



MEMORANDUM

TO: Majority Leader-Elect Devin LeMahieu
FROM: Rick Champagne, chief
DATE: December 28, 2020
SUBJECT: Public access to the state capitol building

Per your request, this memorandum addresses the issue of whether the Department of Administration may close public access to the state capitol building. For the reasons discussed in this memorandum, DOA's decision to close the state capitol building may impermissibly restrict public access to legislators in the performance of their legislative duties under the Wisconsin Constitution.

Discussion

Under Wis. Stat. § 16.84 (1), DOA has charge of, operates, and maintains the state capitol building and the capitol grounds. However, not all spaces of the state capitol building are under DOA's control. Chapter Adm., section 2.04 (1), of the Wisconsin Administrative Code, acknowledges that there are spaces in the state capitol building that are "reserved for use by the legislature, the use of which shall be as determined by the legislature." In other words, the legislature controls the use of these spaces. Moreover, under Wis. Stat. § 13.90 (3) (c), the Joint Committee on Legislative Organization may assign any space in the state capitol building for legislative offices that is not reserved for other uses under Wis. Stat. § 16.835. The exceptions under Wis. Stat. § 16.835 are for an office for the governor, the lieutenant governor, the attorney general, the Wisconsin Supreme Court, and the press room located on the second floor.

In this way, Wisconsin law provides that control of the state capitol building is a shared power of the executive branch and the legislative branch. In exercising this shared power, the legislature and the executive branch are subject to the constitutional requirement, under article IV, section 10, of the Wisconsin Constitution, that "The doors of each house shall be kept open except when the public welfare shall require secrecy." Importantly, under *State ex rel. Ozanne v. Fitzgerald*, 334 Wis. 2d 70, 798 N.W.2d 436, 2011 WI 43, the legislature may determine the kind and extent of in-person public access to legislative proceedings and business under this constitutional provision, subject to court review.

On March 26, 2020, DOA closed the state capitol building to the public on account of the COVID-19 pandemic. Since that time, DOA has reopened the state capitol building to the public when the legislature is in session and when legislative committees convene, but otherwise the building has been closed to the public. The result of this DOA action is that the public does not have access to those areas of the state capitol building that are reserved exclusively for legislative uses except when the legislature is in session or its committees meet. DOA has determined, without legislative approval, that these are the only legislative proceedings that require the state capitol building to be open to the public.

This has consequences. If a legislator wishes to hold open office hours for constituents in the state capitol building, the constituents may not enter the building to attend these office hours. If a legislator would like to meet in the state capitol building with constituents to discuss matters relating to the legislator's district or to receive suggestions or ideas for legislation, the constituents are not granted access to the building. If a legislator intends to present a lecture or lead a discussion on a concern or matter of public importance in a legislative hearing room or other legislative space, members of the public are not freely permitted entrance to the state capitol building to attend or participate in the lecture or discussion.

The result of these restrictions on members of the public to meet with legislators in areas of the state capitol building reserved to the legislature may raise constitutional concerns. The executive branch, by restricting public access to the state capitol building, may be impermissibly interfering with the ability of the legislative branch to carry out its legislative duties and exercise legislative powers, especially those relating to representation and delivery of constituent services. These legislative powers are reserved exclusively to the legislature under article IV, section 1, of the Wisconsin Constitution. DOA's decision to close the state capitol building, including access to legislative spaces in the building, may restrict public access to legislators in ways not intended or permitted by the constitution. Under the current arrangement, the legislature does not control the uses of its spaces in the state capitol building because it cannot grant members of the public access to its spaces. In this one respect, the executive branch is determining the manner in which members of the public may meet and confer with their senators and representatives to the assembly.

Conclusion

Wisconsin law provides that control of the state capitol building is a shared power of the executive branch and the legislative branch. DOA operates and maintains the state capitol building, but the legislature controls the use of legislative spaces in the building. Presumably, use of the spaces includes access to the spaces. DOA's decision to close the state capitol building restricts not only public access to public areas of the building, but also access to spaces in the building controlled by the legislature. These spaces include legislators' offices. Neither the legislature nor its organization committees have approved these restrictions. If the legislature determines that the lawful exercise of legislative power requires in-person public access to legislators in legislative spaces, DOA's action to restrict public access to the state capitol building may impermissibly infringe on the legislature's core constitutional powers.

I hope this information is helpful. If the LRB can be of further assistance, please contact us.