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News For School and Municipal Clients

Closed Session Discussions May Be Subject To Discovery

The Wisconsin Open Meetings Law generally requires a governing body to hold its meetings in open session. In some instances, however, a governing body is authorized to convene in closed session. Such closed sessions must fall within one of thirteen statutory exemptions. These exemptions recognize that some subject matters are particularly sensitive in nature and may be discussed privately. A recent Wisconsin Supreme Court decision, *Sands v. Whitnall School District,* however, concludes that some private discussions during closed sessions may need to be disclosed if information about a closed session is requested during the course of litigation.

Barbara Sands was hired as the supervisor/facilitator of the Gifted and Talented Education Program in the Whitnall School District. In 2002, the school board met twice in closed session to discuss Sands' continued employment in the district. Both closed sessions were noticed and conducted pursuant to the Open Meetings Law. After these meetings, the school board decided not to offer Sands an employment contract for the following year. Sands filed a lawsuit alleging that the school board failed to give her four months notice of its intent to nonrenew her contract as required under state law.

As part of civil litigation, parties are allowed to conduct "discovery" activities. During discovery, a party attempts to "discover" facts through permissible activities, such as depositions (i.e., oral questions seeking testimony from an individual) or interrogatories (i.e., written questions from one party seeking a written response from the other party). Sands served the school board with a set of interrogatories. *These interrogatories sought information* about the substantive discussion that occurred during the board's closed sessions relating to the decision not to renew Sands' contract. The school board refused to answer these interrogatories, claiming that the information was privileged (i.e., exempt from discovery) based on the Open Meetings Law exemptions under which the meetings were closed and a "deliberative process privilege."

In response, Sands filed a motion with the court to compel the school district to answer the interrogatories. The circuit court ruled in favor of Sands and required the school district to provide the information requested in the interrogatories. On appeal, the Wisconsin Court of Appeals reversed the circuit court's decision, concluding that the substance of what takes place in a closed session of a school board meeting is privileged and not subject to disclosure. The Wisconsin Supreme Court, however, recently overturned the Court of Appeals decision and concluded that no privilege exists and that such information is subject to discovery.

In reaching this conclusion, the Supreme Court first held that the Open Meetings Law does *not*

explicitly state that the contents of closed meetings are secret or exempt from discovery in the context of litigation and, therefore, does not provide a privilege from discovery during litigation. It noted that other privileges are explicitly provided for in state statute. Further, according to the Court, such a privilege could not be inferred from the Open Meetings Law. In this respect, the Court noted that, because the Open Meetings Law only *permits* closed sessions and does not *require* them, a mandatory privilege would not be inferred. As a result, the Court refused to create a discovery privilege for communications during closed session based on the Open Meetings Law that would have prevented disclosure of the information.

Second, the Court rejected the school district's argument that a "deliberative process privilege" prevented the disclosure of the closed session discussion. In one federal case involving the Freedom of Information Act, the "deliberative process privilege" was recognized as protecting communications that are part of the decision-making process of a governmental agency. The Supreme Court noted, however, that such a privilege had never been recognized by the Wisconsin courts in the context of discovery, and it refused to create such a new privilege. The Court asserted that such a privilege would be detrimental to the search for truth and would dramatically affect discovery in areas where government bodies are litigants.

In the end, however, the Supreme Court indicated that its decision should not be viewed as undermining the ability of government bodies to conduct meetings in closed session. It noted that discovery rights are not without limitations, highlighting that parties may object to discovery requests that are not relevant to the subject matter of the pending action. In addition, parties may seek protective orders when discovery requests are annoying, embarrassing, or oppressive. Further, there may be situations where discovery requests implicate sensitive information to which the general public should not be given access. Finally, courts may consider motions to seal the record or may review the documents privately in chambers to ensure that the information requested is necessary to the litigant and does not exceed the scope of allowable discovery.

Based on the *Sands* decision, school board members must have a heightened awareness of their closed session comments and statements. After *Sands*, school board members may now be compelled to respond to discovery requests or provide testimony about the comments that they made during a closed session meeting. It is understandable if board members react to this decision in a way that may have a chilling effect upon discussions during closed session meetings. However, school board members must not avoid comments over school district matters simply because it may be discovered at some later point. Instead, it is advisable for school board members to simply be cautious to avoid discussion that may show unlawful intent in their decision-making or may be defamatory in nature. It is also important to note that discussions between the school board and its attorney during closed session may still be covered under an attorney-client privilege. The *Sands* decision did not address this privilege.

This FYI was prepared by members of the Lathrop & Clark LLP *School, Municipal, Labor and Employment Law Team. If you have any questions regarding this topic, please call any of the following members:*

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