

SQUIRES, WALDSPURGER & MACE, P.A.



333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Office (612) 436-4300
Fax (612) 436-4340
www.raswlaw.com

LEGAL CONSIDERATIONS FOR CITY OFFICIALS

City of Red Wing 2024

By: Amy E. Mace

Amy.Mace@raswlaw.com

THE OPEN MEETING LAW

I. Purposes of the Open Meeting Law

Minnesota Statutes chapter 13D, also known as the Open Meeting Law (“OML”), was passed in the 1950s. It has been amended several times over the years, but its general aim—to prevent public bodies from dissolving into executive sessions to discuss controversial issues—has remained the same.

The Minnesota Supreme Court has discussed the purposes of the OML as follows:

- A. To prohibit actions from being taken at secret meetings where it is impossible for the public to be fully informed and/or detect improper influences. Lindahl v. Indep. Sch. Dist. No. 306 of Hubbard County, 133 N.W.2d 23 (Minn. 1965).
- B. To protect the public’s right to be informed. Channel 10, Inc. v. Indep. Sch. Dist. No. 709, St. Louis County, 215 N.W.2d 814 (Minn. 1974).

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel. ©2024 Squires, Waldspurger & Mace, P.A.

- C. To guarantee the public a forum to present its views to the public body. Sullivan v. Credit River Twp., 217 N.W.2d 502 (Minn. 1974).

II. Meetings Subject to the Open Meeting Law

The law applies to all meetings of the City Council, and in general, meetings of City commissions and boards. Although the OML does not include a definition of a “meeting,” the Minnesota Supreme Court has defined a meeting under the OML as a “gathering of a quorum or more members of the governing body . . . at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.” Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

- A. A majority of the public body constitutes a quorum. See Moberg.
- B. Even if a quorum of the public body is present, “chance or social gatherings” are not covered by the law. The social gathering, however, cannot be used to conduct official business unless the notice requirements discussed below have been met. St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1 (Minn. 1983); Moberg.
- C. The law does not apply to telephone conversations or letters between less than a quorum of members. See, e.g., Minnesota Educ. Ass’n v. Bennett, 321 N.W.2d 395 (Minn. 1982).
- D. Courts have cautioned that serial meetings of less than a quorum may be found to violate the law if the facts and circumstances indicate the purpose was to avoid the requirements of the law or to reach an agreement on an issue before the public meeting. Moberg.
- E. The Minnesota Supreme Court has rejected the argument that a discussion between two board members, outside of an open meeting, about a matter pending before the board is an absolute or automatic violation of the law. Moberg. The Court noted that public officials have a duty to persuade each other in an attempt to resolve issues, and the public benefits from this, so long as the discussion is not “designed to avoid public discussion altogether, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.” Moberg, 336 N.W.2d at 518.
- F. An advisory opinion from the Minnesota Department of Administration’s Data Practices Office (“DPO”) concluded that email communication between board members constituted a meeting, which was required to be public. Adv.

Op. 09-020. A non-member sent an email to the Advisory Board of the Metro Gang Strike Force raising several issues and asking the Board to issue a press release. Seven members replied and copied the rest of the Board members. Based on their comments, the Chair issued a press release and emailed the Board that he had taken such action. The DPO concluded that the conduct of the Board constituted a meeting because a quorum of the Board, in addition to receiving information, commented on and provided direction to the Chair on a matter relating to official business of the Board. The DPO noted that one-way communication between the Chair and other members is permissible, such as when meeting materials are sent via email, as long as no discussion or decision-making ensues.

- G. An advisory opinion from the DPO noted that the definition of a meeting does not require a public body to transact public business or make or vote on motions for the OML requirements to apply. Adv. Op. 23-003. Instead, the Minnesota Supreme Court has determined that any gathering of a quorum or more of a public body's members to "discuss, decide, or receive information as a group on issues relating to the official business of that governing body" is a meeting subject to the OML's requirements. In that opinion, a city council had discussed issues at a special meeting that were not included in the special meeting notice's purpose but argued that the council did not transact public business, no motions were made, and no public business occurred during those discussions. The DPO determined it did not matter that the council did not transact public business or make or vote on motions—that is not required for a meeting to exist or for the OML requirements to apply.
- H. An advisory opinion from the DPO concluded that when a quorum of a Township Board attended a county planning commission meeting and heard and discussed matters also before the Board, this constituted a special meeting of the Board. Adv. Op. 16-005. The Board should have posted written notice of the time, date, place and purpose (i.e., a quorum of Board Supervisors will attend the [County] Planning Commission meeting on [date] at [time] for [purpose]).
- I. An advisory opinion from the DPO concluded that a school board violated the OML when a quorum of the school board was present at a school board committee meeting, which was noticed as a committee meeting but not as a full school board meeting. Adv. Op. 19-012. The DPO stated that each group identified in Minnesota Statutes section 13D.01, subdivision 1 (e.g., governing body of a school district or city and any committee of a public body), is independently subject to the notice requirements of the OML. The DPO concluded that once the fourth school board member was present (creating a quorum) to discuss, decide, or receive information as a group

relating to the official business of the school board, the committee meeting also became a meeting of the school board that needed to be noticed as a regular or special school board meeting. In this matter, the fourth school board member engaged in a discussion with the committee members, including whether items had been presented to the school board, an exchange about one-time funding, and a potential form to use to present information to the school board.

- J. An advisory opinion from the DPO concluded that it would not be a violation of the OML if a quorum of board members met privately with a facilitator in sessions designed to “improve trust, relationships, communications, and collaborative problem solving among Board members,” if they are not “gathering to discuss, decide, or receive information as a group relating to ‘the official business’ of the governing body.” Adv. Op. 16-006. The DPO did caution that, while the goal of the gatherings was not for Board members to exchange views on substantive decisions, incidental discussions of public business would constitute a meeting subject to the OML. Therefore, the Board members must avoid any issues specific to its official business during the sessions.
- K. An advisory opinion from the DPO concluded that a City Council’s two-day goal-setting session, at which the City Council discussed its long-term vision for the City and prioritized goals and action steps, constituted a meeting for purposes of the OML. Adv. Op. 18-003. The DPO’s opinion is consistent with Minnesota precedent finding that workshops or retreats specifically related to a particular city’s business are considered meetings under the OML. The DPO further opined that, because the goal-setting session was a meeting, convening the goal-setting session outside the territorial jurisdiction of the City Council violated the OML. The DPO explained that the City Council “effectively removed themselves from the people that they serve, thus undermining the public policy intent of the OML” to provide for open and public access to meetings.
- L. The Minnesota Court of Appeals has limited the law’s application to those committees possessing decision-making authority on behalf of the governing body. The Minnesota Daily v. Univ. of Minnesota, 432 N.W.2d 189 (Minn. App. 1988).
 - 1. Decision-making authority will be presumed where members of the committee constitute a quorum of the governing body. Sovereign v. Dunn, 498 N.W.2d 62 (Minn. App. 1993).

III. Notice Requirements

The notice requirements of the OML vary depending on the type of meeting: regular, special, emergency, and recessed/continued.

A. Regular Meetings

A public body must keep a schedule of its regular meetings on file at its primary office. Minn. Stat. § 13D.04, subd. 1. If a regular meeting is going to be held at a time or place different than listed on its schedule, the public body must provide notice of the meeting in the same manner as for a special meeting. Id.

B. Special Meetings

Notice of a special meeting must be posted three days in advance of the meeting. Minn. Stat. § 13D.04, subd. 2(b). Three days means 72 hours. The notice must state the date, time, place and purpose of the meeting, and it must be posted on the City's principal bulletin board. Id. subd. 2(a). The principal bulletin board has to be located in a place that is "reasonably accessible to the public." Rupp v. Mayasich, 533 N.W.2d 893 (Minn. App. 1995). If there is no principal bulletin board, it must be posted on the door of the regular meeting room. Minn. Stat. § 13D.04, subd. 2(a).

Notice of the special meeting must also be mailed or otherwise delivered to each person who has filed a written request for notice of special meetings. Id. subd. 2(b). In the alternative, the public body can publish notice in the official newspaper three days before the special meeting. Id. subd. 2(c).

While a public body may add (or remove) topics from consideration at a regular meeting (where the notice required does not include listing the "purpose"), it cannot do so at a special meeting. Adv. Op. 19-006. A notice for a special meeting must identify the purpose and the public body must limit the discussion to that purpose. Id. (city council violated the OML when it discussed and acted on three items that it failed to identify in its special meeting notice). The OML does not define "purpose" and, as a result, the DPO looked to the dictionary definition of the term, which is "something set up as an object or end to be attained: intention." Adv. Op. 22-009. Based on this, the DPO concluded that the OML requires a public body to provide notice of the intended object or end to be attained in a special meeting. Id. (board violated the OML when it closed a special meeting, stating in its notice that the purpose of the meeting was for preliminary consideration of allegations or charges against an individual, but then came out of closed

session and voted to impose discipline against the employee—in voting to impose discipline, the board moved beyond the special meeting’s “intended object or end to be obtained” described in the notice).

C. Emergency Meetings

An emergency meeting is defined as a meeting called because of circumstances that, in the judgment of the public body, require immediate consideration by the public body. Minn. Stat. § 13D.04, subd. 3(e).

Notice of the emergency meeting shall be given by telephone or by any other reasonable method to members of the public body. Id. subd. 3(b).

The public body must also make a good faith effort to provide notice to news media that have filed a request for notice of emergency meetings if the request includes the news medium’s telephone number. Id. subd. 3(a).

D. Recessed or Continued Meetings

Published or mailed notice is unnecessary for a recessed or continued meeting as long as the time and place of the meeting were established during the previous meeting and recorded in the previous meeting’s minutes. Minn. Stat. § 13D.04, subd. 4(a).

E. Closed Meetings

The same notice requirements apply to a regular, special, or emergency meeting that is closed. Minn. Stat. § 13D.04, subd. 5.

IV. Materials for the Meeting

At least one copy of the agenda and any other written materials that are:

1) distributed to all members at the meeting; 2) distributed to all members before the meeting; or 3) available to all members in the meeting room must also be available in the meeting room for public inspection while the public body considers the subject matter. Minn. Stat. § 13D.01, subd. 6(a).

There are two general exceptions: 1) data classified as non-public under the Minnesota Government Data Practices Act; and 2) data relating to matters discussed at a closed meeting. See id. subd. 6(b).

An advisory opinion from the DPO concluded that materials handed out to a Township Board by a presenter had to be available to the public in the meeting

room, even if those materials were included in a prior meeting packet and read aloud at the meeting. Adv. Op. 18-011.

V. Meetings During Pandemic or Chapter 12 Emergency

A. **Interactive Technology Defined.** In 2021, the legislature included a definition of “interactive technology” in the OML and replaced the previously used phrases—“other electronic means” and “interactive television”—with “interactive technology” throughout the OML. “Interactive technology” means “a device, software program, or other application that allows individuals in different physical locations to see and hear one another.” Minn. Stat. § 13D.001, subd. 2.

B. **Conditions.** Meetings may be conducted by *telephone or interactive technology* if certain conditions are met. Minn. Stat. § 13D.021, subd. 1.

1. The presiding officer, chief legal counsel, or chief administrative officer for the affected governing body must determine that an in-person meeting (or a meeting conducted by interactive technology under section 13D.02—see section VI) is “not practical or prudent *because of a health pandemic or an emergency declared under chapter 12.*”
2. All members of the body participating in the meeting, wherever their physical location, *can hear one another and can hear all discussion and testimony*;
3. Members of the public present at the regular meeting location *can hear all discussion and testimony and all votes* of the members of the body, “*unless attendance at the regular meeting location is not feasible due to the health pandemic or emergency declaration*”;
4. At least one member of the body, chief legal counsel, or chief administrative officer is *physically present* at the regular meeting location, “*unless unfeasible due to the health pandemic or emergency declaration*”; and
5. All votes are conducted by roll call, so each member’s vote on each issue can be identified and recorded.
 - a. The DPO noted that actions that are typically taken by unanimous consent are still subject to this roll call vote requirement.

- C. **Quorum.** All members who attend by telephone or interactive technology are present for quorum purposes. Minn. Stat. § 13D.021, subd. 2.
- D. **Remote Monitoring.** If telephone or interactive technology is used to conduct a meeting, to the extent practical, the body shall allow a person to monitor the meeting electronically from a remote location. Minn. Stat. § 13D.021, subd. 3. The law used to allow the public body to require the person making such a connection pay for the documented additional cost that the body incurred as a result of the additional connection. The legislature removed this language in 2021, so the public body can no longer require this payment.
- E. **Notice.** If telephone or interactive technology is used to conduct a meeting, the public body must provide notice of the regular meeting location, of the fact that some members may participate by telephone or interactive technology, and of the details for monitoring remotely per paragraph D above. Minn. Stat. § 13D.021, subd. 4. Otherwise, the same notice requirements discussed earlier in section III apply to a regular, special, or emergency meeting that is conducted by telephone or interactive technology. Id.
- F. **Public Comment.** *If attendance at the regular meeting location is not feasible due to the health pandemic or emergency declaration and the public body's practice is to offer a public comment period at in-person meetings, members of the public shall be permitted to comment from a remote location during the public comment period of the meeting, to the extent practical.* Minn. Stat. § 13D.021, subd. 5.
- G. An advisory opinion from the DPO concluded that a board did not comply with Minnesota Statutes section 13D.021 when, solely in order to reach a quorum, a member participated by telephone at two meetings. Adv. Op. 18-018. Per section 13D.021, a public body may conduct meetings by telephone if certain conditions are met, the threshold requirement being that there is a health pandemic or declared emergency under chapter 12. Minnesota Statutes section 12.03, subdivision 1e, defines "declared emergency" as "a national security or peacetime emergency declared by the governor under section 12.31." Thus, the board could not conduct its meetings by telephone, under section 13D.021, unless it determined that it was warranted due to a health pandemic or declared emergency.
- H. Another advisory opinion from the DPO noted that there is currently not a mechanism in the OML for public body members to hold in-person meetings while limiting public attendance to electronic monitoring. Adv. Op. 21-003.

In that matter, a school board invoked its right to hold its meetings virtually under Minnesota Statutes section 13D.021 due to the COVID-19 pandemic and declared state of emergency. The board chair determined that in-person meetings were not practical or prudent because of the current health pandemic. Members of the public were limited to attending the meetings remotely. On four occasions, however, a quorum of the school board attended the meetings in person. The DPO concluded the school board did not comply with the OML when a quorum of the school board held in-person meetings while the public was limited to remote attendance. The presence of a quorum of the school board in person rendered the meetings in-person meetings, negating the option to meet remotely pursuant to section 13D.021. Thus, if a public body determines in-person meetings are not practical or prudent under section 13D.021, a quorum or more of the members cannot gather for the meeting in-person. Also, public bodies cannot decide that it is feasible for a quorum of the board to meet in-person, but unfeasible to have the public attend in person.

VI. Participation in Meetings by Interactive Technology

- A. **Conditions.** Members of a public body can attend and participate in meetings by *interactive technology* if certain conditions are met. Minn. Stat. § 13D.02, subd. 1(a).
1. All members of the body participating in the meeting, wherever their physical location, *can hear and see one another* and *can hear and see all discussion and testimony* presented at any location at which at least one member is present;
 2. Members of the public present at the regular meeting location *can hear and see all discussion and testimony and all votes* of the members of the body;
 3. *At least one member of the body is physically present* at the regular meeting location;
 4. All votes are conducted by roll call so each member's vote on each issue can be identified and recorded; and
 - a. Actions that are typically taken by unanimous consent are still subject to this roll call vote requirement.
 5. *Each location* at which a member of the body is present *is open and accessible to the public*.

- B. Location Not Open or Accessible to the Public.** A meeting satisfies the requirements of paragraph A above, even though a member of the public body participates from a location that is not open or accessible to the public (see paragraph A.5.), if the member has not participated more than three times in a calendar year from a location that is not open or accessible to the public, **and**:
1. **Military members.** The member is serving in the military and is at a required drill, deployed, or on active duty; **or**
 2. **NEW—Medical reasons.** The member has been advised by a health care professional against being in a public place for personal or family medical reasons. Minn. Stat. § 13D.02, subd. 1(b)(1)-(2). This clause used to only apply when a state of emergency had been declared under section 12.31, and expired 60 days after the removal of the state of emergency. Effective July 1, 2023, that limitation was deleted. Because this health care professional advice exception is no longer tied to times when a state of emergency exists, this exception will be somewhat more available.
- C. Quorum.** All members who attend by interactive technology are present for quorum purposes. Minn. Stat. § 13D.02, subd. 2.
- D. Remote Monitoring.** If interactive technology is used to conduct a meeting, to the extent practical, a public body must allow a person to monitor the meeting electronically from a remote location. Minn. Stat. § 13D.02, subd. 3. The law used to allow the public body to require the person making such a connection pay for documented marginal costs that the public body incurred as a result of the additional connection. The legislature removed this language in 2021, so the public body can no longer require this payment.
- E. Notice.** If interactive technology is used to conduct a meeting, the public body must provide notice of the regular meeting location and notice of any location where a member of the public body will be participating in the meeting by interactive technology, except for the locations of members participating pursuant to paragraph B above. Minn. Stat. § 13D.02, subd. 4. Otherwise, the same notice requirements discussed earlier in section III apply to a regular, special, or emergency meeting that is conducted by interactive technology. Id.
- F. Record.** The minutes for a meeting conducted by interactive technology must reflect the names of any members appearing by interactive technology

and state the reason or reasons for the appearance by interactive technology.
Minn. Stat. § 13D.02, subd. 6.

VII. Closing a Meeting

A meeting cannot be closed simply because private or confidential data will be discussed, unless one of the exceptions discussed below is met. So long as the meeting is not required to be closed, private data can be discussed in public without liability or penalty if the disclosure relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the public body's business. Minn. Stat. § 13D.05, subds. 1(a), (b).

A. Valid Reasons to Close a Meeting

1. Labor Negotiations

A meeting may be closed to discuss strategy for labor negotiations, but the closed meeting must be tape recorded and the tape retained for two years after the contract is signed. Minn. Stat. § 13D.03, subds. 1(b), 2(a)-(b). The recording must be available to the public after all contracts are settled for the current budget period. Id. subd. 2(b). The OML does not mandate how public bodies make recordings "available" to the public. Adv. Op. 21-004. The DPO stated public bodies may decide how to best implement this requirement but that posting the recordings on a website or providing access upon request certainly satisfies the requirement. Id.

A majority vote is required to close the meeting, and a written roll must be taken of the members and other persons present at the closed meeting. Id. subds. 1(b), 1(d). The written roll must be made available to the public after the closed meeting. Id. subd. 1(d).

2. Preliminary Consideration of Charges Against an Employee

A meeting must be closed for preliminary consideration of allegations or charges against an employee. Minn. Stat. § 13D.05, subd. 2(b). The meeting must be open if the employee requests that it be open. Id. If the meeting is closed, it must be tape recorded. Id. subd. 1(d).

If the public body concludes that discipline may be warranted as a result of the allegations or charges, future meetings related to the allegations or charges must be open. Id. subd. 2(b).

An advisory opinion from the DPO concluded that once a public body discusses replacing or otherwise removing an employee, it is clear that disciplinary action may be warranted. Adv. Op. 23-004. A city council closed a January meeting to discuss allegations against an employee. Although during the closed meeting, the city council members did not vote to remove the employee from her position, the council did discuss hiring a temporary replacement and theorized that the issues raised in the allegations or charges against the employee would disappear if the employee was no longer employed by the city. After closing the January meeting, the city council held three additional closed meetings (in February, May, and June) to discuss the allegations against this employee. The DPO determined it was improper to close the subsequent meetings—because the city council discussed replacing or otherwise removing the employee at the January closed meeting, the council had determined disciplinary action *may* be warranted and, as a result, all later meetings on that topic (the allegations against the employee) needed to be open to the public.

3. Performance Evaluations

A meeting may be closed to evaluate an employee’s performance. Minn. Stat. § 13D.05, subd. 3(a). The meeting must be open if the employee requests that it be open. Id. Before the meeting is closed, the employee must be identified. Id. If the meeting is closed, it must be tape recorded, and at the next open meeting, the public body must summarize its conclusions regarding the evaluation. Id. subds. 1(d), 3(a).

The DPO deemed the following statements to be insufficient to fulfill the public bodies’ statutory obligation to summarize their conclusions regarding the evaluations:

- a. “[The board] discussed the [the employee’s] strengths and weaknesses.”
- b. “As a result of that review, strengths were noted and areas of improvement were defined. The board developed goals regarding communication and leadership.”
- c. “Areas of growth were identified and [the employee’s] evaluation is an ongoing process.”
- d. Regarding an evaluation that was conducted at a workshop, “I wasn’t at the actual workshop because I was out of town. But I’ll

summarize what I think happened and you guys can affirm it. Basically we talked about [the City administrator's] performance, her strengths, weaknesses, where she needs improvement. Overall, I think it was satisfactory." Two council members responded, "Nope, that's about right" and "That's pretty close."

Adv. Op. 14-007.

An advisory opinion from the DPO concluded that this section 13D.05, subd. 3(a), (closing a meeting to evaluate an employee's performance) does not allow a public body to close meetings to generally discuss personnel issues, such as hiring or appointment decisions. Adv. Op. 22-008. A board closed a meeting under this statute to review and evaluate applications to select finalists who it would interview for a board vacancy. The board did not provide any information indicating that it closed the meeting to evaluate the performance of any individual subject to its authority. The DPO determined that the board violated the OML when it closed a meeting under section 13D.05, subd. 3(a), to review applications to appoint a new board supervisor.

4. Attorney-Client Privilege

A meeting may be closed if permitted by the attorney-client privilege. Minn. Stat. § 13D.05, subd. 3(b). The extent of the privilege for closing an open meeting, however, is not as broad as the privilege itself.

Generally, a meeting may be closed to discuss matters pertaining to pending or threatened litigation. A meeting cannot be closed to seek general legal advice that is basic to the deliberative process of any public body.

The Minnesota Court of Appeals has seemingly limited the ability to close meetings under the attorney-client privilege to only those circumstances where the public body can demonstrate that there is an absolute need to discuss the matter outside the public arena. See Prior Lake American v. Mader, 642 N.W.2d 729 (Minn. 2002).

5. Acquisition/Sale of Land or Personal Property

A meeting may be closed in conjunction with discussions surrounding the acquisition or sale of land or personal property, but detailed procedures must be followed. Minn. Stat. § 13D.05, subd. 3(c).

6. Security Briefing

A meeting may also 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 that information would pose a danger to public safety or compromise security procedures or responses. Minn. Stat. § 13D.05, subd. 3(d). However, financial issues related to security matters must be discussed and all related financial decisions must be made during open session. Id.

Before closing the meeting, the public body must describe the subject to be discussed and refer to the facilities, systems, procedures, services or infrastructures to be considered during the closed meeting. Id. The closed meeting must be tape recorded, and the tape preserved for at least four years. Id.

7. Discussion of Certain Types of Data

Any portion of a meeting must be closed where the following types of data are discussed:

- a. Data identifying alleged victims or reporters of criminal sexual conduct, domestic abuse, maltreatment of minors or maltreatment of vulnerable adults.
- b. Active investigative data. See definition in Minn. Stat. § 13.82, subd. 7.
- c. Internal affairs data relating to allegations of misconduct of law enforcement personnel.
- d. Educational data, health data, medical data, welfare data and/or mental health data that are not public data under the Minnesota Government Data Practices Act and other specified statutes, and/or an individual's medical records under the Minnesota Health Records Act. Minn. Stat. § 13D.05, subd. 2(a).

B. Procedures for Closed Meetings

During the open portion of the meeting, the public body must state on the record the specific basis for closing the meeting and describe the subject

matter that will be discussed in the closed portion of the meeting. Minn. Stat. § 13D.01, subd. 3. The specific basis should not include any non-public data.

Materials reviewed in a closed meeting should not be distributed to the public. The meeting minutes should simply state that a closed meeting was held and the basis for closing the meeting.

No business can be conducted during a closed meeting – all business must be conducted when the public body reconvenes in open session.

VIII. Use of Social Media

Minnesota Statutes section 13D.065 states that the use of social media by members of a public body does not violate the OML so long as the social media use is limited to exchanges with all members of the general public. Note that for purposes of this section, email is not considered a type of social media. Apart from this exclusion, however, social media is not defined.

Section 13D.065 only applies when elected or appointed City officials are acting in their official capacities, not in their private capacities. Elected or appointed City officials' participation in private social media groups is a concern if there is a quorum or more members of the public body discussing, deciding, or receiving information on issues relating to the official business of that governing body.

Practically, this means that members of a public body may comment on issues on a blog, Instagram, X, or on Facebook without fear of violating the OML so long as the exchanges are with all members of the general public, which requires the general public to have access to that particular type of social media.

Public body members should refrain from engaging in discussions about official business over social media that include a quorum or more of public body members.

IX. Penalties for Violations

A. Civil Penalty

Each person who intentionally violates the OML can be fined up to \$300 for each violation, and the penalty cannot be paid by the municipality. Minn. Stat. § 13D.06, subd. 1.

B. Removal

If a member of a public body is involved in three separate violations of the OML, which are proven in three separate actions, the member could be removed. Minn. Stat. § 13D.06, subd. 3(a); Brown v. Cannon Falls Twp., 723 N.W.2d 31 (Minn. App. 2006).

C. Costs and Attorneys' Fees

A court may award up to \$13,000 for the plaintiff's costs and attorneys' fees. Minn. Stat. § 13D.06, subd. 4(a). The municipality may, but is not required to, pay the award. Id. subd. 4(c).

D. Defense Costs

A municipality is not required to reimburse members for the cost of defending an OML claim under the Municipal Tort Liability Act because it is not an action for damages. Minn. Stat. § 466.07; Kroschel v. City of Afton, 512 N.W.2d 351 (Minn. App. 1994) rev'd on other grounds, 524 N.W.2d 719 (Minn. 1994).

CONFLICTS OF INTEREST

I. Statutory Conflict of Interest

Minnesota Statutes section 471.87 specifies that a public officer who is authorized to take part in any manner in making any sale, lease, or contract in that officer's official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. This section applies to city officials, and would include contracts involving the purchase or sale of any property by or to the city (a direct conflict of interest). See also Red Wing City Code § 2.15, subd. 2.

The statute does not specify that abstention from voting would remedy what would otherwise be a conflict of interest. Op. Atty. Gen. 90E-6 (Jun. 15, 1988); Op. Atty. Gen. 90-E-5 (Nov. 13, 1969). Instead, the language is "who is authorized to take part in any manner in making . . ." Minn. Stat. § 471.87.

Violation of the statute is a gross misdemeanor, but all elements must be present: 1) the interest must be voluntary; 2) the interest must be financial; and 3) there must be a sale, lease or contract.

Examples of transactions that have been prohibited include:

- A. A public body's contract with a newspaper in which one member was an interested party.
- B. Compensating a member of a county welfare board for services as an appraiser.
- C. County's contract for testing cattle with a commissioner who was a veterinarian.

There is a list of exceptions in section 471.88. Refer to the list when questions arise. In these circumstances, the interested officer is to disclose their interest at the earliest stage and abstain from voting or deliberating on any contract in which they have an interest. The exceptions only apply when a unanimous vote of the remaining members of the public body approves the contract. The following are some of the exceptions:

- A. The designation of an official newspaper in which a member is an interested party, when it is the only newspaper complying with the statutory requirements relating to the designation.
- B. A contract with a cooperative association of which a member is a share/stockholder but not an officer or manager.
- C. A contract for which competitive bids are not required by law.¹
- D. The public body may apply for and accept a state or federal grant for housing, community, or economic development in which a member may benefit, if the member abstains from voting on measures related to the grant.
- E. Loans or grants to a member from a local development organization. If a member applies for a loan or grant, the member must disclose as part of the official minutes of a public meeting of the governmental unit that the member has applied for a loan or grant.

¹ If the City enters into this type of contract, the procedures in Minnesota Statutes section 471.89 must still be followed, or the contract may be void. Section 471.89 requires that the City authorize the contract in advance by adopting a resolution setting out the essential facts and determining that the contract price is as low or lower than the price at which the commodity or services could be obtained elsewhere. In addition, the interested officer must file an affidavit with the clerk of the governing body providing information regarding the contract and the officer's interest in the contract.

II. Common Law Conflict of Interest

Conflicts of interest under the common law are broader than the statutory conflicts of interest and may exist where a statutory conflict of interest does not. The purpose of the common law rule is to ensure that a decision will not simply be an arbitrary reflection of a member's own selfish interests. Lenz v. Coon Creek Watershed Dist., 153 N.W.2d 209, 219 (Minn. 1967). See also Red Wing City Code § 2.15, subd. 2.

A conflict of interest exists under the common law when a public official has any "direct interest" in the outcome of a matter before the public body. See, e.g., Lenz, 153 N.W.2d 209, 219; E.T.O., Inc. v. Town of Marion, 375 N.W.2d 815 (Minn. 1985). Courts have generally interpreted a "direct interest" as a financial interest.

The following factors are considered by courts to determine whether a conflict of interest exists:

- A. The nature of the decision to be made;
- B. The nature of the pecuniary interest;
- C. The number of interested officials participating in making the decision;
- D. The need, if any, to have interested officials make the decision; and
- E. The other means available, if any, to ensure the interested officials will not act arbitrarily to further their own interests (e.g., the opportunity for review). Lenz, 153 N.W.2d 209, 219.

If a common law conflict of interest exists, the member is prohibited from voting on the matter. However, unlike statutory conflicts of interest, a common law conflict of interest is cured by abstaining from a vote on the matter. See Op. Atty. Gen. Dec. 5, 2002; Op. Atty. Gen. 90E-6 (Jun. 15, 1988).

III. How to Avoid Conflicts of Interest

Public officials should expect to be the subject of regular public scrutiny. As such, public officials must accept restrictions on their conduct that might be viewed as burdensome to the ordinary citizen. For example, public officials must avoid impropriety and the appearance of impropriety. While there is no test for what constitutes the appearance of impropriety, ask whether a person aware of the facts might reasonably entertain a doubt that the public official would be able to act with integrity, impartiality, and competence.

There are many statutes dealing with ethics in government, and all of them seek to ensure public confidence in public officials is not eroded by irresponsible or improper conduct by public officials. The Minnesota Campaign Finance and Public Disclosure Board provides advisory opinions on matters dealing with ethics. See Minn. Stat. § 10A.02, subd. 12(a). Selected advisory opinions may be found online at www.cfboard.state.mn.us/ao.

ACCEPTANCE OF GIFTS

I. General Prohibition

A local official may not accept gifts from a person or a representative of a person or association that has a direct financial interest in decisions the official is authorized to make. Minn. Stat. §§ 471.895, 10A.071. A gift is defined as money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, which is given and received without the giver receiving consideration of equal or greater value in return. Minn. Stat. § 10A.071, subd. 1(b). See also Red Wing City Code § 2.15, subd. 2.

II. Exceptions

A local official may accept the following:

- A. “Contributions” – defined as anything of monetary value given or loaned to a candidate or committee for a political purpose. A contribution does not include a service provided without compensation by an individual. See Minn. Stat. § 211A.01, subd. 5.
- B. Services to assist in the performance of official duties, including, but not limited to, providing advice, consultation, information and communication in connection with legislation and services to constituents.
- C. Services of insignificant monetary value.
- D. A plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause.
- E. A trinket or memento costing \$5 or less.
- F. Informational material of unexceptional value.

- G. Food or a beverage given at a reception, meal, or meeting away from the official's place of work by an organization before whom the official appears to make a speech or answer questions as part of a program.
- H. Gifts given because of a recipient's membership in a group, so long as the majority of the group members are not local officials and other members of the group are given or are offered equivalent gifts.
- I. Gifts given by a family member, unless the gift is given on behalf of someone who is not a family member.
- J. Food or beverage given to national or multistate conference attendees at a reception or meal. The majority of dues paid to the national or multistate organization of governmental organizations or public officials must be paid from public funds and an equivalent gift must be given or offered to all other attendees. Minn. Stat. § 471.895, subd. 3.

SWM: 258945