

May 23, 2019

Wisconsin Attorney General Josh Kaul
Wisconsin Department of Justice
17 West Main St.
Madison, WI 53703

Re: Request for advice on potential open meetings laws violation

In December 2018, during what was known as the lame-duck session, Republicans passed a series of bills that made several significant changes to the law including stripping the incoming Governor and Attorney General of important powers enjoyed by their predecessors. This unprecedented power grab was widely denounced as an illegitimate and undemocratic maneuver that served only to erode the public's trust in good government.

I am requesting an opinion from the Wisconsin Attorney General's Office, as is prescribed under Wis.Stat. § 19.98, to determine whether Republican leadership violated our open meetings laws in contravention of the Wisconsin state constitution, and if so, whether the bills passed during the lame-duck session should be nullified. Secondarily, I would like to know whether Dane County District Attorney Ismael Ozanne violated the law by ignoring my verified complaint that I filed with his office.

It is my belief that Republicans took advantage of my disability and excluded me, a duly elected member of the state legislature, from participating in the legislative process in violation of our open meetings laws. By doing so, Republicans have denied my constituents the representation guaranteed to them under the Wisconsin constitution. Such exclusion also violates my individual rights as an elected official and our state constitution's equal protection clause. As such, I believe a court should nullify the bills passed during the lame-duck session.

To help advise your opinion, let me provide you with a quick rundown of the events that led to this situation. When I began my first term as a state representative in January 2017, I met with Speaker Vos to discuss my physical and logistical limitations, and what we could do to provide appropriate accommodations. After that meeting, things were working well until a floor session in April of 2017.

During that floor session, Democrats used a procedural motion to force an additional vote on a bill. Republicans were annoyed by the maneuver, and in retaliation, scheduled the vote for early the next morning. Given the lack of notice and the early hour of the vote, my disability made it impossible for me to attend. I was particularly frustrated because the vote dealt with an issue that directly affected my constituents.

I took my frustrations to Assistant Minority Leader Dianne Hesselbein, explaining how my disability prevented me from attending the vote. She promised to take my concerns to Republican leadership and would request that future floor sessions come with appropriate notice and be scheduled at reasonable times. I had hoped that with the weight of Democratic leadership

behind me, Republicans would begin taking my needs seriously. Unfortunately, that ended up not being the case.

On the day of the lame-duck session, I was on the floor at 1 PM, the time scheduled by Republican leadership, but no one was there. Apparently, Republicans in the Assembly and Senate had not come to an agreement on the proposed legislation and so the vote was indefinitely delayed. After several hours went by, I contacted Majority Leader Jim Steinke to ask when I should expect the floor session to begin so that I could properly coordinate with my home health aide. Representative Steinke said that the situation was “fluid” and nothing more. Without any concrete details, I was forced to go home for reasons related to my disability.

I woke up the next day, checked my email, and saw that Representative Steinke had sent a message around 4 AM giving members roughly 10 minutes to get to the floor. This email came after a 14 hour delay that forced many members to wait in their offices overnight. Unfortunately, by the time I read the email, the votes had been cast and the floor session was over. Rather than delaying the vote to a more reasonable time, Republicans chose to hold the vote in the early morning hours, hoping to hide their unpopular and undemocratic actions from the public. In doing so, Republicans manipulated the process, took advantage of my disability, and excluded me from participating in the legislative process.

At first, I thought of remaining silent. But, in this instance, the accommodation I required was so small that it is a shame that my Republican colleagues could not even do the bare minimum to be inclusive to my needs. If they had just held the vote later that day, everything would have been fine. Instead, their embarrassment drove them to manipulate the schedule so that as few people as possible would see their actions. If I were to remain silent, I would be condoning their exclusionary process and failing to hold them accountable for their actions. That, I cannot live with.

After researching the law, I do believe there is a case to be made. There are three legal questions that need to be asked. First, was there a violation of our open meetings laws? Second, does that violation infringe upon our state constitution? And third, does the violation outweigh the public’s interest in the improperly passed legislation?

I believe Wisconsin Republicans violated our open meetings laws by excluding me from participating in the legislative process. It is obvious that our open meetings laws were created with inclusivity in mind. Under Wis.Stat. § 19.81(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.” To require reasonable accessibility puts the onus on those scheduling meetings of our legislature to be cognizant of my limitations as a disabled person and to provide such reasonable accommodations as is necessary for me to participate.

Instead, Wisconsin Republicans, while fully aware of my limitations, held a meeting of the legislature at a time and place that was impossible for me to attend. Under Wis.Stat. § 19.89, the law states unambiguously that, “No duly elected or appointed member of a governmental

body may be excluded from any meeting of such body.” At this date, no court has defined what it means to exclude somebody under this statute making this a novel question.

I believe that by failing to provide reasonable notice, Wisconsin Republicans have excluded me in violation of this statute. Sending members an email at 4 AM giving them mere minutes to be on the floor after an overnight 14 hour delay is an impossible request for most people let alone someone in a wheelchair. It is no different than if they had held the meeting at the top of a set of stairs. Accessibility cannot be limited to the physical dimensions of a space, especially when the logistical accommodation is reasonable. In this case, if Wisconsin Republicans had simply held the vote at 1 PM rather than 4 AM, there would have been no issue. Instead, Wisconsin Republicans rushed through an early morning vote with only 10 minutes notice, excluding me from participating in the meeting in violation of Wis.Stat. § 19.89.

The next step is to determine whether Wis.Stat. § 19.89 derives its power from our state constitution or is simply an issue just for the legislature to decide. In our most recent open meetings laws case, the court held that the judiciary cannot invalidate laws passed “unless the legislative procedure is mandated by the Constitution.” *State ex rel. Ozanne v. Fitzgerald*, 798 NW 2d 436, 2011 WI 43 at ¶ 50. Essentially, the court said that even if there is a violation of our open meetings laws, the separation of powers doctrine precludes the judiciary from passing judgment on actions that are entirely within the purview of the legislature.

In the controlling case *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 338 NW 2d 684 (1983) the court described a situation in which the legislature failed to follow what amounted to an internal rule when passing a piece of legislation. In *Stitt*, a bill was not referred to the statutorily mandated committee before being passed. *Id.* at 364. The court concluded that when the legislature ignored a procedural requirement, even a procedural requirement prescribed by statute, that it amounted to “an implied *ad hoc* repeal of such rules.” *Id.*

However, the court made a very important distinction between statutorily prescribed procedures that were of the legislature’s own creation versus statutorily prescribed procedures that derived their power from the Wisconsin constitution. “Courts generally consider that the legislature’s adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution. . . . If the legislature fails to follow self-adopted procedural rules in enacting legislation, and such rules are not mandated by the constitution, courts will not intervene to declare the legislation invalid.” *Id.* at 365.

The court continued stating that it would not “interfere with the conduct of legislative affairs in the absence of a constitutional mandate to do so or unless either its procedures or end result constitutes a deprivation of constitutionally guaranteed rights. Short of such deprivation which give this court jurisdiction, recourse against legislative errors, nonfeasance or questionable procedure is by political action only.” *Id.* at 367 citing *Outagamie County v. Smith*, 38 Wis. 2d 24 (1968).

There are numerous reasons to find that by violating Wis.Stat. § 19.89, Wisconsin Republicans have infringed upon our state constitution. This is not just some statutorily

prescribed rule dictating the timing of a vote or the appropriate committee process. This statute guarantees that the individuals elected by the people of Wisconsin can perform their constitutional duties as members of the state legislature. I cannot think of a more bedrock principle of our constitution than ensuring that our duly elected members cannot be excluded from casting votes. To find otherwise would allow Wisconsin Republicans to manipulate the legislative process to disenfranchise my constituents who elected me, wheelchair and all.

There is also an argument to be made that our state constitution's equal protection clause applies to individuals with disabilities. By failing to provide reasonable accommodations, Wisconsin Republicans have excluded me on the basis of my disability and violated the Wisconsin constitution.

Finally, the court will have to make a public interest determination as to whether the underlying policies of the legislation, even if improperly passed, are so important that they should not be invalidated. I cannot see how a court could come to this conclusion. The bills passed were extremely unpopular and served only the interests of Republicans in the legislature. When weighed against the value of being inclusive to individuals with disabilities, the danger of disenfranchising thousands of Wisconsinites, and the expectation that elected officials be allowed to exercise their constitutional rights, Wisconsin Republicans' interest in centralizing power in the legislature and making it harder to vote seems petty.

I am also requesting that your office determine whether Dane County District Attorney Ismael Ozanne violated the law when he ignored the verified complaint I filed with his office. Earlier in the year, I followed the procedure outlined under Wis.Stat. § 19.97(1) and filed a signed and verified complaint with the Dane County District Attorney's office outlining the same facts addressed in this letter. Under the statute, it states that, "This subchapter shall be enforced in the name and on behalf of the state by the Attorney General or, upon the verified complaint of any person, by the district attorney of any County where in a violation may occur."

After numerous emails, voicemails and phone calls, I have been unable to get DA Ozanne to come to a determination on my verified complaint. All I want is an answer one way or the other. According to the statute, it states that DA Ozanne shall enforce our open meetings laws after receiving a verified complaint. From the plain language of the statute, it does seem to mandate that some action be taken, and that DA Ozanne cannot simply ignore my verified complaint.

To summarize, I am asking for an opinion from the Wisconsin Attorney General's Office, as prescribed under Wis.Stat. § 19.98, whether:

- First, if Speaker Vos and those in the majority manipulate the day and time of floor votes to make it impossible for an individual with a disability to participate in the legislative process, does that amount to exclusion as defined under Wis.Stat. § 19.89, taking into consideration my particular needs?
- Second, does exclusion require intent? In other words, to constitute exclusion under Wis.Stat. § 19.89, would I have to demonstrate that Wisconsin Republicans purposefully manipulated

the schedule to specifically exclude me or is it on the majority to ensure that their actions are not exclusionary to the duly elected members, especially given previous notice of my limitations?

- Third, if a member was excluded from participating in a floor session on the basis of their disability, would that give rise to a constitutional violation? Does Wis.Stat. § 19.89 derive its power from our state constitution or is this an issue entirely within the purview of the legislature?
- And lastly, does Wis.Stat. § 19.97(1) require Dane County District Attorney Ozanne to act after receiving my verified complaint alleging violations of our open meetings laws or is he allowed to simply ignore my verified complaint?

I want to thank you for taking the time to answer these questions. While the outcome matters a great deal to me, it is more important that we establish appropriate standards for the legislature when dealing with individuals with disabilities. This is for the next generation of legislators so that they know their rights and that those in power know their responsibilities.

I will end by noting that our open meetings laws empower the Wisconsin Attorney General to enforce these laws on behalf of the state. If your opinion does identify a violation of our open meetings laws in contravention of our state constitution, I would hope your office would move forward by filing a lawsuit.

Sincerely,

Representative Jimmy Anderson