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### Advisory Opinion 08-001

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below. All public data the Commissioner relied upon to issue this opinion are available for public inspection and copying at the office of the Information Policy Analysis Division (IPAD), unless the data have been disposed of in compliance with the state Records Management Act.

#### **Facts and Procedural History:**

On December 14, 2007, the Commissioner received a letter dated December 13, 2007, from Maren Swanson, an attorney representing the City of Northfield. In her letter, Ms. Swanson asked the Commissioner to issue an advisory opinion relating to the classification of certain data and certain of a governing body's duties under the Open Meeting Law. Shortly thereafter, IPAD received comments from David Lansing.

In a letter to Ms. Swanson dated December 21, 2007, IPAD requested additional information and clarification. Ms. Swanson submitted same in a letter dated January 14, 2008. In a letter dated January 31, 2008, IPAD invited Mr. Lansing to submit comments in response to Ms. Swanson's revised opinion request. IPAD received Mr. Lansing's comments on February 11, 2008.

A summary of the facts as provided by Ms. Swanson is as follows. In the opinion request, she wrote:

On May 7, and June 26, 2007, the Northfield City Council held closed meetings...to consider offers and counteroffers for the acquisition of an interest in two specified properties for purposes of constructing a new municipal liquor store. The meetings were closed pursuant to Minn. Stat. Sec. 13D.05, Subd. 3 (c). The City followed the requirements of that statute.

On November 19, 2007, in response to a lawsuit asserting that inappropriate subjects were addressed at the Closed Meetings (which the City denies) and in response to subsequent public and media interest in those meetings, the City Council voted to release the tapes of the [closed meetings] to the public....

However, persons with interests in property considered for acquisition at the [closed meetings] have objected, in writing, to the release of the tapes of the meeting (and related documentation). They contend that release would violate [Minnesota Statutes, Chapter 13] by publicizing information deemed [not public] by statute.

**Issues:**

Based on Ms. Swanson's opinion request, the Commissioner agreed to address the following issues:

1. What are the City's duties under Minnesota Statutes, Chapter 13D, the Open Meeting Law (OML), with regard to releasing or withholding the tapes of the closed meetings? Specifically, may the City Council authorize release of those tapes to the public before one of the events specified by section 13D.05, subdivision 3(c) has occurred, which event makes the tapes of such meetings available to the public?
2. What is the classification of the tapes under Minnesota Statutes, Chapter 13, before and after one of the events specified in Minnesota Statutes, section 13D.05, subdivision 3(c) has occurred? Specifically, but not by way of limitation, if data that are not public data are discussed on the tapes, are those parts of the tapes public or not public once the tapes are available to the public pursuant to the statute?
3. What is the classification under the Minnesota Statutes, Chapter 13, of (a) the consultant's reports submitted to the Council at the closed meetings for purposes of discussing offers for the property, and (b) letters from the property owners involved in matter objecting to release of the tapes of the closed meetings?

**Discussion:**

*Issue 1: What are the City's duties under Minnesota Statutes, Chapter 13D, the Open Meeting Law (OML), with regard to releasing or withholding the tapes of the closed meetings? Specifically, may the City Council authorize release of those tapes to the public before one of the events specified by section 13D.05, subdivision 3(c) has occurred, which event makes the tapes of such meetings available to the public?*

Minnesota Statutes, section 13D.05, subdivision 3(c)(3), states that public bodies may close a meeting "to develop or consider offers or counteroffers for the purchase or sale of real or personal property." In addition:

...The proceedings of a meeting closed under this paragraph must be tape recorded at the expense of the public body. The recording must be preserved for eight years after the date of the meeting and made available to the public after all real or personal property discussed at the meeting has been purchased or sold or the governing body has abandoned the purchase or sale....

Based on the statutory language, once one of the events described has occurred, the public body must release the tape recording. It seems reasonable to conclude, therefore, that the public body's duty is to withhold the recording until one of the conditions has been met. As this has not

happened in the situation presented by Ms. Swanson, the public body's duty under Chapter 13D is to continue to withhold the recording, absent a court order to release.

*Issue 2: What is the classification of the tapes under Minnesota Statutes, Chapter 13, before and after one of the events specified in Minnesota Statutes, section 13D.05, subdivision 3(c) has occurred? Specifically, but not by way of limitation, if data that are not public data are discussed on the tapes, are those parts of the tapes public or not public once the tapes are available to the public pursuant to the statute?*

IPAD briefly reviewed the videotapes in question. As the Commissioner previously has opined, a government entity generally is in the best position to make specific determinations about data it collects and maintains. Ms. Swanson wrote in her letter that the City Council closed the meetings to consider offers and counteroffers for acquisition of an interest in two specified properties. The Commissioner is not aware that such data are classified as anything other than public.

Thus, there is a conflict between the language in Chapter 13D which directs the public body to withhold the tape recording and the Chapter 13 classification of the tape, which is public. Minnesota Statutes, section 645.26, discusses how to interpret statutory provisions that are in conflict. Subdivision 1 of section 645.26 states that when the conflict is irreconcilable, "the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session..."

Here, the language in Chapter 13D was enacted during the 2004 Legislative Session. The language stating the public presumption of government data was enacted prior to 2004. Based on the above analysis, the Commissioner concludes that although the data in the videotapes are classified as public, the public body cannot release them based on the language in section 13D.05, subdivision 3(c).

*Issue 3: What is the classification under the Minnesota Statutes, Chapter 13, of (a) the consultant's reports submitted to the Council at the closed meetings for purposes of discussing offers for the property, and (b) letters from the property owners involved in matter objecting to release of the tapes of the closed meetings?*

Again, the City of Northfield is in the best position to make specific determinations about data in the consultants' reports and letters from the property owners. However, based on the Commissioner's review of these documents, it appears the data are public.

### **Opinion:**

Based on the facts and information provided, my opinion on the issues that Ms. Swanson raised is as follows:

1. The City Council's duty under Minnesota Statutes, section 13D.05, subdivision 3(c)(3), is to withhold the videotape recordings until one of the described events has occurred or eight years have passed.

2. Because the classification of the data in the videotape recordings is presumptively public under Minnesota Statutes, there is a conflict. Pursuant to Minnesota Statutes, section 645.26, the language in Minnesota Statutes, section 13D.05, subdivision 3(c)(3), prevails and the recordings must be withheld from the public.
3. Pursuant to Minnesota Statutes, Chapter 13, the data in (a) the consultant's reports submitted to the Council at the closed meetings for purposes of discussing offers for the property, and (b) letters from the property owners involved in matter objecting to release of the tapes of the closed meetings are presumptively public.

Signed:

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Dana B. Badgerow  
Commissioner

Dated:

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March 5, 2008