG 129 (1991).]

5. In 2005, making use of the standard of whether an entity resembles a governmental corporation in purpose, effect, or status closely enough to be a quasi-governmental corporation, the Attorney General concluded that the Board of Directors of the Wisconsin Land and Water Conservation Association constituted a quasi-governmental corporation under the Open Meetings Law. The Attorney

General noted that the statutes require a county board to create a land conservation committee. The land conservation committees across the state created the association and elected its Board of Directors. The Board of Directors then elected officers. The Attorney General stated that all seven directors of the association at that time were county officials, serving in official capacities and that three of the seven directors acted as officers. While the association was not housed in a public building and had no public staff, the dues ultimately came from public funds. Further, nonvoting members of the association included other governmental bodies. The Attorney General found that the purpose of the association resembled that of land and water conservation boards and committees; that the memberships were essentially identical; that the goals were identical; that the dues came from public funds; and that the election of board members occurred at the annual meeting of the association. For these reasons, the Attorney General found that the association resembled a governmental corporation in purpose, effect, and status closely enough to be deemed a quasi-governmental corporation subject to the Open Meetings Law. [See 2005 Wisc. AG-LEXIS 33 (October 25, 2005).]

6. In 2006, the Attorney General again found that a private entity was a quasi-governmental corporation under the Open Meetings Law by applying the standards developed in the 1991 and 2005 opinions. The Attorney General noted that the following nonexclusive factors should be considered in making this determination:

a. Whether the entity serves a public purpose.

b. Whether public funding is received.

c. Whether the by-laws of the entity reserve seats on the Board of Directors for governmental officials or employees or give a governmental actor power to appoint governmental officials or employees to the Board of Directors.

d. Whether the government has in fact exercised its appointment power.

e. Whether governmental employees serve as officers of the entity.

f. Whether the entity is housed, equipped, or staffed by a unit of government.

In this instance, towns and a city entered into an agreement to create a nonprofit corporation to provide ambulance services. The corporation's board was made up of municipal officials, the president and vice president of the corporation were municipal officials, removals and vacancies were made and determined by municipal governments, fees were paid by municipalities and residents, and the corporation's assets belonged to the public. Because of these circumstances, the Attorney General held that Cornell Area Ambulance, Inc., was a quasi-governmental corporation subject to Wisconsin's Open Meetings Law. [See 2006 Wisc. AG-LEXIS 7 (March 13, 2006).]

COMMITTEE OPTIONS

The standard used by the Attorney General to determine the existence of a governmental corporation is whether the entity closely resembles a governmental corporation in function, affect, and status. In applying this standard, the Attorney General looks to factual matters such as the entity's purpose, the source of the entity's funding, governmental participation in the entity's activities, and governmental support for the entity. In reviewing the applicability of the Open Meetings Law to a

quasi-governmental corporation, the Special Committee can consider a number of general approaches including the following:

1. Take no action and allow the current standard to be applied on a case-by-case basis by the Attorney General and await the adoption of the standard, or the application of a new standard, in an appellate court decision.

2. Propose legislation to define the term "quasi-governmental corporation," incorporating the standard and factual questions used by the Attorney General to make this determination.

3. Propose legislation that, regardless of whether a general standard otherwise is used to define the term "quasi-governmental corporation," specifically exempts statutorily described entities from requirements of the Open Meetings Law.

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