

## 'Serial meetings' are vexing issue for state's Open Meeting Law

By Mark Anfinson  
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As with many statutes, the Minnesota Open Meeting Law, Minnesota Statutes Chapter 13D, generates some difficult questions of interpretation. Among the most important – and vexing – of these involves what have been referred to as “serial meetings.”

Until July 15, 1983, it was generally believed that the Open Meeting Law applied when as few as two members of a government body discussed public business. But on that date, the Supreme Court issued its landmark ruling in *Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983), the decision that established what became known as the “quorum rule” – the Open Meeting Law does not trigger unless a quorum of the public body participates.

The *Moberg* Court acknowledged, however, that the quorum rule created opportunities for abuse, particularly in one-on-one discussions among members of a public body for the purpose of resolving difficult issues outside the public eye. This prompted the Court to issue a (sort of) warning: “Of course, serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute, depending upon the facts of the individual case.” (Id. at 518.) Unfortunately, the Court’s formulation left some key questions hanging.

Strangely enough, in the more than 20 years since *Moberg*, no reported court decision in Minnesota has really shed

light on these questions, to say nothing of answering them. Some educated guesses can be made, however:

1. Though the *Moberg* Court did not define the term, it seems evident that “serial meetings” are exchanges between individual members of a public body on a particular topic, close in time, that collectively involve a quorum or more of the public body. This would include use of a go-between or an intermediary, such as a city administrator or school superintendent. Also, the exchanges do not have to be in person; they certainly can (and often do) occur via e-mail or telephone.

2. If these exchanges involve topics related to their duties as members of a public body, then the Open Meeting Law likely would be violated if the members involved in the exchange attempt to “fashion agreement on an issue.”

3. The ambiguity deepens once other possible scenarios are considered, particularly since the Supreme Court concluded its warning about serial meetings with the unfortunate phrase “depending upon the facts of the individual case,” plainly intending to leave itself considerable maneuvering room for case-by-case analysis. It does seem probable that if public officials conduct exchanges in a serial fashion where they actively attempt to persuade one another on a particular issue within their jurisdiction, or actively deliberate about a pending matter, it would violate the Open Meeting Law. This is because the high court

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# Urban Legends: The Minnesota Open Meeting Law

IPAD regularly receives inquiries about the Minnesota Open Meeting Law (OML), which is Chapter 13D of Minnesota Statutes. The OML gives the public certain rights of access to meetings of public bodies – such as county boards, city councils and school boards. Public bodies that are subject to the OML are identified in the handout, *The Minnesota Open Meeting Law: Does It Apply?*, available on the IPAD Website at: [www.ipad.state.mn.us/docs/omlapply.doc](http://www.ipad.state.mn.us/docs/omlapply.doc).

Some of the inquiries IPAD receives relate to what might be called myths, or urban legends, about OML requirements. This article identifies and discusses some of these myths.

**Myth One:** The OML requires a public body to provide advance notice of its regular meetings.

**Fact:** The OML requires the body to establish a schedule for regular meetings and keep that schedule on file at its primary offices. If the body changes the time or location from the regular meeting schedule, an advance notice must be provided. See the document, *Notices, Notices, Notices! The Minnesota Open Meeting Law*, at [www.ipad.state.mn.us/docs/omlnotice.doc](http://www.ipad.state.mn.us/docs/omlnotice.doc), for a discussion of the specific notice requirements for *special* meetings and *emergency* meetings. See also, *Advice From the Swamp Fox* in this issue.

**Myth Two:** The OML requires public bodies to follow Roberts Rules of Order or another parliamentary process when conducting a public meeting.

**Fact:** There is no such requirement in Chapter 13D. Since it certainly is good practice to use a parliamentary process to provide structure to the meeting and conduct business efficiently, many public bodies have adopted all or part of Roberts Rules of Order or some other parliamentary process.

**Myth Three:** An action of a public body can be reversed because the body did not comply with the OML in conducting the meeting at which the action was taken.

**Fact:** The OML permits the public to be informed about decisions that are made by public officials, and the penalties for violations of its provisions are fines and, in some cases, forfeiture of office. The OML does not offer a remedy for reversing or voiding a public body's actions or decisions.

**Myth Four:** The OML gives the public the right to speak at an open meeting.

**Fact:** Generally, the OML gives citizens the right to attend meetings of public bodies in order to watch and listen to the proceedings. It does not guarantee the right to speak at a meeting that is open to the public. If a public body chooses to allow public comments, the body can set the parameters for those comments.

**Myth Five:** The OML requires public bodies to prepare meeting agendas and meeting minutes.

**Fact:** With a limited number of specific exceptions, Chapter 13D does not require preparation of agendas or minutes. Section 13D.01, subdivision 4,

though, does require public bodies to record and maintain votes of its members. In addition, Minnesota's Official Records Act, which is section 15.17 of Minnesota Statutes, requires the public body to "make and preserve all records necessary to a full and accurate knowledge of [its] official activities." The specific requirements of section 15.17 are discussed in various advisory opinions at [www.ipad.state.mn.us/docs/opindex.doc](http://www.ipad.state.mn.us/docs/opindex.doc), in the topic category, Official Records Act. See also, *Advice from the Swamp Fox* in this issue.

It is worth noting here the myth that minutes of public meetings are accessible to the public only after either formal preparation or adoption by the public body. Various advisory opinions have discussed that notes taken at a meeting for the purpose of preparing minutes, and minutes in draft form, are public data and must be provided to anyone upon request. See, for example, Advisory Opinions 04-018 and 00-030, at [www.ipad.state.mn.us/opinions/index.html](http://www.ipad.state.mn.us/opinions/index.html).



# Advice from the Swamp Fox\*

\*Francis Marion, "the Swamp Fox," was a colonial officer from South Carolina in the Revolutionary War renowned for hiding in swamps while carrying out guerilla warfare against the British.

## Dear Swamp Fox:

I am the county attorney for Malachite County. The hot topic around here is the rapidly deteriorating condition of our bridges. It's been on the county board meeting agenda every month for the last year, it's on the agenda for next week's board meeting, and I expect it will stay on the agenda until the county obtains funding to make repairs.

Last week, the Moonrock Society held a breakfast meeting. (The society is a service organization with a large and inclusive membership from throughout the county, and is famous for its breakfasts.) The society invited the county's highway engineer to talk about his latest assessment of the bridges.

On the evening before the meeting, the engineer became ill and contacted the county's administrator to see if anyone else from the county would be available to speak at the breakfast meeting. The county administrator sent an email to all of the county commissioners, asking for a volunteer to fill in for the engineer.

The next morning, all of the commissioners showed up at the society hall for the meeting, discussed the engineer's findings, answered questions from attendees and identified possible solutions to the concerns at hand. The following day, our local newspaper, the *Malachite Messenger*, published an editorial about the breakfast meeting, criticizing the board for violating the Open Meeting Law and accusing the commissioners of malfeasance. Legal difficulties likely loom. What did we do wrong?

*Malachite County Attorney*

## Dear Malachite County Attorney:

This certainly *is* a swamp!

As you know, the county board is a local public body that is subject to the OML. Because all of the commissioners were present at the breakfast meeting, the board had authority to transact public business, thus triggering the notice requirements of the Open Meeting Law. (See *Notices, Notices, Notices! The Minnesota Open Meeting Law*, at [www.ipad.state.mn.us/docs/omlnotice.doc](http://www.ipad.state.mn.us/docs/omlnotice.doc).) A special board meeting, such as this appears to have been, requires that notice be given three days in advance of the meeting. Had time permitted the board to give proper notice, all of the commissioners could have attended the meeting without liability. Because time did not permit giving notice, liability could have been avoided by taking steps to ensure that a quorum was not present.

In this instance, the county administrator might have contacted the commissioners one at a time to determine which and how many of the commissioners would attend the meeting. Failing that, and superb breakfasts aside, the commissioners themselves might have decided who would attend the meeting – or who would leave the meeting once a quorum was present. The Swamp Fox certainly would not wish a violation of the Open Meeting Law to jeopardize the safety of the bridges of Malachite County.

Also note that if the Moonrocks had invited members of one or more *other* public bodies – such as the city council, township board or watershed district – to the breakfast meeting, each of those bodies would have had to follow the same procedures as the county board.

For a discussion of special meeting notice requirements, see Advisory Opinions 04-004 and 04-057, at [www.ipad.state.mn.us/opinions/year.html](http://www.ipad.state.mn.us/opinions/year.html).

*The Swamp Fox*

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has repeatedly stated that among the core purposes of the statute are "to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning . . . board decisions or to detect improper influences" and to insure "the public's right to be informed." *St. Cloud Newspapers v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983).

4. Finally, public officials often convey or share with one another a wide variety of information pertinent to their public duties. Such actions alone would not seem to violate the law, because they do not involve deliberation, discussion, or decision-making. Thus, for example, a school superintendent may certainly e-mail items concerning an issue of interest to all members of the school board. However, if the superintendent then acted as a go-between or conduit for deliberations or discussions about that issue among individual members totaling a quorum or more, it likely would offend the law.

# Opinion Highlights

*The following are highlights of recent advisory opinions by the Commissioner of Administration. All Commissioner's opinions are available on the IPAD web site at [www.ipad.state.mn.us](http://www.ipad.state.mn.us).*

**06-005:** The Minnesota Department of Public Safety asked about the classification of data a vendor submitted in response to a request for proposal. The vendor asserted the data were trade secret pursuant to Minnesota Statutes, section 13.37, but the Department did not find the vendor's arguments persuasive. The Commissioner agreed with the Department and opined that the data are public.

**06-007:** An individual asked whether Hampton Township complied with Chapter 13 regarding his request for data. The Township argued that it is not subject to the requirements of Chapter 13. Pursuant to section 13.02, subdivision 11, the following townships must comply with Chapter 13: any town located in the metropolitan area, as defined in section 473.121, subdivision 2, that exercises powers under Chapter 368. The Township asserted that if it were exercising powers under Chapter 368, it would need to have (1) obtained an affirmative vote of its electors at the annual town meeting, and (2) so notified in writing the Dakota County Auditor as well as the Secretary of State. The Township stated it had done nothing to exercise those powers. The Commissioner agreed with the Township's analysis and opined that because it is not subject to Chapter 13, it is not obli-

gated to comply with the Statute in responding to the individual's data request.

**06-009:** An individual asked whether the Minnesota State Historical Society complied with Chapter 13 regarding his request for data. The Society argued that it is not subject to the requirements of Chapter 13. The Society cited numerous statutory provisions in support of its conclusion that it is not a state agency for purposes of Chapter 13. The Society also emphasized the fact that it historically has been treated as a private corporation. The Commissioner agreed with the Society's analysis, as she is unaware of any statutory provision subjecting the Society to Chapter 13, or requiring compliance as a condition of accepting public funds. The Commissioner noted, however, that if the Society enters into a contract with a government entity to perform functions on the entity's behalf, related data would be subject to the requirements of Chapter 13.

**06-010:** An individual asked whether the City of North Saint Paul had complied with Chapter 13 in denying her request for the names and addresses of three people who had complained about a City employee. The Commissioner opined that if the complainants are members of the public, their names and

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## From the IPAD Toolbox\*

*\*From the IPAD Toolbox highlights resources for citizens to use in exercising their rights, and for government entities to use in improving compliance with Chapters 13, 13D and other data practices laws.*

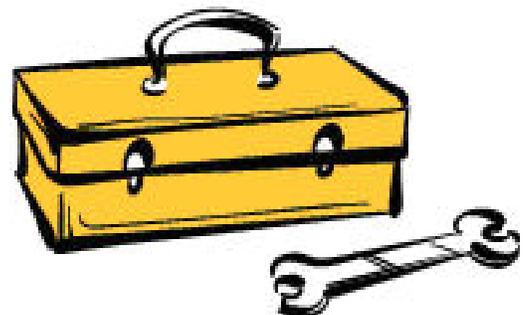
This issue of *FYI* focuses on the requirements of Minnesota's Open Meeting Law (OML), which is Chapter 13D of Minnesota Statutes.

With few exceptions, the Open Meeting Law applies to every public body in Minnesota and to all subordinate bodies (such as committees, subcommittees and commissions). The publication, *The Minnesota Open Meeting Law: Does It Apply?*, identifies public bodies that are subject to the Open Meeting Law, as well as those that are specifically excluded from its provisions. See [www.ipad.state.mn.us/docs/omlapply.doc](http://www.ipad.state.mn.us/docs/omlapply.doc).

The Open Meeting Law requires every public body to give the public advance notice of its meetings. The publication, *Notices, Notices, Notices! The Minnesota*

*Open Meeting Law*, summarizes the notice requirements for regular meetings, special meetings, emergency meetings and recessed or continued meetings. See [www.ipad.state.mn.us/docs/omlnotice.doc](http://www.ipad.state.mn.us/docs/omlnotice.doc).

Also see *Advice From the Swamp Fox*, in this issue, about notice requirements for special meetings in the case of the Malachite County Board. For help sorting truth from certain misunderstandings about the OML, see *Urban Legends*, also in this issue.



# Court Case Update

The **United States Supreme Court** has resolved the issue of military recruiter access to college and graduate school campuses that receive funding from federal agencies.

The Court said the Solomon Amendment, 10 USC section 983, requires that military recruiters get the same access and support that other recruiters receive when visiting a campus to interview students. An association of law schools and their faculty members had requested a preliminary injunction in 2003 that would have prevented enforcement of the Solomon Amendment on the grounds that it required law schools to support an employer that discriminated against some possible employees. In making its decision, the Supreme Court said the Solomon Amendment regulates conduct, not speech, and so is a constitutional exercise of Congressional power. *Rumsfeld v. Forum For Academic and Institutional Rights, Inc.*, No. 04-1152 decided March 6, 2006.

Judge Richard Kyle of the **Federal District Court in Minnesota** issued an opinion on February 7, 2006, that discussed what security is appropriate for personal information stored on a business laptop. In *Guin v. Brazos Higher Education Service Corporation*,

*Inc.*, a student loan customer of Brazos sued because a laptop containing unencrypted nonpublic customer data was stolen from the home of a Brazos employee. In analyzing Guin's negligence claim, the court found that Brazos had acted according to its duty of reasonable care to Guin. Specifically, Brazos had policies in place to protect customer information, it had trained its employees in those policies and had transmitted and used the data in accordance with those policies. Judge Kyle found that because Guin had not suffered any harm as a result of the theft of the laptop, there was no injury. The testimony of an expert speculating on possible future harm was specifically rejected, following precedent from the federal district court in Arizona. *Guin v. Brazos Higher Education Service Corporation, Inc.* (D. Minn. Civ. No. 05-668 (RHK/JSM) Feb. 7, 2006).



**Information Policy  
Analysis Division**

## Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email [info.ipad@state.mn.us](mailto:info.ipad@state.mn.us).

Staff: Laurie Beyer-Kropuenske, *Director*, Katie Engler, Janet Hey, Brooke Manley, Linda Miller and Catherine Scott.

This document can be made available in alternative formats, such as large print, Braille or audiotape by calling 651.296.6733.

For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

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addresses are public (see *Demers v. City of Minneapolis*, 468 N.W.2d 721 (Minn. 1991)). If the complainants are employees, their names and addresses are private pursuant to section 13.43, subdivision 2.

**06-011:** An individual asked whether Sherburne County complied with Chapter 13 in denying remote access to certain data from the assessor's office. The individual asked to inspect data (free of charge) that are part of the online Geographic Information Systems (GIS) that the County provides via subscription. The Commissioner discussed section 13.03, subdivision 3(b), which provides that government entities may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. The Commissioner opined that the County's refusal to provide free remote access to the data was appropriate. The Commissioner also noted that the individual was entitled to inspect and obtain copies of any and all public data that the assessor's office maintains.