

Agenda Item: 6 (b)

Background Information: Attached please find several pages of information provided by the League of Minnesota Cities regarding The Open Meeting Law. References throughout the document to “city councilmembers” includes planning commission members. A few key points the Planning Commission needs to be aware of are:

- ✓ Chance or social gathering of city councilmembers will not be considered a meeting subject to the open meeting law, if a quorum is present, as long as the quorum does not discuss, decide, or receive information about official city business.
- ✓ Serial Meetings – Planning Commission Members should not discuss specific agenda items outside of the regular meetings.
- ✓ Communication through letters, emails and telephone calls could violate the open meeting law. Information should be sent from Staff to Planning Commission Members, not from Members to Members. Do not click “Reply All” to an email sent from Staff; you may use “Reply”. Staff will include a statement indicating same on information sent out.
- ✓ In 2017 Planning Commission Members will receive a city email account. Please see comments at bottom of page 21 and top of page 22.

If you have questions, please bring them to the November Planning Commission meeting.

RELEVANT LINKS:

Minn. Stat. § 645.44, subd. 5.

Minn. Stat. § 645.44, subd. 5.

Minn. Stat. § 202A.19, subd. 1.
Minn. Stat. § 204C.03, subd. 1.

Minn. Stat. § 645.15.

Minn. Stat. § 13D.01.

Rupp v. Mayasich, 533 N.W.2d 893 (Minn. Ct. App. 1995). *St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools*, 332 N.W.2d 1 (Minn. 1983).

The public holidays are:

- New Year's Day (Jan. 1).
- Martin Luther King's Birthday (the third Monday in January).
- Washington's and Lincoln's Birthday (the third Monday in February).
- Memorial Day (the last Monday in May).
- Independence Day (July 4).
- Labor Day (the first Monday in September).
- Christopher Columbus Day (the second Monday in October).
- Veterans Day (Nov. 11).
- Thanksgiving Day (the fourth Thursday in November).
- Christmas Day (Dec. 25).

All cities have the option, however, of deciding whether Christopher Columbus Day and the Friday after Thanksgiving shall be holidays. If these days are not designated as holidays, public business may be conducted on them.

If a holiday falls on a Saturday, the preceding Friday is considered to be a holiday. If a holiday falls on a Sunday, the next Monday is considered to be a holiday.

In addition, city council meetings may not be held during the following times:

- After 6 p.m. on the evening of a major political party precinct caucus.
- Between 6 p.m. and 8 p.m. on a day when there is an election being held within the city's boundaries.

State law does not prohibit meetings on weekends. However, state law regulating how time is computed for the purpose of giving any required notice provides that if the last day of notice falls on either a Saturday or Sunday, that day cannot be counted.

*** II. The open meeting law ***

A. Purpose

The Minnesota open meeting law generally requires that all meetings of public bodies must be open to the public. This presumption of openness serves three vital purposes:

- It prohibits actions from being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning decisions of public bodies or detect improper influences.
- It ensures the public's right to be informed.
- It gives the public an opportunity to present its views to the public body.

RELEVANT LINKS:

See section I. - *Types of meetings and notice requirements*. Minn. Stat. § 13D.04, subd. 7.

Minn. Stat. § 13D.01, subd. 6. IPAD 08-015. IPAD 13-015 (noting that the open meeting law “is silent with respect to agendas; it neither requires them nor prohibits them”).

Minn. Stat. § 13D.01, subd. 6.

Minn. Stat. § 13D.01, subd. 1.

Southern Minnesota Municipal Power Agency v. Boyne, 578 N.W.2d 362 (Minn. 1998).

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983). *St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools*, 332 N.W.2d 1 (Minn. 1983).

Minn. Stat. § 412.191, subd. 1. Minn. Stat. § 645.08 (5).

B. Public notice

Public notice generally must be provided for meetings of a public body subject to the open meeting law. The notice requirements depend on the type of meeting. However, if a person receives actual notice of a meeting at least 24 hours before it takes place, all notice requirements under the open meeting law are satisfied regardless of the method of receipt.

C. Printed Materials

At least one copy of the printed materials relating to agenda items that are provided to the council at or before a meeting must also be made available for public inspection in the meeting room while the governing body considers the subject matter.

This requirement does not apply to materials classified by law as other than public or to materials relating to the agenda items of a closed meeting.

D. Groups governed by the open meeting law

The open meeting law applies to all governing bodies of any school district, unorganized territory, county, city, town or other public body, and to any committee, sub-committee, board, department or commission of a public body.

Thus, the law applies to meetings of all city councils, planning commissions, firefighter relief associations, economic development authorities, and housing redevelopment authorities, among others.

The Minnesota Supreme Court has held, however, that the governing body of a municipal power agency, created under Minn. Stat. §§ 453.51–453.62, is not subject to the open meeting law because the Minnesota Legislature granted these agencies authority to conduct their affairs as private corporations.

E. Gatherings governed by the open meeting law

The open meeting law does not define the term “meeting.” The Minnesota Supreme Court, however, has ruled that meetings are gatherings of a quorum or more of the members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.

A majority of the members of a statutory city council constitutes a quorum. A majority of the qualified members of any board or commission also constitutes a quorum. Home rule charter cities may have different quorum requirements.

RELEVANT LINKS:

See section II.G.6. for more information about serial meetings.

Minn. Stat. § 13D.01, subd. 3.

Minn. Stat. § 13D.05, subd. 1 (d).

IPAD 14-005.
IPAD 13-012.
IPAD 14-014.

The Free Press v. County of Blue Earth, 677 N.W.2d 471 (Minn. Ct. App. 2004) (holding that a county’s statement that it was closing a meeting under the attorney-client privilege to discuss “pending litigation” did not satisfy the requirement of describing the subject to be discussed at a closed meeting).

Minn. Stat. § 13D.05, subd. 1 (d).

Minn. Stat. § 13D.04, subd. 5.

The open meeting law does not generally apply in situations where less than a quorum of the city council is involved. However, serial meetings in groups of less than a quorum that are held in order to avoid the requirements of the open meeting law may be found to violate the law, depending on the specific facts.

F. Open meeting law exceptions

There are seven exceptions to the open meeting law that authorize the closure of meetings to the public. Under these exceptions, some meetings may be closed and some meetings must be closed. Before a meeting is closed under any of the exceptions, the council must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.

The commissioner of the Minnesota Department of Administration has advised that a member of the public body (and not its attorney) must make the statement on the record. The open meeting law does not define the phrase “on the record” but the commissioner has advised that the phrase should be interpreted to mean a verbal statement in open session.

The commissioner has also advised that citing the specific statutory authority that permits the closed meeting is the simplest way to satisfy the requirement for stating the specific grounds permitting the meeting to be closed. Both the commissioner and the Minnesota Court of Appeals have concluded that something more specific than a general statement is needed to satisfy the requirement of providing a description of the subject to be discussed.

All closed meetings, except those closed as permitted by the attorney-client privilege, must be electronically recorded at the expense of the public body. Unless otherwise provided by law, the recordings must be preserved for at least three years after the date of the meeting.

The same notice requirements that apply to open meetings also apply to closed meetings. For example, if a closed meeting takes place at a regular meeting, the notice requirements for a regular meeting apply. Likewise, if a closed meeting takes place as a special meeting, the notice requirements for a special meeting apply.

1. Meetings that may be closed

The public body may choose to close certain meetings. The following types of meetings may be closed:

RELEVANT LINKS:

Minn. Stat. § 13D.03.
IPAD 13-012.

Minn. Stat. § 13D.03. Minn.
Stat. § 13D.01, subd. 3.

IPAD 05-027.
IPAD 00-037.

Minn. Stat. § 13D.03, subd. 3.

Minn. Stat. § 13D.05, subd.
3(a).

Minn. Stat. § 13D.05, subd.
3(a). Minn. Stat. § 13D.01,
subd. 3.

IPAD 05-013 (advising that a
government entity could close
a meeting under this
exception to discuss its
contract with an independent
contractor when that
contractor is an individual
human being).

a. Labor negotiations under PELRA

A meeting to consider strategies for labor negotiations, including negotiation strategies or development or discussion of labor-negotiation proposals, may be closed. However, the actual negotiations must be done at an open meeting if a quorum of the council is present.

The following procedure must be used to close a meeting under this exception:

- The council must decide to close the meeting by a majority vote at a public meeting and must announce the time and place of the closed meeting.
- Before closing the meeting, the council must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.
- A written record of all people present at the closed meeting must be available to the public after the closed meeting.
- The meeting must be tape-recorded.
- The recording must be kept for two years after the contract is signed.
- The recording becomes public after all labor agreements are signed by the city council for the current budget period.

If an action claiming that other public business was transacted at the closed meeting is brought during the time the tape is not public, the court will review the recording privately. If it finds no violation of the open meeting law, the action will be dismissed and the recording will be preserved in court records until it becomes available to the public. If the court determines there may have been a violation, the entire recording may be introduced at the trial. However, the court may issue appropriate protective orders requested by either party.

b. Performance evaluations

A public body may close a meeting to evaluate the performance of an individual who is subject to its authority.

The following procedure must be used to close a meeting under this exception:

- The public body must identify the individual to be evaluated prior to closing the meeting.
- The meeting must be open at the request of the individual who is the subject of the meeting; so some advance notice to the individual is needed in order to allow the individual to make a decision.

RELEVANT LINKS:

IPAD 14-007 and IPAD 15-002 (discussing what type of summary is sufficient).

Minn. Stat. § 13D.05, subd. 3(b).

Brainerd Daily Dispatch, LLC v. Dehen, 693 N.W.2d 435 (Minn. Ct. App. 2005).

Prior Lake American v. Mader, 642 N.W.2d 729 (Minn. 2002).

Northwest Publications, Inc. v. City of St. Paul, 435 N.W.2d 64 (Minn. Ct. App. 1989). *Minneapolis Star & Tribune v. Housing and Redevelopment Authority in and for the City of Minneapolis*, 251 N.W.2d 620 (Minn. 1976).

Minn. Stat. § 13D.01, subd. 3.

See *The Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004) (holding that a general statement that a meeting was being closed under the attorney-client privilege to discuss "pending litigation" did not satisfy the requirement of describing the subject to be discussed).

Minn. Stat. § 13D.05, subd. 3(c). *Vik v. Wild Rice Watershed Dist.*, No. A09-1841 (Minn. Ct. App. 2010) (unpublished opinion).

- Before closing the meeting, the council must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.
- The meeting must be electronically recorded, and the recording must be preserved for at least three years after the meeting.
- At the next open meeting, the public body must summarize its conclusions regarding the evaluation. The council should be careful not to release private or confidential data in its summary.

c. Attorney-client privilege

Meetings between the governing body and its attorney to discuss active, threatened, or pending litigation may be closed when the balancing of the purposes served by the attorney-client privilege against those served by the open meeting law dictates the need for absolute confidentiality. The need for absolute confidentiality should relate to litigation strategy, and will usually arise only after a substantive decision on the underlying matter has been made.

This privilege may not be abused to suppress public observations of the decision-making process, and does not include situations where the council will be receiving general legal opinions and advice on the strengths and weaknesses of a proposed action that may give rise to future litigation.

The following procedure must be used to close a meeting under this exception:

- Before closing the meeting, the council must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.
- The council should also describe how a balancing of the purposes of the attorney-client privilege against the purposes of the open meeting law demonstrates the need for absolute confidentiality.
- The council must actually communicate with its attorney at the meeting.

d. Purchase or sale of property

A public body may close a meeting to:

- Determine the asking price for real or personal property to be sold by the public body.
- Review confidential or nonpublic appraisal data.
- Develop or consider offers or counteroffers for the purchase or sale of real or personal property.

RELEVANT LINKS:

Minn. Stat. § 13D.05, subd. 3(c).

IPAD 14-014.

IPAD 08-001 (advising that a public body cannot authorize the release of a tape of a closed meeting under this exception until all property discussed at the meeting has been purchased or sold or the public body has abandoned the purchase or sale).

Minn. Stat. § 13D.05, subd. 3(d).

Minn. Stat. § 13D.05, subd. 3(d).

The following procedure must be used to close a meeting under this exception:

- Before closing the meeting, the council must state on the record the specific grounds for closing the meeting, describe the subject to be discussed, and identify the particular property that is the subject of the meeting.
- The meeting must be tape-recorded and the property must be identified on the tape. The recording must be preserved for eight years, and must be made available to the public after all property discussed at the meeting has been purchased or sold or after the public body has abandoned the purchase or sale.
- A list of councilmembers and all other persons present at the closed meeting must be made available to the public after the closed meeting.
- The actual purchase or sale of the property must be approved at an open meeting, and the purchase or sale price is public data.

e. Security reports

A meeting may be closed to receive security briefing and reports, to discuss issues related to security systems, to discuss emergency-response procedures and to discuss security deficiencies in or recommendations regarding public services, infrastructure, and facilities—if disclosure of the information would pose a danger to public safety or compromise security procedures or responses. Financial issues related to security matters must be discussed, and all related financial decisions must be made at an open meeting.

The following procedure must be used to close a meeting under this exception:

- Before closing the meeting, the council must state on the record the specific grounds for closing the meeting and describe the subject to be discussed.
- When describing the subject to be discussed, the council must refer to the facilities, systems, procedures, services or infrastructure to be considered during the closed meeting.
- The closed meeting must be tape-recorded, and the recording must be preserved for at least four years.

2. Meetings that must be closed

There are some meetings that the open meeting law requires to be closed. The following meetings must be closed:

RELEVANT LINKS:

Minn. Stat. § 13D.05, subd. 2(b). Minn. Stat. § 13.43, subd. 2(4). IPAD 03-020.

IPAD 14-004.

IPAD 10-001.
Minn. Stat. § 13.43.

Minn. Stat. § 13D.01, subd. 3.
Minn. Stat. § 13D.05, subd. 1.

Note: There is a special provision dealing with allegations of law enforcement personnel misconduct; see Minn. Stat. § 13D.05, subd. 2(a) and section II.F.2.b.

Minn. Stat. § 13D.05, subd. 2(a).

a. Misconduct allegations

A public body must close a meeting for preliminary consideration of allegations or charges against an individual subject to the public body's authority.

The commissioner of the Minnesota Department of Administration has advised that a city could not close a meeting under this exception to consider allegations of misconduct against a job applicant who had been extended a conditional offer of employment. (The job applicant was not a city employee). The commissioner reasoned that the city council had no authority to discipline the job applicant or to direct his actions in any way; therefore, he was not "an individual subject to its authority."

The commissioner has also advised that a tape recording of a closed meeting for preliminary consideration of misconduct allegations is private personnel data under Minn. Stat. § 13.43, subd. 4, and is accessible to the subject of the data but not to the public. The commissioner noted that at some point in time, some or all of the data on the tape may become public under Minn. Stat. § 13.43, subd. 2. For example, if the employee is disciplined and there is a final disposition, certain personnel data becomes public.

The following procedure must be used to close a meeting under this exception:

- Before closing the meeting, the council must state on the record the specific grounds for closing the meeting and describe the subject to be discussed.
- The meeting must be open at the request of the individual who is the subject of the meeting. Thus, the individual should be given advance notice of the existence and nature of the charges against him or her, so that the individual can make a decision.
- The meeting must be electronically recorded, and the recording must be preserved for at least three years after the meeting.
- If the public body decides that discipline of any nature may be warranted regarding the specific charges, further meetings must be open.

b. Certain not-public data

The general rule is that meetings cannot be closed to discuss data that are not public under the Minnesota Government Data Practices Act. A meeting must be closed, however, if the following not-public data is discussed:

- Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults.
- Internal affairs data relating to allegations of law enforcement personnel misconduct or active law enforcement investigative data.

RELEVANT LINKS:

Minn. Stat. § 13.32. Minn. Stat. § 13.3805, subd. 1. Minn. Stat. § 13.384. Minn. Stat. § 13.46, subd. 2 or 7. Minn. Stat. §§ 144.291-144.298.

Minn. Stat. § 13D.01, subd. 3. Minn. Stat. § 13D.05, subd. 1.

Minn. Stat. § 13D.05, subds. 1(a), 2(a). See section II. F. b.

Minn. Stat. § 13D.05, subd. 2(a). Minn. Stat. § 13.03, subd. 11.

Minn. Stat. § 13D.05, subd. 1(b).

Minn. Stat. § 13D.05, subd. 1(c).

Channel 10, Inc. v. Indep. Sch. Dist. No. 709, 298 Minn. 306, 215 N.W.2d 814 (Minn. 1974).

- Educational data, health data, medical data, welfare data or mental health data that are not-public data.
- Certain medical records.

The following procedure must be used to close a meeting under this exception:

- The council must state on the record the specific grounds for closing the meeting and describe the subject to be discussed.
- The meeting must be electronically recorded, and the recording must be preserved for at least three years after the meeting.

G. Common issues

This section provides an overview of some of the common issues cities face while attempting to comply with the open meeting law.

1. Data practices

Generally, meetings may not be closed to discuss data that is not public under the Minnesota Government Data Practices Act (MGDPA). However, the public body must close any part of a meeting at which certain types of not-public data are discussed.

If not-public data is discussed at an open meeting when the meeting is required to be closed, it is a violation of the open meeting law. Discussions of some types of not-public data may also be a violation of the MGDPA.

However, not-public data may generally be discussed at an open meeting without liability or penalty if both of the following criteria are met:

- The disclosure relates to a matter within the scope of the public body's authority.
- The disclosure is necessary to conduct the business or agenda item before the public body.

Data that is discussed at an open meeting retains its original classification under the MGDPA. However, a record of the meeting is public, regardless of the form. It is suggested that not-public data that is discussed at an open meeting not be specifically detailed in the minutes.

2. Interviews

The Minnesota Supreme Court has held that a school board must interview prospective employees in open sessions.

RELEVANT LINKS:

See section II. G. 6. - *Serial meetings.*

Mankato Free Press v. City of North Mankato, No. C1-96-100036 (Fifth Jud. Dist. 1996).

Mankato Free Press v. City of North Mankato, 563 N.W.2d 291 (Minn. Ct. App. 1997).
Mankato Free Press v. City of North Mankato, No. C9-98-677 (Minn. Ct. App. Dec. 15, 1998) (unpublished decision).

A.G. Op. 63-A-5 (June 13, 1957). See also Minn. Stat. §13D.01, subd. 1(b) (4).

St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools, 332 N.W.2d 1 (Minn. 1983).

The Supreme Court concluded that the absence of a statutory exception to the open meeting law for interviews indicated that the legislature had decided that such sessions should not be closed. The reasoning would seem to apply to a city council's interview of prospective officers and employees as well, if a quorum is present.

In 1996, a district court found that it was not a violation of the open meeting law for candidates to be serially interviewed by members of a city council in one-on-one closed interviews. In this case, five city councilmembers were present in the same building but each was conducting separate interviews in five different rooms. Because there was no quorum present in any of the rooms, the court found there was no meeting. The decision, however, was appealed.

In 1997, the Minnesota Court of Appeals reversed the district court's decision and remanded the case back to the district court for a factual determination on whether the city used the one-on-one interview process in order to avoid the requirements of the open meeting law. On remand, the district court found that the private interviews were not conducted for the purpose of avoiding public hearings. The case was again appealed. In an unpublished decision, the court of appeals affirmed the district court's decision.

The conclusion that can be drawn from this decision appears to be that if serial meetings involving less than a quorum of a public body are held for the purpose of avoiding the requirements of the open meeting law, it will constitute a violation of the law. Cities that are considering holding private interviews with job applicants should first consult their city attorney.

3. Executive sessions

The attorney general has advised that executive sessions of a city council must be open to the public.

4. Informational meetings and committees

The Minnesota Supreme Court has held that informational seminars about school-board business, which the entire board attends, must be noticed and open to the public. As a result, it appears that any scheduled gathering of a quorum of a city council where it receives information about city business must be properly noticed and open to the public, regardless of whether the council takes or contemplates taking action at that gathering.

In addition, many city councils create committees to make recommendations regarding a specific issue. Commonly, such a committee will be responsible for researching the issue and submitting a recommendation to the council for its approval. These committees are usually advisory, and the council is still responsible for making the final decision.

RELEVANT LINKS:

IPAD 05-014.

This type of committee may be subject to the open meeting law. Some factors that may be relevant in deciding whether a committee is subject to the open meeting law include how the committee was created and who are its members; whether the committee is performing an ongoing function, or instead, is performing a one-time function; whether the committee receives public funds or uses public facilities or staff; and what duties and powers have been granted to the committee.

For example, the commissioner of the Minnesota Department of Administration has advised that “standing” committees of a city hospital board that were responsible for management liaison, collection of information, and formulation of issues and recommendations for the board were committees subject to the open meeting law. The advisory opinion noted that the standing committees were performing tasks that relate to the ongoing operation of the hospital district and were not performing a one-time or “*ad hoc*” function.

IPAD 07-025.

In contrast, the commissioner has advised that a city’s Free Speech Working Group was not a committee that was subject to the open meeting law. This group consisted of members, including city officials, the city council had appointed to develop and review strategies for addressing free-speech concerns relating to a political convention that was going to be held in the city. The commissioner reasoned that the group was not a committee subject to the open meeting law because it did not have any decision-making authority.

A.G. Op. 63a-5 (Aug. 28, 1996).

City councils also routinely appoint individual councilmembers to act as liaisons between the council and particular groups. These types of groups may be considered a committee that is subject to the open meeting law.

Sovereign v. Dunn, 498 N.W.2d 62 (Minn. Ct. App. 1993). See also *Minnesota Daily v. Univ. of Minnesota*, 432 N.W.2d 189 (Minn. Ct. App. 1988) and *Zahavy v. Univ. of Minnesota*, 544 N.W.2d 32 (Minn. Ct. App. 1996).

The Minnesota Court of Appeals considered a situation where the mayor and one other member of a city council attended a series of mediation sessions regarding an annexation dispute that were not open to the public. The court of appeals held that the open meeting law did not apply to these meetings concluding “that a gathering of public officials is not a ‘committee, subcommittee, board, department or commission’ subject to the open meeting law unless the group is capable of exercising decision-making powers of the governing body.”

Sovereign v. Dunn, 498 N.W.2d 62 (Minn. Ct. App. 1993).

The court of appeals also noted that the capacity to act on behalf of the governing body is presumed where members of the group comprise a quorum of the body and could also arise where there has been a delegation of power from the governing body to the group.

Thuma v. Kroschel, 506 N.W.2d 14 (Minn. Ct. App. 1993).

In addition, a separate notice for a special meeting of the city council may also be required if a quorum of the council will be present at a committee meeting and will participate in the discussion.

RELEVANT LINKS:

A.G. Op. 63a-5 (Aug. 28, 1996).

St. Cloud Newspapers, Inc. v. District 742 Cmty. Sch., 332 N.W.2d 1 (Minn. 1983).
Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982).

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983). See also IPAD 10-011 and IPAD 06-017.

Mankato Free Press v. City of North Mankato, 563 N.W.2d 291 (Minn. Ct. App. 1997).

Mankato Free Press v. City of North Mankato, No. C9-98-677 (Minn. Ct. App. Dec. 15, 1998) (unpublished decision).

For example, when a quorum of a city council attended a meeting of the city's planning commission, the Minnesota Court of Appeals ruled that there was a violation of the open meeting law, not because of the councilmembers' attendance at the meeting, but because the councilmembers conducted public business in conjunction with that meeting.

Based on that decision, the attorney general has advised that mere attendance by additional councilmembers at a meeting of a council committee held in compliance with the open meeting law would not constitute a special city council meeting requiring separate notice. The attorney general warned, however, that the additional councilmembers should not participate in committee discussions or deliberations absent a separate notice of a special city council meeting.

5. Chance or social gatherings

Chance or social gathering of city councilmembers will not be considered a meeting subject to the open meeting law as long as there is not a quorum present, or, if a quorum is present, as long as the quorum does not discuss, decide, or receive information about official city business.

The Minnesota Supreme Court has held that a conversation between two councilmembers over lunch regarding an application for a special-use permit did not violate the open meeting law because a quorum was not present.

6. Serial meetings

The Minnesota Supreme Court has noted that meetings of less than a quorum of the public body held serially to avoid public hearings or to fashion agreement on an issue may violate the open meeting law depending on the circumstances.

A Minnesota Court of Appeals' decision also indicates that serial meetings could violate the open meeting law. The Minnesota Court of Appeals considered a situation where individual councilmembers conducted separate, serial interviews of candidates for a city position in one-on-one closed interviews. Although the district court found that no meetings had occurred because there was never a quorum of the council present, the court of appeals remanded the decision back to the district court for a determination of whether the councilmembers had used this interview process for the purpose of avoiding the requirements of the open meeting law.

On remand, the district court found that the private interviews were not conducted for the purpose of avoiding the requirements of the open meeting law. This decision was also appealed, and the court of appeals, in an unpublished decision, agreed with the district court's decision.

RELEVANT LINKS:

Compare *St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools*, 332 N.W.2d 1 (Minn. 1983) and A.G. Op. 63a-5 (Feb. 5, 1975).

A.G. Op. 63a-5 (Feb. 5, 1975).

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

IPAD 09-020.

O'Keefe v. Carter. No. A12-0811 (Minn. Ct. App. Dec. 31, 2012) (unpublished decision).

A city that wants to hold private interviews with applicants for city employment should first consult with its city attorney.

7. Training sessions

Whether the participation of a quorum or more of councilmembers in a training program should be considered a meeting under the open meeting law would likely depend on whether the program includes a discussion of general training information or a discussion of specific matters relating to an individual city.

The attorney general has advised that a city council's participation in a non-public training program devoted to developing skills at effective communication was not a meeting subject to the open meeting law. However, the opinion also stated that if there were to be any discussions of specific city business by the attending members, such as where councilmembers exchange views on the city's policy in granting liquor licenses, such discussions would likely violate the open meeting law.

8. Telephone, email, and social media

It is possible that communication through telephone calls, email, or other technology could violate the open meeting law. The Minnesota Supreme Court has indicated that communication through letters and telephone calls could violate the open meeting law under certain circumstances.

The commissioner of the Minnesota Department of Administration has advised that back-and-forth email communication among a quorum of a public body in which official business was discussed violated the open meeting law. However, the opinion also advised that "one-way communication between the chair and members of a public body is permissible, such as when the chair or a staff sends meeting materials via email to all board members, as long as no discussion or decision-making ensues."

In contrast, the Minnesota Court of Appeals, in an unpublished decision, has concluded that email communications are not subject to the open meeting law because they are written communications and are not a "meeting" for purposes of the open meeting law.

The decision also concluded that even if the email messages were subject to the open meeting law, the substance of the emails in question did not contain the type of discussion that would be required for a prohibited "meeting" to have occurred. The decision noted that the substance of the email messages was not important and controversial; instead, it related to a relatively straightforward operational matter. The decision also noted that the town board members did not appear to make any decisions in their email messages.

RELEVANT LINKS:

Minn. Stat. § 13D.065.

Moberg v. Indep. Sch. Dist.
No. 281, 336 N.W.2d 510
(Minn. 1983). See Section II.
G. 6. - *Serial meetings.*

Minn. Stat. § 13.02, subd. 7.

Because this decision is unpublished, it is not binding on other courts. In addition, the outcome of this decision might have been different if the substance of the emails had related to something other than operational matters, for example, if the emails were attempting to build agreement on a particular issue that was going to be presented to the town board at a future meeting.

In 2014, the open meeting law was amended to provide that “the use of social media by members of a public body does not violate the open meeting law as long as the social media use is limited to exchanges with all members of the general public.” Email is not considered a type of social media under the new law.

The open meeting law does not define the term “social media,” but this term is generally understood to mean forms of electronic communication, including websites for social networking like Facebook, LinkedIn, and MySpace as well as blogs and microblogs like Twitter through which users create online communities to share information, ideas, and other content.

It is important to remember that the use of social media by city councilmembers could result in other claims, in addition to open meeting law claims, such as claims of defamation or of bias in decision making.

As a result, councilmembers should make sure that any comments they make on social media are factually correct, and they should not make any comments demonstrating bias on issues that will come before the council in the future for a quasi-judicial decision, such as the consideration of whether to grant an application for a conditional use permit.

It is also important to remember that serial discussions between less than a quorum of a public body that is subject to the open meeting law could violate the open meeting law under certain circumstances. Therefore, city councils and other groups to which the open meeting law applies should take a conservative approach and avoid using letters, telephone conversations, email, and other such technology if the following circumstances exist:

- A quorum of the council will be contacted regarding the same matter.
- City business is being discussed.

Another thing councilmembers should be careful about is which email account they use to receive emails relating to city business because such emails would likely be considered government data that are subject to a public-records request under the Minnesota Government Data Practices Act (MGDPA). The best option would be for each councilmember to have an individual email account that the city provides and city staff manage. However, this is not always possible for cities due to budget, size, or logistics.

RELEVANT LINKS:

See Handbook for Minnesota Cities, Chapter 27 for more information about records management.

Minn. Stat. § 13.072, subd. 1(b). See IPAD for an index of advisory opinions by topic.

See Requesting an Open Meeting Law Advisory Opinion from IPAD.

Minn. Stat. § 8.07. See index of Attorney General Advisory opinions from 1993 to present.

Star Tribune Co. v. Univ. of Minnesota Bd. of Regents, 683 N.W.2d 274, 289 (Minn. 2004).

If councilmembers don't have a city email account, there are some things to think about before using a personal email account for city business. First, preferably only the councilmember should have access to the personal email account. Using a shared account with other family members could lead to information being inadvertently deleted. Also, since city emails are government data, city officials may have to separate personal emails from city emails when responding to a public-records request.

Second, if the account a city councilmember wants to use for city business is tied to a private employer, that private employer may have a policy that restricts this kind of use. Even if a private employer allows this type of use, it is important to be aware that in the event of a public-records request under the MGDPA, or a discovery request in litigation, the private employer may be compelled to have a search done of a councilmembers' email communication on the private employer's equipment or to restore files from a backup or archive.

What may work best is to use a free, third-party email service, such as gmail or Hotmail, for your city account and to avoid using that email account for any personal email or for anything that may constitute an official record of city business since such records must be retained in accordance with the state records-retention requirements.

H. Advisory opinions

1. Department of Administration

The commissioner of the Minnesota Department of Administration has authority to issue non-binding advisory opinions on certain issues related to the open meeting law. A court or other tribunal must give deference to an advisory opinion. A \$200 fee is required. The Information Policy Analysis Division (IPAD) of the Department of Administration handles these requests.

A public body subject to the open meeting law can request an advisory opinion from the commissioner. In addition, a person who disagrees with the manner in which members of a governing body perform their duties under the open meeting law can also request an advisory opinion.

2. Minnesota Attorney General

The Minnesota Attorney General is authorized to issue written advisory opinions to city attorneys on "questions of public importance." The Attorney General has issued several advisory opinions on the open meeting law.

Opinions of the Attorney General are not binding on the courts but are entitled to careful consideration when they are of long standing.

RELEVANT LINKS:

Minn. Stat. § 13D.06, subd. 2.
O'Keefe v. Carter, No. A12-0811 (Minn. Ct. App. Dec. 31, 2012) (unpublished decision). Minn. Stat. § 541.07 (2).

Minn. Stat. § 13D.06, subds. 1, 4.

Minn. Stat. § 13D.06, subd. 4.
See LMC information memo, *LMCIT Liability Coverage Guide*, Section III-M, Open meeting law and bankruptcy lawsuits, for information about insurance coverage for lawsuits under the open meeting law.

Minn. Stat. 13D.06, subd. 4.

Minn. Stat. § 13D.06, subd. 4 (d). *Coatwell v. Murray*, No. C6-95-2436 (Minn. Ct. App. Aug. 6, 1996) (unpublished decision). *Elsbeth v. Hille*, No. A12-1496 (Minn. Ct. App. May 13, 2013) (unpublished opinion).

Minn. Stat. § 13D.06, subd. 3. *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994). *Brown v. Cannon Falls Township*, 723 N.W.2d 31 (Minn. Ct. App. 2006).

Minn. Stat. § 13D.06, subd. 3 (b) and (c).

I. Penalties

An action to enforce the open meeting law may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. In an unpublished decision, the court of appeals concluded that this broad grant of jurisdiction authorized a member of a town board to bring an action against his own town board for alleged violations of the open meeting law. This same decision also concluded that a two-year statute of limitations applies to lawsuits under the open meeting law.

A councilmember who intentionally violates the open meeting law can be subject to personal liability in the form of a civil penalty of up to \$300. The city may not pay this penalty. A court may take into account a councilmember's time and experience in office to determine the amount of the penalty.

In addition, a court may award reasonable costs, disbursements, and attorney fees of up to \$13,000 to the person who brought the violation to court. The court may award costs and attorney fees to a city only if the action is found to be frivolous and without merit. A city may pay for any costs, disbursements, and attorney fees awarded.

If a plaintiff prevails in a lawsuit under the open meeting law, an award of reasonable attorney fees is mandatory if the court determines the public body was the subject of a prior written advisory opinion from the commissioner of the Department of Administration, and the court finds that the opinion is directly related to the lawsuit and that the public body did not act in conformity with the opinion. A court is required to give deference to the advisory opinion in a lawsuit brought to determine whether the open meeting law was violated.

No monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds there was intent to violate the open meeting law.

If a person is found to have intentionally violated this chapter in three or more separate actions, the person must be removed from office and may not serve in any other capacity with that public body for a period of time equal to the term of office the person was serving.

If a court finds a separate, third violation that is unrelated to the previous violations, it must declare the position vacant and notify the appointing authority or clerk of the governing body.

RELEVANT LINKS:

Quast v. Knutson, 276 Minn. 340, 150 N.W.2d 199 (Minn. 1967).

Sullivan v. Credit River Township, 217 N.W.2d 502 (Minn. 1974). *In re D & A Truck Line, Inc.*, 524 N.W.2d 1 (Minn. Ct. App. 1994). *Lac Qui Parle-Yellow Bank Watershed Dist. v. Wollschlager*, No. C6-96-1023 (Minn. Ct. App. Nov. 12, 1996) (unpublished decision). IPAD 11-004.

As soon as practicable, the appointing authority or governing body shall fill the position as in the case of any other vacancy.

The open meeting law does not address whether actions taken at an improper meeting would be invalid. The Minnesota Supreme Court once held that an attempted school district consolidation was fatally defective when the initiating resolution was adopted at a meeting that was not open to the public.

However, in more recent decisions, Minnesota courts have refused to invalidate actions taken at improperly closed meetings. The Minnesota Supreme Court has noted that the open meeting law “does not specify that actions taken at a meeting which is not public shall be invalid.”

III. Meeting procedures

A. Agendas

The city clerk generally prepares an agenda for council meetings. The agenda is then given to councilmembers and other interested individuals such as department heads and citizens.

The agenda establishes the order in which the matters will be addressed during the meeting.

Many city councils have found the following order of business convenient:

- Call to order.
- Roll call.
- Approval of minutes from previous meeting.
- Consent agenda.
- Petitions, requests, and complaints.
- Reports of officers, boards, and committees.
- Reports from staff and administrative officers.
- Ordinances and resolutions.
- Presentation of claims.
- Unfinished business.
- New business.
- Miscellaneous announcements.
- Adjournment.