STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
Branch 2

STATE OF WISCONSIN ex rel.
ISMAEL R. OZANNE

Plaintiff,

Case No. 11 CV 1244

vs.

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER and
DOUGLAS LAFOLLETTE

Defendants.

DECISION

The Court is prepared to decide the request for a temporary restraining order, and will then schedule the hearing on the request for preliminary injunction.

I begin with Wisconsin Constitution Article IV, Section 10, a straightforward statement of the public's expectation for the legislature: "The doors of each house shall be kept open except when the public welfare shall require secrecy."

This constitutional provision is repeated in the policy statement preceding the Open Meetings Law, §19.81(3) of the Wisconsin Statutes: "In conformance with Article IV, Section 10 of the Wisconsin Constitution, which states that the doors shall remain open except when public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter." This makes clear the overriding purpose of the law that the Supreme

Court set in *State ex rel. Lynch vs. Conta*, 71 Wis. 2d 662 (1976).

The Court must respond to the contention that the judicial branch is invading the legislative province. I want to make clear that I make no judgment, nor would my judgment on the merits of 2011 Wisconsin Act 10, be relevant. A Court does not determine whether the Legislature acted wisely or did not act wisely.

Instead, this Court has been requested to enforce provisions of the Open Meetings Law that I have just read to you. Under that law, the District Attorney does have the authority to proceed on the verified complaint of a citizen, and to challenge action alleged to be in violation of the Open Meetings Law.

The District Attorney has done so, and I have heard no challenge today to his authority to do so. I've already noted that the legislators who are sought to be enjoined by the ultimate relief in this action enjoy legislative immunity before and after a legislative session. I respect that immunity. But I don't believe it precludes the court from today deciding whether a temporary restraining order should go forward.

The authority for a temporary restraining order is set forth in §813.02. The Court may, with or without notice to the other party, (although notice to the other party is preferable and certainly achieved here), determine whether the pleadings show that a party is doing or is about to do an act in violation of rights of another party, and tending to render the judgment ineffectual. If the court so finds, it may issue a temporary restraining order.

There are four standards for issuance of a temporary restraining order or injunction: first, the probability of ultimate success on the merits; second, whether there will be irreparable harm if the relief is denied; third, lack of adequate remedy at law; and fourth, the necessity of preserving the

status quo pending litigation.

We begin with the likelihood or probability of ultimate success on the merits. The petitioner District Attorney must demonstrate, first, that there was a violation of the Open Meetings Law. Secondly, the District Attorney must show that the appropriate remedy is the voiding or nullification of the action that was taken by the governmental body at issue here.

Was there a violation of the Open Meetings Law? The statute providing for notice of public meetings, §19.84(3), states that, "Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than two hours in advance of the meeting."

There is a longstanding presumption that a meeting of a governmental body will be open. The burden of proof to show that an exemption applies is on the person seeking the exemption.

Wisconsin Statutes §19.87(2) provides that "no provision of the Open Meetings Law which conflicts with a rule of the Senate or Assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule." Neither party has cited any rule that would have overridden the clear provisions of the notice requirement in §19.84.

Likewise, the court has not been given any reason why there was not the full 24 hours notice, nor any other basis upon which the State could claim that there was good cause for failure to provide timely notice.

In making the good cause finding, there really is no guidance in Wisconsin case law. The closest analogy appears in a 2007 Wisconsin Supreme Court case, *Buswell vs. Tomah Area School District*, 2007 WI 71. In that case, the Court addressed the applicable legal standard with respect to

determining the sufficiency of notice. The three factors the court believed important were are as follows.

First, the burden imposed on the one who has to provide the notice, the burden of actually providing a good and valid notice. The court discussed the typical case, in which part-time citizen boards struggle with the requirements of the Open Meetings Law. The burden of proper notice imposed on a part-time citizen local board must be contrasted with the burden on legislative officials who post notices every single day that they are in session. Consideration of this factor suggests that the burden of providing a good notice in this case rested squarely on the shoulders of legislative officials.

The second factor, whether the subject is of particular public interest, corresponds to the level of public interest to the need for adequate notice. The public interest was extremely high in this particular series of legislative activities.

The third and final factor is whether the action is non-routine and may thus catch the public unaware. Although governmental bodies do meet in evening hours and sometimes on short notice, the particular circumstances set forth in the pleadings here show that this indeed was not routine action.

This was a closed session of a body that took decisive action in propelling 2011 Wisconsin Act 10 forward. The *Buswell* factors, though not strictly meant to apply to the exercise of judgment as to proper time notice, are relevant in helping define special circumstances that could justify a shortening of the notice provisions. They suggest that "good cause" did not justify the lack of notice.

The State has shown a probability of success on the merits that a violation of the Open

Meetings Law did occur. The question, then, becomes what would the State have to show to establish a likelihood of success on the merits to, for example, void the legislation or grant other equitable relief.

The enforcement section of the Open Meetings Law, subsection (3) of §19.97, states: "Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the Attorney General or the District Attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter, [the Open Meetings Law], outweighs any public interest which there may be in sustaining the validity of the action taken."

The public policy behind effective enforcement of the Open Meetings Law is so strong that it does outweigh the interest, at least at this time, that may exist in favor of sustaining the validity of the action taken.

The State has shown a probability of ultimate success on the merits. That doesn't close the question, however, because the court must balance the next three factors to determine, in the exercise of its discretion, whether there should be a restraining order pending further hearing.

I address, then, the need to show irreparable harm. There is Wisconsin case law supporting the proposition that when government seeks to enforce public rights, the need to show irreparable harm is either absent or lessened. In *Forest County vs. Goode*, 219 Wis.2d 654, the Wisconsin Supreme Court discusses the standards for issuance of an injunction, and concludes: "Where a public entity is authorized to seek a statutory injunction, the plaintiff does not have to show irreparable harm in order to obtain the injunction." In any event, the pleadings in this case

sufficiently demonstrate that irreparable harm would occur if a temporary restraining order is not granted.

I look next at the lack of adequate remedy at law. Forfeitures are not adequate remedies at this point.

Finally, the necessity to preserve the status quo. I think relief is essential to preserve the status quo, which is what exists here and now. The bill has passed. But it has not been published. I think a legitimate question might be asked, how can something so apparently minor – the failure to provide timely notice prior to a meeting that led to the enactment of the 2011 Wisconsin 10 – how can a minor failure of notice really halt this bill in its tracks?

And my answer to that is - it's not minor. It's not a minor detail. And bear with me for a homely analogy. Those few of you who may have seen the Super Bowl know that there was a much-photographed guy with a cheesehead, and it said "owner" on it. And of course, we all know what that refers to, the fact that the Green Bay Packers are publicly owned. It's a heartwarming moment to see that, but in fact, it states that we in Wisconsin own our government. We own it. And we own it in three ways. We own it by the vote. We own it by the duty to provide open and public access to records, so that the activities of government can be monitored. And we own it in that we are entitled by law to free and open access to governmental meetings, and especially governmental meetings that lead to the resolution of very highly conflicted and controversial matters.

That's our right. And a violation of that right is tantamount to a violation of what is already provided in the Constitution, open doors, open access, and that nothing in this government happens in secret.

I am now issuing a restraining order preventing further implementation of this act. And I want to read to you from a case, *State ex rel. Hodge vs. Town of Turtle Lake*, on the meaning of the Open Meetings Law. The Wisconsin Supreme Court states: "The purpose of the Open Meetings Law is to protect the public's right to be informed to the fullest extent of the affairs of government. The public's interest in enforcement of the open meetings law weighs heavily in matters such as this, where governmental bodies discuss topics of public controversy and concern behind closed doors."

The Court continued: "An open meetings law is not necessary to ensure openness in easy and noncontroversial matters where no one really cares whether the meeting is open or not. Like the First Amendment, which exists to protect unfavored speech, the Open Meetings Law exists to ensure open government in controversial matters. The Open Meetings Law functions to ensure that these difficult matters are decided without bias or regard for issues such as race, gender, or economic status, and with highest regard for the interests of the community. This requires, with very few exceptions, that governmental meetings be held in full view of the community."

Those words were written by Justice William A. Bablitch, who passed away just a month ago. His words live on here, and they set the direction for how the Open Meetings Law is to be construed, applied, and enforced.

I do, therefore, restrain and enjoin the further implementation of 2011 Wisconsin Act 10. The next step in implementation of that law would be the publication of that law by the Secretary of State. He is restrained and enjoined from such publication until further order of this court.

The hearing on the Petitioner's request for a preliminary injunction is set for March 29, 2011.

Dated: This 18th day of March 2011.

BY THE COURT:

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Maryann Sumi, Judge
Circuit Court, Branch 2

cc: ADA Ismael Ozanne
AAG Maria Lazar