



Advisory Opinion 09-020

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2009). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On May 26, 2009, the Information Policy Analysis Division (IPAD) received a letter, dated May 22, 2009, from John Borger, an attorney. In his letter, Mr. Borger asked the Commissioner, on behalf of his client, the *Star Tribune*, to issue an advisory opinion on whether the Metro Gang Strike Force (MGSF) Advisory Board had violated the Open Meeting Law (OML), Minnesota Statutes, Chapter 13D. Mr. Borger submitted the \$200.00 fee required by section 13.072.

The Commissioner accepted Mr. Borger's request and in a letter to Manila Shaver, MGSF Advisory Board Chair, notified Mr. Shaver of her intent to issue the opinion and gave the members of the Board an opportunity to explain their position. Mr. Shaver replied, in a letter dated June 11, 2009. Subsequently, the Commissioner notified Mr. Borger and Mr. Shaver that she would not issue an opinion because the MGSF had been dissolved. (The Commissioner refunded Mr. Borger's fee.)

Mr. Borger asked the Commissioner to reconsider her decision, because the Board was still in operation, even though the MGSF was not. The Commissioner agreed, and Mr. Borger resubmitted his request on July 17, 2009, along with the \$200.00 fee.

In response, IPAD notified Mr. Shaver that the Commissioner intended to issue this opinion, in a letter dated July 27, 2009, and again gave the members of the Board an opportunity to explain their position. Mr. Shaver responded again, in a letter dated August 12, 2009.

The Commissioner also invited Rodney Bartsh, Chair of the Gang and Drug Oversight Council, which oversees the Board, to submit comments. Mr. Bartsh did not provide any comments. A summary of the facts follows.

The MGSF and its Advisory Board were established by the Gang and Drug Oversight Council, as part of its duty to "establish multijurisdictional task forces and strike forces to combat gang and drug crime." (See section 299A.641, subdivision 3.) The MGSF was organized as a joint powers entity, whose 13 Advisory Board members are the chief law enforcement officers, or their designees, of all parties to the Joint Powers Agreement. (See MGSF Advisory Board Bylaws, Section IV.)

On April 7, 2009, a Star Tribune editorial writer sent an email to (then) MGSF Assistant Commander James Heimerl, seeking his perspective on an issue that was the subject of an April 5, 2009, newspaper article, about which she intended to write an editorial. She asked for a response by the following afternoon “for deadline purposes.”

According to documentation Mr. Borger provided, at 1:40 p.m. on April 8, Deputy Chief Rob Allen of the Minneapolis Police Department sent an email, with an attached letter, to Mr. Shaver and 33 others, including all Advisory Board members/member-designees. In the email, which Mr. Allen addressed to his ‘colleagues,’ he asked them to review the attached letter, stating ‘[t]here is some time critical information that I think can help prevent further issue with MGSF operations if we act quickly enough.’ In the letter, Mr. Allen raised several issues and wrote, “I would like the board to consider issuing a statement similar to” a paragraph he drafted and included.

According to copies of the emails Mr. Borger submitted, between 2:50 and 4:29 p.m., seven Advisory Board members (or their designees) replied to Mr. Allen (and copied other Board members, including Mr. Shaver) with the following comments, listed in chronological order:

1. The Sheriff and I looked your memo and the proposed statement over. We like the idea of having this statement on record If you get consensus on it, we recommend [Mr. Shaver], on behalf of the MGSF Board, take action today and release it.
2. Chief . . . and I reviewed your memo and endorse your recommendation and the immediate action by the board suggested by [commenter #1.]
3. In my view the statement is a good idea and reflects a solidarity on the part of the board. I also feel that as chair of the MGSF Board, Chief Shaver is the person the statement should come from.
4. You did a nice job [in the statement.]
5. I agree with the others.
6. I support the statement and agree [Mr. Shaver] as the chair of the MGSF would be the appropriate person to deliver the message.
7. I support the statement and agree that Chief Shaver as the chair of the MGSF would be the appropriate person to deliver the message.

At 5:00 p.m., Mr. Shaver issued a press release, which consisted of the verbatim statement Mr. Allen proposed in his email to Board members and two additional introductory sentences. Mr. Shaver then emailed the Advisory Board that he had taken that action.

Issues:

Based on Mr. Borger’s request, the Commissioner agreed to address the following issues:

1. Is the Advisory Board for the Metro Gang Strike Force a public body that must comply with the Open Meeting Law, Minnesota Statutes, Chapter 13D?
2. Did the members of the Advisory Board for the Strike Force comply with the OML when they exchanged certain email messages relating to the activities of the Strike Force?

Discussion:

Issue 1. Is the Advisory Board for the Metro Gang Strike Force a public body that must comply with the Open Meeting Law, Minnesota Statutes, Chapter 13D?

In his comments to the Commissioner, Mr. Shaver wrote: “(t)he OML applies to any ‘board’ of a ‘public body.’ Minn. Stat. § 13D.01, subd. 1(c)(3). As MGSF Bylaws acknowledge, the Advisory Board is subject to the OML.”

Issue 2. Did the members of the Advisory Board for the Strike Force comply with the OML when they exchanged certain email messages relating to the activities of the Strike Force?

Minnesota Statutes, section 13D.01, subdivision 1, states: “[a]ll meetings, including executive sessions, must be open to the public.” The Legislature did not define “meeting” in the OML; however, the Minnesota Supreme Court described the “quorum rule:”

‘Meetings’ subject to the requirements of the Open Meeting Law are those gatherings 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. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

In his comments to the Commissioner, Mr. Borger wrote:

Because more than a quorum of the Advisory Board participated in the communications and a majority of the board expressly approved issuing the statement, it amounted to a ‘virtual meeting’ that violated the OML. The OML allows a non-physical ‘meeting’ of a public body only in very limited circumstances [See Minnesota Statutes, section 13D.021]. . . .

It is immaterial that Mr. Shaver might have issued a press release on his own authority, without any action by the Advisory Board. That is simply not what happened. . . . Mr. Allen expressly requested action by the Advisory Board. All board members received that request. Discussion among board members addressed whether there was a ‘consensus’ on the requested action. Points of discussion included whether there should be a press release at all, what the release should say, and who should issue the press release. A majority of the board members expressly approved the request That surely constitutes ‘transacting public business’ under the standard of *St. Cloud Newspapers, Inc.*, 332 N.W.2d 1, 6 (Minn. 1983). . . . What happened was that a

quorum of the Advisory Board, ‘as a group, discuss[ed] . . . [and] receive[d] information on official business.’ [See *Moberg*, 336 N.W.2d at 518.]

Mr. Shaver responded first on June 11, 2009; he modified his comments to the Commissioner in his August 12, 2009 response.

In his June 11, 2009, comments, Mr. Shaver wrote:

- I cannot speak on behalf of the Board on this matter as our Board has not met to discuss this issue. Our next meeting is on June 30th, almost two weeks beyond the June 17th deadline you provided.
- As Chair, I cannot control the independent actions of the Board or individual Board member [sic] outside an official meeting.
- In this incident I did not initiate the original e-mail or distribute it. I did distribute to the Board a copy of a news release, which is part of my day-to-day duties as chair.

In his August 12, 2009, comments, Mr. Shaver wrote:

The situation is analogous to a city council member alerting officials with administrative responsibilities to issues requiring immediate attention or offering other unsolicited input regarding day-to-day municipal business. Deputy Chief Allen’s letter, and its distribution by e-mail, did not violate the OML. See *Moberg*, 336 N.W.2d at 518 He was simply disseminating information to all Board members alerting them about a matter of high importance.

....

The e-mail from Deputy Chief Allen was a single Board member’s opinion that a response was required. The communication in the other e-mails represented individuals offering their opinion that I should act on the matter immediately. References to the ‘Board’ or ‘MGSF’ in these e-mail communications stem from the fact that any routine actions performed by the Chair were done ‘on the Board’s behalf,’ as specified by the MGSF Bylaws. . . .

With respect to Mr. Shaver’s assertion that he issued the news release as part of his day-to-day duties, the Commissioner respectfully disagrees. Mr. Shaver characterized the subject of the email Mr. Allen sent as “a matter of high importance” to the Advisory Board. Seven of the Advisory Board members, more than a quorum, expressed their opinions to all other Board Members about whether the Board should act, what action it should take and who should act on the Board’s behalf.

Mr. Shaver stated that Mr. Allen’s email was permissible under *Moberg*, because it is permissible for members of a public body to receive information “through the mail.” In *Moberg*, the Court stated that in a situation in which a quorum or more of a public body received written information as a group, but did not read and discuss it, there was no violation of the OML. In that situation, the Court wrote, “. . . such distribution was functionally equivalent to receiving

