



NEW BUSINESS – OPEN MEETING LAW

Agenda Item: 6 (b)

Background Information: Attached are several pages 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 are:

- ✓ Chance or social gathering of Planning Commission Members 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.

Planning Commission Direction: The Planning Commission should review the attached information prior to the meeting.

See LMC information memo,
Meetings of City Councils,
for more information about
the open meeting law.

Minn. Stat. § 13D.01. *St.*
Cloud Newspapers, Inc. v.
Dist. 742 Community
Schools, 332 N.W.2d 1
(Minn. 1983).

II. Open meeting law

A. Purpose

The open meeting law requires that meetings of public bodies must generally be open to the public. It serves three vital purposes:

RELEVANT LINKS:

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

Quast v. Knutson, 150 N.W.2d 199, 200 (Minn. 1967) (holding that a school board violated the open meeting law when it held a meeting in a room located 20 miles outside the school district.). DPO 18-003.

Minn. Stat. § 13D.01, subd. 6. DPO 08-015. DPO 17-006. DPO 18-003. DPO 18-011. DPO 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. Minn. Stat. § 465.719, subd. 9.

- Prohibits actions from being taken at a secret meeting where the interested public cannot be fully informed of the decisions of public bodies or detect improper influences.
- Ensures the public’s right to be informed.
- Gives the public an opportunity to present its views.

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 the meeting, all notice requirements under the open meeting law are satisfied regardless of the method of receipt.

C. Location

The Minnesota Supreme Court has held that, to satisfy the statutory requirement that meetings of public bodies shall be open to the public, “it is essential that such meetings be held in a public place located within the territorial confines of the [public body] involved.”

D. 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.

E. Groups governed by the open meeting law

Under the Minnesota open meeting law, all city council meetings and executive sessions must be open to the public with only a few exceptions. The open meeting law also requires meetings of a public body or of any committee, subcommittee, board, department, or commission of a public body to be open to the public. For example, the governing bodies of local public pension plans, housing and redevelopment authorities, economic development authorities, and city-created corporations are subject to the open meeting law.

RELEVANT LINKS:

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).

See Section II-G-4 for more information about serial meetings.

Minn. Stat. § 13D.05, subd. 1(d).

Minn. Stat. § 13D.01, subd. 3.

DPO 14-005. DPO 13-012. DPO 06-020. DPO 14-005. See *The Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004)

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

F. 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 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.

For most public bodies, including statutory cities, a majority of its qualified members constitutes a quorum. Charter cities may provide that a different number of members of the council constitutes a quorum.

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

G. Open meeting law exceptions

The open meeting law is designed to favor public access. Therefore, the few exceptions that exist are carefully limited to avoid abuse.

All closed meetings (except those closed under 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.

Before closing a meeting under any of the following exceptions, a city council must make a statement on the record that includes the specific grounds that permit the meeting to be closed and describes 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 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.

RELEVANT LINKS:

(holding that the 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 the closed meeting).

Minn. Stat. § 13D.04, subd. 5.

Minn. Stat. § 13D.03, subd. 1 (b).
DPO 13-012.
Minn. Stat. §§ 179A.01-25.

Minn. Stat. § 13D.03, subds. 1(d), 2.
DPO 05-027.
DPO 00-037.

Minn. Stat. § 13D.03, subd. 3.

Minn. Stat. § 13D.05, subd. 2.

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.

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 or as an emergency meeting, the notice requirements for a special meeting or an emergency meeting would apply.

1. Labor negotiations

The city council may, by majority vote in a public meeting, decide to hold a closed meeting to consider its strategy for labor negotiations, including negotiation strategies or developments or discussion of labor-negotiation proposals conducted pursuant to Minnesota Statutes sections 179A.01 to 179A.25. The council must announce the time and place of the closed meeting at the public meeting.

After the closed meeting, a written record of all members of the city council and all other people present must be available to the public. The council must tape-record the proceedings at city expense and preserve the tape for two years after signing the contract. The tape-recording must be available to the public after all labor contracts are signed for the current budget period.

If someone claims the council conducted public business other than labor negotiations at the closed meeting, a court must privately review the recording of the meeting. If the court finds the law was not violated, the action must be dismissed and the recording sealed and preserved. If the court determines a violation of the open meeting law may exist, the recording may be introduced at trial in its entirety, subject to any protective orders requested by either party and deemed appropriate by the court.

2. Not public data under the Minnesota Government Data Practices Act

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 certain not public data is discussed.

RELEVANT LINKS:

Minn. Stat. §§ 144.291-.298.

Minn. Stat. § 13D.05, subd. 1(d).

Minn. Stat. § 13D.05, subd. 1(b), (c).
DPO 09-012.

Minn. Stat. § 13D.05, subds. 1(d), 2(b).
DPO 03-020. (Advising that when a meeting is closed under this exception, Minn. Stat. § 13.43, subd. 2 requires the government entity to identify the individual who is being discussed.)

DPO 14-004.

Any portion of a meeting must be closed if expressly required by law or if any of the following types of not public data are discussed:

- Data that would identify victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults.
- Active investigative data created by a law-enforcement agency, or internal-affairs data relating to allegations of law-enforcement personnel misconduct.
- Educational, health, medical, welfare, or mental-health data that are not public data.
- Certain medical records.

A closed meeting held to discuss any of the not public data listed above must be electronically recorded, and the recording must be preserved for at least three years after the meeting.

Other not public data may be discussed at an open meeting without liability or penalty if the disclosure relates to a matter within the scope of the public body's authority, and it is reasonably necessary to conduct the business or agenda item before the public body. The public body, however, should make reasonable efforts to protect the data from disclosure. Data discussed at an open meeting retains its original classification; however, a record of the meeting shall be public.

3. Misconduct allegations or charges

A public body must close one or more meetings for "preliminary consideration" of allegations or charges of misconduct against an individual subject to its authority. This type of meeting must be open at the request of the individual who is the subject of the meeting. If the public body concludes discipline of any nature may be warranted, further meetings or hearings relating to the specific charges or allegations that are held after that conclusion is reached must be open. This type of meeting must be electronically recorded, and the recording must be preserved for at least three years after the meeting.

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."

RELEVANT LINKS:

DPO 10-001.
Minn. Stat. § 13.43.

Minn. Stat. § 13D.05, subds. 1(d), 3(a). See DPO 14-007, DPO 15-002, and DPO 16-002 (discussing what type of summary satisfies the open meeting law).

DPO 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).

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).
DPO 14-005. DPO 14-017.
DPO 16-003. DPO 17-003.

Minn. Stat. § 13D.05, subd. 3 (c).

Minn. Stat. § 13.44, subd. 3.

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 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.

4. Performance evaluations

A public body may close a meeting to evaluate the performance of an individual who is subject to its authority. The public body must identify the individual to be evaluated before closing the meeting.

At its next open meeting, the public body must summarize its conclusions regarding the evaluation. This type of meeting must be open at the request of the individual who is the subject of the meeting. If this type of meeting is closed, it must be electronically recorded, and the recording must be preserved for at least three years after the meeting.

5. Attorney-client privilege

A meeting may be closed if permitted by the attorney-client privilege. Meetings between a government body and its attorney to discuss active or threatened litigation may only be closed, under the attorney-client privilege, when a 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 the city has made a substantive decision on the underlying matter. 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 underlying action that may give rise to future litigation.

6. Purchase or sale of real or personal 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 protected nonpublic appraisal data.

RELEVANT LINKS:

Minn. Stat. § 13D.05, subd. 3 (c).

Vik v. Wild Rice Watershed Dist., No. A09-1841 (Minn. Ct. App. Aug. 10, 2010) (unpublished opinion) (holding that this exception authorizes closing a meeting to discuss the development or consideration of a property transaction and is not limited to the discussion of specific terms of advanced negotiations). DPO 08-001. DPO 14-014.

Minn. Stat. § 13D.05, subd. 3 (d).

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

- Develop or consider offers or counteroffers for the purchase or sale of real or personal property.

Before holding a closed meeting under this exception, the public body must identify on the record the particular real or personal property that is the subject of the closed meeting.

The closed meeting must be tape-recorded. The recording must be preserved for eight years, and must be made available to the public only after all real or personal property discussed at the meeting has been purchased or sold, or after the public body has abandoned the purchase or sale. The real or personal property that is being discussed must be identified on the tape. A list of members 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 real or personal property must be approved at an open meeting, and the purchase or sale price is public data.

7. Security reports

Meetings may be closed to receive security briefings 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. Before closing a meeting under this exception, the public body must, when describing the subject to be discussed, refer to the facilities, systems, procedures, services or infrastructures 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.

H. Common issues

1. Interviews

The Minnesota Supreme Court has ruled that a school board must interview prospective employees for administrative positions in open sessions. The court reasoned that the absence of a statutory exception indicated that the Legislature intended such sessions to be open.

As a result, a city council should conduct any interviews of prospective officers and employees at an open meeting if a quorum or more of the council will be present.

RELEVANT LINKS:

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 opinion).

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

DPO 08-007.
DPO 13-015.

DPO 05-014.

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. The district court found that no “meeting” of the council had occurred because there was never a quorum of the council present during the interviews.

However, the court of appeals sent the case back to the district court for a determination of whether the councilmembers had conducted the interview process in a serial fashion to avoid the requirements of the open meeting law.

On remand, the district court found that the individual interviews were not done to avoid the requirements of the open meeting law. This decision was also appealed, and the court of appeals affirmed the district court’s decision. Cities that want to use this type of interview process should first consult their city attorney.

2. 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 gatherings of a quorum or more of a city council must be properly noticed and open to the public, regardless of whether the council takes or contemplates taking action at that gathering. This includes meetings and work sessions where members receive information that may influence later decisions.

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. 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; 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 subject to the open meeting law.

RELEVANT LINKS:

DPO 07-025.

A.G. Op. 63a-5 (Aug. 28, 1996). *Sovereign v. Dunn*, 498 N.W.2d 62 (Minn. Ct. App. 1993). DPO 07-025.

Thuma v. Kroschel, 506 N.W.2d 14 (Minn. Ct. App. 1993). DPO 16-005.

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

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.

In contrast, the commissioner has advised that a city’s Free Speech Working Group, consisting of citizens and city officials appointed by the city to meet to develop and review strategies for addressing free-speech concerns relating to a political convention, was not subject to the open meeting law. The advisory opinion noted that the group did not have decision-making authority.

It is common for city councils to appoint individual councilmembers to act as liaisons between the council and particular council committees or other government entities. 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.”

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.

If a city is unsure whether a meeting of a committee, board, or other city entity is subject to the open meeting law, it should consult its city attorney or consider seeking an advisory opinion from the commissioner of the Minnesota Department of Administration.

Notice for a special meeting of the city council may be needed if a quorum of the council will be present at a committee meeting and will be participating in the discussion. 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 the councilmembers simply attended the meeting but because the councilmembers conducted public business in conjunction with that meeting.

Based on this decision, the attorney general has advised that mere attendance by 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.

RELEVANT LINKS:

St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools, 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). DPO 18-003 (advising dinner that a quorum of a city council attended did not violate open meeting law).

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983). DPO 10-011. DPO 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 opinion).

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

The attorney general cautioned, however, that the additional councilmembers should not participate in committee discussions or deliberations absent a separate special-meeting notice of a city council meeting.

3. Social gatherings

Social gatherings of city councilmembers will not be considered a meeting subject to the requirements of the open meeting law if there is not a quorum present, or, if a quorum is present, if the quorum does not discuss, decide, or receive information on official city business. The Minnesota Supreme Court has ruled that a conversation between two city councilmembers over lunch about a land-use application did not violate the open meeting law because a quorum of the council was not present.

4. Serial meetings

The Minnesota Supreme Court has noted that meetings of less than a quorum of a public body held serially to avoid a public meeting or to fashion agreement on an issue of public business may 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. The district court found that no “meeting” of the council had occurred because there was never a quorum of the council present during the interviews. However, the court of appeals sent the case back to the district court for a determination of whether the councilmembers had conducted the interview process in a serial fashion to avoid the requirements of the open meeting law.

On remand, the district court found that the individual interviews were not done to avoid the requirements of the open meeting law. This decision was also appealed, and the court of appeals affirmed the district court’s decision. Cities that want to use this type of interview process with job applicants should first consult their city attorney.

5. Training sessions

It is not clear whether the participation of a quorum or more of the members of a city council in a training program would be defined as a meeting under the open meeting law.

RELEVANT LINKS:

A.G. Op. 63a-5 (Feb. 5, 1975). DPO 16-006.

A.G. Op. 63a-5 (Feb. 5, 1975). DPO 16-006.

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983). DPO 17-005 (advising communication through a letter violated the open meeting law).

DPO 09-020. DPO 14-015.

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

The determining factor would likely be 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 was not a meeting subject to the open meeting law. The commissioner of the Department of Administration has likewise advised that a school board’s participation in a non-public team-building session to “improve trust, relationships, communications, and collaborative problem solving among Board members,” was not a meeting subject to the open meeting law if the members are not “gathering to discuss, decide, or receive information as a group relating to ‘the official business’ of the governing body.”

However, the opinion also advised that if there were to be any discussion of specific official business by the attending members, either outside or during training sessions, it could be a violation of the open meeting law.

6. 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 Department of Administration has advised that back-and-forth email communications among a quorum of a public body that was subject to the open meeting law in which the members commented on and provided direction about official business violated the open meeting law.

However, the commissioner also advised that “one-way communication between the chair and members of a public body is permissible, such as when the chair or staff sends meeting materials via email to all board members, as long as no discussion or decision-making ensues.”

In contrast, an unpublished opinion by the Minnesota Court of Appeals 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 noted that, even if email communications are 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.

RELEVANT LINKS:

The court of appeals noted that the substance of the email messages was not important or controversial; instead, the email communications discussed a relatively straightforward operational matter. The decision also noted that the town board members did not appear to make any decisions in their email communications.

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

Minn. Stat. § 13D.065.

The open meeting law was amended in 2014 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 this 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 councilmembers could still be used to support other claims against a city or city officials, such as claims of defamation or of conflict of interest in decision-making. As a result, councilmembers should make sure that any comments they make on social media are factually correct and should not comment on issues that will come before the council in the future for a quasi-judicial hearing and decision, such as the consideration of whether to grant an application for a conditional use permit.

See II-G-4 - *Serial meetings*.

It is also important to remember that serial discussions between less than a quorum of the council could violate the open meeting law under certain circumstances. As a result, city councils and other public bodies should take a conservative approach and should not use telephone calls, email, or other technology to communicate back and forth with other members of the public body if both of the following circumstances exist:

- A quorum of the council or public body will be contacted regarding the same matter.
- Official business is being discussed.

RELEVANT LINKS:

Minn. Stat. § 13.02, subd. 7.

Another thing councilmembers should be careful about is which email account they use to receive emails relating to city business because such emails likely would be considered government data that is 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.

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 incorrect information being communicated from the account, or incoming 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 under the MGDPA.

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 councilmember's email communications 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.

See Handbook, *Records Management*, for more information about records management.

I. 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 \$200 fee is required. The Data Practices Office (DPO) handles these requests.

Minn. Stat. § 13.072, subd. 1 (b). See Minnesota Department of Administration, *Data Practices for an index of advisory opinions*.

RELEVANT LINKS:

See Requesting an Open Meeting Law Advisory Opinion.

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

Minn. Stat. § 13D.06, subd. 1.

Claude v. Collins, 518 N.W.2d 836 (Minn. 1994).

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

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

Minn. Stat. § 13D.06, subd. 4.

A public body, subject to the open meeting law, can request an advisory opinion. A person who disagrees with the way members of a governing body perform their duties under the open meeting law can also request an advisory opinion.

2. 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.

J. Penalties

Any person who intentionally violates the open meeting law is subject to personal liability in the form of a civil penalty of up to \$300 for a single occurrence. The public body may not pay the penalty. A court may consider a councilmember’s time and experience in office to determine the amount of the civil penalty.

An action to enforce this penalty 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 Minnesota 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.

The court may also award reasonable costs, disbursements, and attorney fees of up to \$13,000 to any party in an action alleging a violation of the open meeting law. The court may award costs and attorney fees to a defendant only if the action is found to be frivolous and without merit. A public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members.

If a party prevails in a lawsuit under the open meeting law, an award of reasonable attorney fees is mandatory if the court determines that the public body was the subject of a prior written advisory opinion from the commissioner of the Minnesota 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.

RELEVANT LINKS:

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

Minn. Stat. § 13D.06, subd. 3 (a). *Brown v. Cannon Falls Twp.*, 723 N.W.2d 31 (Minn. Ct. App. 2006). *Funk v. O'Connor*, No. A16-1645 (Minn. July 18, 2018).

Minn. Stat. § 13D.06, subd. 3 (b).

Minn. Const. art. VIII, § 5.

Jacobsen v. Nagel, 255 Minn. 300, 96 N.W.2d 569 (Minn. 1959).

Jacobsen v. Nagel, 255 Minn. 300, 96 N.W.2d 569 (Minn. 1959). *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994).

Sullivan v. Credit River Twp., 299 Minn. 170, 217 N.W.2d 502 (Minn. 1974). *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757 (Minn. 1982). *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 opinion). DPO 11-004.

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

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

If a person is found to have intentionally violated the open meeting law in three or more separate, sequential actions involving the same governing body, that person must forfeit any further right to serve on the governing body or in any other capacity with the 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. As soon as practicable, the appointing authority or governing body shall fill the position as in the case of any other vacancy.

Under the Minnesota Constitution, the Legislature may only provide for the removal of public officials for malfeasance or nonfeasance. To constitute malfeasance or nonfeasance, a public official's conduct must affect the performance of official duties and must relate to something of a substantial nature directly affecting the rights and interests of the public.

"Malfeasance" refers to evil conduct or an illegal deed. "Nonfeasance" is described as neglect or refusal, without sufficient excuse, to perform what is a public officer's legal duty to perform. More likely than not, a violation of the open meeting law would be in the nature of nonfeasance. Although good faith does not nullify a violation, good faith is relevant in determining whether a violation amounts to nonfeasance.

The open meeting law does not address whether actions taken at a meeting that does not comply with its requirements would be valid. Minnesota courts have generally refused to invalidate actions taken at an improperly closed meeting because this is not a remedy the open meeting law provides.

But the Minnesota Supreme Court has 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.