



Advisory Opinion 10-011

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 March 9, 2010, the Information Policy Analysis Division (IPAD) received a letter, dated March 4, 2010, from Sharon Jacks. In her letter, Ms. Jacks asked the Commissioner to issue an advisory opinion regarding whether the State of Minnesota Board of Public Defense complied with Minnesota Statutes, Chapter 13D, the Open Meeting Law.

IPAD, on behalf of the Commissioner, wrote to Laura Budd, Board Chair, in response to Ms. Jacks' request. The purposes of this letter, dated March 19, 2010, were to inform her of Ms. Jacks' request and to ask her to provide information or support for the Board's position. On April 6, 2010, IPAD received a response from Ms. Budd.

A summary of the facts as Ms. Jacks provided them is as follows. In her opinion request, Ms. Jacks wrote:

On February 11, 2010, I attended a Board of Public Defense meeting. ... I wanted to observe the Board's interviews of the applicants for the position of the Chief Appellate Defender. ...

After the last interview, it was announced that a short break would be taken before deliberations would begin. During that break, I noticed that the chief administrator for the public defense system and the board chair were escorting individual board members into an adjoining room. After a few minutes, a board member would reemerge and another would go into the room with the board chair and chief administrator. I do not know if the board chair was in the room the entire time. I did see at least four board members go into that room, and at times more than one board member was in the room.

...

To be respectful, I did not walk into the room but rather waited until a board member reemerged to ask what was happening. I told her that we were present for the open deliberations and asked if I should be going in the adjoining room to hear them. She replied that the meeting was open. ... At this point the chief administrator and a board member reentered the meeting room and the public deliberations began.

Those deliberations ... ended in less than 10 minutes. ... a straw poll was conducted. There were four votes for one applicant and one each for two other applicants. ... Then the board unanimously voted for [one of the applicants].

Ms. Jacks attached to her opinion request signed statements from three individuals who also attended the February 11, 2010, meeting. One individual stated, "During the recess, I observed [the Board Chair] summon individual board members into a side room, one at a time. At least two members went into the room with [the Board Chair]." The second individual wrote, "I did witness [the Board's Chief Administrator] take individual board members into the hallway for private conversations. Eventually the conversations were moved to an adjourning [sic] room." The third individual stated, "I then watched...as an individual from the State Public Defender Administrative Services Office...took individual members of the Board into a side room, where some type of discussion was held."

Issue:

Based on Ms. Jacks' opinion request, the Commissioner agreed to address the following issue:

Did the State Board of Public Defense comply with Minnesota Statutes, Chapter 13D, when, at a February 11, 2010, open meeting, (1) board members left the meeting to deliberate in a separate room and (2) after returning to the meeting, conducted a straw poll?

Discussion:

The first part of the issue Ms. Jacks asked the Commissioner to address is whether the Board complied with Minnesota Statutes, Chapter 13D, during the recess of the February 11, 2010, Board meeting.

Minnesota Statutes, section 13D.01, subdivision 1, states, in part, "All meetings, including executive sessions, must be open to the public." The Legislature did not define "meeting" in Chapter 13D; however, in *Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983), the Supreme Court wrote:

We therefore hold that "meetings" subject to the requirements of [Chapter 13D] are those 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.

Moberg at 518.

In her comments to the Commissioner, Ms. Budd wrote:

... There are no factual allegations in the letters which you received to support any claim that deliberations on the candidates took place anywhere but in the meeting room during the public meeting.

Second, there is nothing in any of the correspondence that you received that indicates that there was ever a quorum of board members together outside of the meeting room. In fact, the letters only indicate that at least two board members were outside the room.

On February 11, 2010 the board did in fact interview four candidates ... After the final interview ... the board recessed. During that time I did have a conversation with the Chief Administrator for the Board of Public Defense. That conversation centered on whether the Board could go into closed session to deliberate on the candidates. My concern was that since we had two candidates who already were Board of Defense employees, the discussion might well center on performance of these employees which could be construed as private. The Chief Administrator indicated to me that he did not believe the Board could close the meeting. At that time, the Vice Chair of the Board ... joined us. [He] also indicated that he did not believe the meeting could be closed. At this point we erred on the side of keeping the meeting open.

The Commissioner's understanding is that the Minnesota Board of Public Defense is made up of seven individuals; however, based on the minutes Ms. Budd provided for the February 11, 2010, meeting, it appears only six board members were present at that meeting. Thus, the involvement of at least four board members is required for there to be a quorum.

Neither Ms. Jacks nor the three other individuals who submitted comments on her behalf allege that four or more board members were gathered together outside the meeting room *at the same time*. Ms. Jacks, though, did state she saw at least four board members go into an adjoining room, and at times more than one board member was in the room. This raises the question of whether the Board was engaged in a serial-type meeting – 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. The Minnesota Supreme Court wrote in *Moberg v. Independent School District No. 281*:

... serial meetings in groups of less than a quorum for the purpose of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of [Chapter 13D] depending upon the facts of the individual case.

Moberg at 518.

If the Board was conducting a serial-type meeting, any discussion or deliberation needed to occur during the official meeting, not during the time the Board was in recess.

Ms. Budd presented a different set of facts; namely, that, during the recess, two members of the Board (she and the Vice Chair) and the Chief Administrator gathered to discuss whether the Board needed to close the meeting. Based on the discussion as described by Ms. Budd, because there was no quorum, there was no meeting pursuant to Chapter 13D. Ms. Budd wrote, "... there is nothing in any of the correspondence ... that indicates that there was ever a quorum of board members together outside of the meeting room."

The Commissioner cannot resolve factual disputes. Thus, she is unable to determine whether the Board complied with Chapter 13D during the time the board meeting was in recess. However, if the facts are as Ms. Jacks describes – at least four board members met individually with one or

more board members in an adjoining room – than, per *Moberg*, the Board may have violated Chapter 13D by conducting serial meetings. If, on the other hand, the facts are as Ms. Budd describes – the Chair and Vice Chair met with the Chief Administrator to discuss closing the meeting and no other gatherings took place – then, there was likely not a violation of Chapter 13D because the gathering did not constitute a quorum of the full body.

The second part of Ms. Jacks’ question is whether the straw (unofficial) poll taken, apparently anonymously, at the February 11, 2010, meeting was appropriate. In her comments to the Commissioner, Ms. Budd wrote:

When the Board returned from its recess it did deliberate for some time and a straw poll was conducted ... [the straw poll] did not narrow the list of finalists, the vote was made public immediately, and the process was not designed to avoid any public discussion. Members of the audience found out the results of the straw poll at the same time as the members of the Board ... Those in attendance were not denied any information. In fact, after the straw poll was conducted the two board members who did not prefer [the candidate with four votes] as their first choice indicated publicly who their preferred candidates were.

The Minnesota Court of Appeals discussed straw votes in *Mankato Free Press v. City of Mankato*, 563 N.W.2d 291 (Minn.App. 1997), a case in which a city council took a written straw vote to narrow the list of finalists during a meeting. The results were not made public during the meeting, but were recorded in the meeting minutes, and were made available only at a later date. The Court wrote:

A city council meeting is not really “open” to the public if the council is conducting its voting in secret ... Secret voting denies the public an opportunity to observe the decision-making process, to know the council members’ stance on issues, and to be fully informed about the council’s actions ... We conclude that the straw vote here was a secret vote, and, as such, violated the Open Meeting Law.

Mankato at 295, 296.

In the issue Ms. Jacks raised, although the Board took an anonymous straw vote at the February 11, 2010, meeting, because discussion at the meeting revealed the vote tally and the candidate voted for by each board member, the Commissioner concludes that the straw poll vote did not violate Chapter 13D.

Opinion:

Based on the facts and information provided, the Commissioner’s opinion on the issue that Ms. Jacks raised is as follows:

Because there is a factual dispute regarding whether the Minnesota Board of Public Defense met inappropriately during the time its February 11, 2010, meeting was recessed, the Commissioner cannot determine whether the Board complied with Minnesota Statutes, Chapter 13D.

