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May 14, 2012

Susan D. Battani, Director
Office of Auditor of State
State of Iowa
State Capitol Building
Des Moines, IA 50319

Re: Winneshiek Medical Center

Dear Ms. Battani:

I am writing on behalf of Winneshiek Medical Center in response to your letter dated April 11, 2012. I have enclosed the Affidavit of Ben Wyatt, the Chair of the Board of Trustees of Winneshiek Medical Center.

Based on the information provided in this response and in Mr. Wyatt's Affidavit, Winneshiek Medical Center respectfully requests that you determine that there is no basis for further action with regard to Winneshiek Medical Center's compliance with Iowa's Open Meetings law, Iowa Code Chapter 21.

1. **Background:**

As described in Mr. Wyatt's Affidavit, Winneshiek Medical Center is a 25 bed critical access hospital located in Decorah, Iowa. The purpose and mission of the hospital is to provide quality medical services to the citizens of Winneshiek County. In 2005, to best serve the needs of Winneshiek County's residents, Winneshiek Medical Center formed an alliance with the Mayo Clinic through affiliation with the Mayo Health System, now the Mayo Clinic Health System. At that time, Winneshiek Medical Center entered into a Management Services Agreement and Professional Services Agreement with the Mayo Clinic. Under

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the Management Services Agreement, the Mayo Clinic provides administrative services to Winneshiek Medical Center. Under the Professional Services Agreement, Mayo provides physician services through the Decorah Clinic.

There is a second health system which provides medical services in Decorah. The two systems compete for patients and market share. For a number of years, including 2010 and 2011, the years that are the subject of your inquiry, Winneshiek Medical Center, like hospitals and health systems nationwide, engaged in strategic planning to maintain financial viability and improve the scope and quality of health care services provided to its community in light of a changing and highly competitive health care environment. Unlike many other health systems, including its competing system in Decorah, Winneshiek Medical Center is a public institution.

While Winneshiek Medical Center and its Board of Trustees understand their duties under Iowa law, including the duty to be open to public scrutiny, in order to remain a viable entity, Winneshiek Medical Center believed and continues to believe that certain planning would be necessary in closed session in order to best maintain the hospital as a resource for the residents of Winneshiek County.

As you stated in your letter, Iowa Code §21.5(1)(l) permits closed sessions for purpose of discussing "marketing and pricing strategies or similar proprietary information . . . where public disclosure of such information would harm such a hospital's competitive position when no public purpose would be served by public disclosure." By necessity, strategic planning requires the development and use of such proprietary business information, including marketing strategies. Discussion of such information in public session would harm -- if not destroy -- Winneshiek Medical Center's competitive position. Moreover, as required by the statute, there is no compelling or public purpose to be served by requiring disclosure of such information at the present time, particularly in light of the fact that Winneshiek Medical Center's competitor is under no similar obligation to conduct its strategic planning in public.

2. **Closed Sessions:**

My understanding is that the Office of the Auditor's concerns about the closed sessions are: (1) there was a frequent number of closed sessions; (2) the

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agendas regularly included a closed session even if the session was not actually closed; and (3) a specific reference to an exception was not provided in the minutes and/or agenda.

As a threshold matter, it is important to note that at all relevant times Winneshiek Medical Center was represented by highly skilled legal counsel with extensive experience in representing public entities and hospitals. As suggested by Attorney General Tom Miller in a number of his bulletins concerning open meetings, Winneshiek Medical Center sought and received advice concerning the circumstances under which sessions could be closed as well as the requirements of public notice concerning such sessions.

With regard to the number of closed sessions, as discussed above and at length in Mr. Wyatt's affidavit, strategic planning sessions were necessary to discuss planning for the hospital and community's future. Section 21.1(5)(1)(I) provided an appropriate basis to close the strategic planning sessions, i.e., to protect disclosure of marketing and pricing strategies, as well as other proprietary information. In addition, on January 5, 2011, the Board of Trustees went into closed session for the purpose of discussing strategic planning as it pertains to the relationship between Winneshiek Medical Center and the Mayo Clinic Health System. The closed session was also for the related purpose of addressing a dispute that had arisen between the two entities concerning amounts billed and paid under the Professional Services Agreement. The minutes of the January 5, 2011 meeting state that the closed session was pursuant to Iowa Code 21(1) c (1)(L).¹ The sections quoted contained a typographical error. In fact the session was closed pursuant to subsections (c) and (l) of 21.5(1). Subsection (c) provides that a session may be closed to discuss litigation strategies with counsel. It should be noted that the dispute was resolved by a vote of the Board of Trustees in open session on August 3, 2011, as reflected in the minutes of that meeting.

With regard to your concern that on a number of occasions "strategic planning" was listed as an agenda item, but the meeting itself was not closed, there appears to be no prohibition against such a practice in Chapter 21. In fact, this contingency makes some sense, and provides flexibility in the event that a matter arises that must be discussed in closed session or not be discussed at all. In

¹ As you noted, this was also used in connection with the March 2, 2011 meeting. Again this was a typographical error and the intent was to close the session under subsections (c) and (l) of 21.5(1).

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addition, the agendas are identified as "tentative agendas." As the Iowa Supreme Court explained in *KCOB/KVLN, Inc.*, 473 N.W.2d 171, 174 (Iowa 1991), the term "tentative agenda" clearly indicates that the agenda is subject to change. That being said, the Board of Trustees has discontinued this practice. It will no longer place "closed session" on the tentative agenda unless the Board plans at the time the agenda is posted to actually have discussions requiring the closing of the session.

With regard to the issue that no specific subsection of 21.5(1) was cited in as a basis for closing a session, since October of 2011, all agendas specifically cite a specific subsection of Iowa Code §21.5 (1), (for example, Iowa Code §21.5 (1)(l)²) as the basis of closing sessions.

3. **The November 30, 2010 Board of Trustees meeting in Rochester, Minnesota.**

With regard to the November 30, 2010 Board of Trustees meeting in Rochester, as stated in Mr. Wyatt's affidavit, the Board of Trustees determined that it was in the best interests of Winneshiek Medical Center -- and the provision of effective care to the community -- to meet with decision makers from the Mayo Clinic and Franciscan Medical Center to discuss the relationship between the parties and revisions to the Professional Service and Management Service Agreements. As stated in his affidavit, Mr. Wyatt believes that the meeting could not have occurred anywhere but Rochester. The appropriateness of holding the meeting in Rochester was confirmed by the fact that counsel attended the meeting.

You have relied on the Spirit Lake Community School District case decided by the Dickenson County district court in 2009. However, that case is factually very different from this case. In that case, the meeting was held 200 miles from Spirit Lake, in Des Moines. In addition, the district court in that case (see page 8 of the opinion) relied on an old case that stated that school boards must hold their meetings "within the geographical boundary of the district which they respectively represent." There is no such requirement for county hospitals.

² It should be noted that the minutes reflect 21.5(1)(L), for clarity's sake, as it is difficult to read the lower case letter.

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Moreover, Rochester is 70 miles from Decorah. It was accessible via state highway, and the manager of the competing clinic did attend. As Mr. Wyatt stated in his affidavit, this is not much different than attendance at Board meetings in Decorah, which rarely have more than two or three public members in attendance.

4. Question concerning actions taken at the June 1, 2011 and August 3, 2011 meetings.

In your letter, you ask about actions taken at the June 1, 2011 and August 3, 2011 meetings in closed session. As per our conversation, we have clarified that there was no closed session on June 1, 2011. You have told me that you received two copies of the June 1, 2011 meeting and no copy of the August 3, 2011 meeting and that is where the misunderstanding arose. Accordingly, my understanding is there is no further issue with regard to duplicate action being taken on June 1, 2011 and August 3, 2011.

5. Availability to the public of the minutes and audio sessions of the closed sessions.

You have asked whether Winneshiek Medical Center has made available minutes and audio recordings of sessions closed pursuant to Iowa Code §21.5(1)(I), which provides that these must be "made available" for public inspection when the "public disclosure would no longer harm the hospital's competitive position."

As stated in Mr. Wyatt's affidavit, Winneshiek Medical Center keeps recordings of all closed sessions. Until October of 2011, it did not create or maintain minutes of those sessions. Until that time, it was the Board of Trustees' understanding, confirmed by advice of counsel, that it was not required to do so, as long as it maintained recordings of the session so that it could use those recordings as a basis for creating minutes in the event minutes were requested. Since October of 2011, the Board now keeps both minutes and recordings of those sessions.

Further, Mr. Wyatt and I and/or another member of my firm, as legal counsel, have reviewed the recordings of the sessions specified in your letter that were closed under Iowa Code §21.5(1)(I) and believe that at the present time

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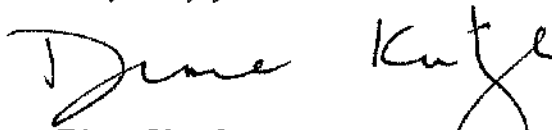
disclosure of the contents of these sessions would harm Winneshiek Medical Center's competitive position.

6. Compliance with the Open Meetings law.

As stated in paragraph 28 of Mr. Wyatt's affidavit, the Board of Trustees continues to review and evaluate its compliance with the Open Meetings law, with the assistance of current counsel. In October of 2011, three members of the Board of Trustees attended an Iowa Hospital Association webinar training entitled "Iowa's Sunshine Laws." As of October 2011 the Board of Trustees maintains both recordings and minutes of its closed sessions consistent with the applicable provisions of Iowa Code Chapter 21. Further, it has discontinued the practice of scheduling "closed sessions" on the tentative agenda if there is no specific reason for holding a closed session at the time the agenda is posted. In addition, the agendas and minutes now specify a particular subsection of §21.5(1) that the Board is relying on to close a session; the Board will continue to work on expanding the description of the basis for its closed sessions, both on the agendas and in minutes. Finally, through in-servicing and other training, the Board of Trustees will continue to monitor its compliance with the Open Meetings law.

For these reasons, and the reasons stated in Mr Wyatt's Affidavit, Winneshiek Medical Center respectfully requests that this matter be closed without further action.

Very truly yours,



Diane Kutzko
Attorney for Winneshiek Medical Center

DK/kf

cc: Andrew Van Der Maaten,
Winneshiek County Attorney