



April 23, 2018

Ald. Terry L. Witkowski
414-731-0472

MEDIA ALERT

Alderman Witkowski releases City Attorney opinion on FPC's inadequate notice in appointing new police chief

Alderman Terry L. Witkowski today released an April 20, 2018, opinion of the office of the City Attorney (**attached**) stating that the Board of Fire and Police Commissioners failed to post adequate notice when it appointed Mr. Alfonso Morales to the position of chief of police.

The opinion states that the notice of the April 5, 2018, board meeting failed all three tests a court would use in determining whether the notice was adequate and therefore, "...a court would likely determine that the agenda item indicating the Term of the Acting/Interim Chief of Police would be discussed was inadequate notice of the fact that a Chief of Police would be appointed."

"Chief Morales has a difficult task before him," Ald. Witkowski said, "and it's unfortunate that the Board chose to begin his tenure in such an irregular way."

"Board members have repeatedly said they want to act independently, but that does not free them from obeying state statutes governing meeting notices," he said.

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April 20, 2018

Alderman Terry L. Witkowski
City Hall
200 E. Wells St., Room 205
Milwaukee, WI 53202

Re: The Notice for the April 5, 2018, meeting of the FPC

Dear Alderman Witkowski,

By letter dated April 10, 2018, you requested a legal opinion as to whether the notice for the April 5, 2018, regular meeting of the Board of Fire and Police Commissioners (“FPC”) was legally adequate under the Open Meetings Law. You shared with this office that your specific concern is that the notice did not explicitly state that Acting/Interim Chief of Police Alfonso Morales would be appointed to the position of Chief of Police at the meeting. Instead, the agenda item under which the Chief of Police was appointed reads simply “Term of Acting/Interim Chief of Police.”

Pursuant to Wis. Stat. § 19.84(2), every public meeting of a governmental body must be preceded by a notice that “shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.” The Attorney General has opined that the public is entitled to the best notice possible for every meeting of every governmental body, including the best notice possible of the specific subject matters to be discussed. *See Boyle Correspondence* (May 4, 2005).

In *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, ¶¶ 22, 27, 301 Wis.2d 178, the Wisconsin Supreme Court opined that a public notice must be “reasonably specific under the circumstances,” and established factors that must be considered by public officials in determining how detailed and specific a meeting notice must be. The factors to be considered include the following:



1. Balancing the burden of providing a more detailed notice;
2. Making a determination of which the subject of the meeting is of particular interest to the public; and
3. Determining whether the subject to the discussed involving nonroutine actions that the public would be unlikely to anticipate.

Id., ¶ 28. With regard to the first factor, the public official drafting the notice must consider the amount of time and effort required to assess what information should be included in the notice, keeping in mind that that demands of the specificity should not “thwart the efficient administration of governmental business.” *Id.* at ¶ 29. With regard to the second factor, the Supreme Court held that the greater the public interest, the greater the specificity required. This includes considering the number of interested citizens and the intensity of the interest. *Id.* at ¶ 30. Finally, with regard to the third factor, the Supreme Court noted that novel issues require more specificity. *Id.* at ¶ 31.

According to the Supreme Court, whether a meeting notice is reasonably specific “cannot be determined from the standpoint of when the meeting actually takes place,” but instead must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.” *Id.* at ¶ 32.

Applying the factors set forth by the Supreme Court in *Buswell* to the notice at issue, it is our opinion that a court is likely to determine that the notice was not sufficiently specific to reasonably apprise members of the public of that a Chief of Police would be appointed at the meeting.

First, it would not have been a burden to add a line in the notice at issue specifying that a Chief of Police would be, or could be, appointed at the meeting. It would only require the insertion of a few additional words. The Wisconsin Supreme Court has stated that adequate notice may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified. *Id.* at ¶ 37, n. 7. However, in this instance, not even the subject matter was specified. On the contrary, the use of the words “Acting/Interim Chief” conveyed that Chief Morales’ status as Interim Chief would remain unchanged.

Second, there can be little doubt that the appointment of a Chief of Police for the City of Milwaukee is a matter that is of particular interest to the public. The Chief of the Milwaukee Police Department is in charge of one of the state’s largest law enforcement agencies. Furthermore, who would ultimately succeed former Chief of Police Edward Flynn as Chief was the subject of a multitude of news stories, and is undisputedly of great interest to many members of the community as well.

Third, the appointment of a Chief of Police is clearly not an action that the FPC routinely performs. There have only been 5 different Chiefs of Police since 1989, and that includes Chief Morales. Prior to Chief Morales, the last Chief of Police was appointed in 2008.

Accordingly, as there was no burden in providing a more detailed notice that there was going to be a discussion or vote relating to the appointment of a Chief of Police, as the appointment of a Chief of Police is a matter of particular interest to the public, as the appointment of a Chief of Police is a non-routine action, and as all of these factors were known, or should have been known, prior to the notice being issued, it is our opinion that a court would likely determine that the agenda item indicating the Term of the Acting/Interim Chief of Police would be discussed was inadequate notice of the fact that a Chief of Police would be appointed.

Please note that although the notice at issue was likely inadequate, that does not automatically mean that the actions taken at the meeting are invalid. A court can void actions taken at a public meeting that was not properly noticed, but only if the court finds that the public interest in the enforcement of the Open Meetings Law outweighs any public interest which there may be in sustaining the validity of the action taken. *See Wis. Stat. § 19.97(3)*. Unless and until such a finding is made, the actions taken at the meetings remain in effect. In this instance, that means that, regardless of whether the notice at issue was sufficient or insufficient, Alfonso Morales remains the current Chief of Police.

Should you have any further questions or concerns, please do not hesitate to contact the undersigned.

Very truly yours,



for GRANT F. LANGLEY
City Attorney



PETER J. BLOCK
Assistant City Attorney

c. Jim Owczarski
City Clerk

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