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### Advisory Opinion 11-004

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2010). It is based on the facts and information available to the Commissioner as described below.

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

On February 22, 2011, the Information Policy Analysis Division (IPAD) received a letter dated same, from Kathy King and Orin Johnson, on behalf of the Citizens Against Rochester Bypass (CARB). In their letter, Ms. King and Mr. Johnson asked the Commissioner to issue an advisory opinion regarding whether the Olmsted County Regional Rail Authority (OCRRA) Board complied with Minnesota Statutes, Chapter 13D, the Open Meeting Law. Ms. King and Mr. Johnson submitted the \$200 fee required by Minnesota Statutes, section 13.072.

IPAD, on behalf of the Commissioner, wrote to Paul Wilson, Vice-Chair of the OCRRA Board, in response to Ms. King and Mr. Johnson's request. The purpose of this letter, dated March 1, 2011, was to inform him of the opinion request and to ask him to provide information or support for the OCRRA Board's position. On March 21, 2011, IPAD received a response, dated same, from Brent Walz, Civil Lead Attorney, Olmsted County Attorney's Office.

A summary of the facts as Ms. King and Mr. Johnson provided them is as follows. They wrote in their opinion request:

The [OCRRA Board] meeting publicly noticed to be held on January 18, 2011 at 4:15 pm actually was called to order at approximately 3:30 pm on that date.

Ms. King and Mr. Johnson also wrote, "Votes were taken during the January 18, 2011 meeting. ... Are they official and binding?"

Ms. King and Mr. Johnson provided documentation supporting their allegation that the County informed the public that the January 18, 2011, meeting would start at 4:15 pm, but that it actually started at 3:30 pm:

- A copy of a letter sent to citizens from County Administration stating that the meeting was to start at 4:15 pm
- A copy of the calendar on the County's website showing that the OCRRA Board meeting was to start at 4:15 pm
- A transcription of a statement that David Hanson, Dodge County Commissioner, made at the meeting: "Well, I did get on the e-mail what your agenda was. It wasn't supposed to start until after 4:00 but that's fine I got here at 3:30."

**Issues:**

Based on Ms. King and Mr. Johnson's opinion request, the Commissioner agreed to address the following issues:

1. Did the Olmsted County Regional Rail Authority comply with Minnesota Statutes, Chapter 13D, when it started a meeting on January 18, 2011, at 3:30 pm when the notice for the meeting stated it would start at 4:15 pm?
2. Did the Olmsted County Regional Rail Authority comply with Minnesota Statutes, Chapter 13D, when it took votes during the January 18, 2011, meeting that started at 3:30 pm when the meeting notice stated it would start at 4:15 pm?

**Discussion:**

*Issue 1: Did the Olmsted County Regional Rail Authority comply with Minnesota Statutes, Chapter 13D, when it started a meeting on January 18, 2011, at 3:30 pm when the notice for the meeting stated it would start at 4:15 pm?*

Pursuant to Minnesota Statutes, section 13D.04, public bodies, such as the OCRRA Board, are required to provide advance notice of meetings.

It appears the January 18, 2011, OCRRA Board meeting was a regular meeting. The notice requirement set forth in Minnesota Statutes, section 13D.04, requires that a public body keep a schedule of its regular meetings on file at its primary office. The schedule must include the date, time, and location of all regular meetings. (See section 13D.04, subdivision 1, and Advisory Opinions 10-013 and 10-020.) (If the body decides to hold a regular meeting at a different time, date, or location, it must then follow the notice requirements for a special meeting, which are outlined in section 13D.04, subdivision 2.)

Also, if the public body proactively communicates to the public about an upcoming regular meeting, beyond what is required by the Open Meeting Law, e.g., via mail, email, or website, the information should be the same as what is on file at the body's primary office. Any such communications, though, do not negate the body's obligation to maintain the schedule notice required under section 13D.04, subdivision 1.

Here, Mr. Walz did not provide the Commissioner with a copy of the schedule of regular meetings of the OCRRA Board, which would have included the January 18, 2011, meeting, or comment on whether the OCRRA Board created and maintains a schedule. Nor did he dispute that the meeting started at 3:30 pm, forty five minutes ahead of the time indicated on the County's website and in a letter sent from the County. In his comments to the Commissioner, Mr. Walz wrote, "Any noncompliance with the Open Meeting Law was inadvertent and unintentional." Because Mr. Walz did not address the issue of the schedule of regular meetings, the Commissioner assumes the OCRRA Board does not have one, and concludes that the Board did not meet the notice requirements outlined in section 13D.04.

In addition, based on information Mr. Walz provided, it appears the individuals who make up the OCRRA Board are the same individuals who make up the Olmsted County Board. If that is the case, it is important to note that for purposes of Chapter 13D, the OCRRA Board is a public body unto itself and must notice its meeting separate and apart from meetings of the Olmsted County Board.

**Issue 2:** *Did the Olmsted County Regional Rail Authority comply with Minnesota Statutes, Chapter 13D, when it took votes during the January 18, 2011, meeting that started at 3:30 pm when the meeting notice stated it would start at 4:15 pm?*

In *Sullivan v. Credit River*, 217 N.W.2d 502 (Minn. 1974), the Minnesota Supreme Court held that action a town board took at a public meeting was not invalid even though the board did not give proper notice of the meeting. The Court wrote:

... [t]he statute is directory rather than mandatory since it fails to provide a method for enforcement and does not specify that actions taken at a meeting which is not public shall be invalid.

*Sullivan* at 507.

Subsequent cases have confirmed this holding. (See *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 765 (Minn. 1982) and *In the Matter of Petitions of D & A Truck Line, Inc.*, 524 N.W.2d 1, 6 (Minn. App. 1994).)

In his comments to the Commissioner, Mr. Walz also cited the *Sullivan* case and wrote, “The Minnesota Supreme Court has held that a violation of the Open Meeting Law does not invalidate the actions taken at such meeting.”

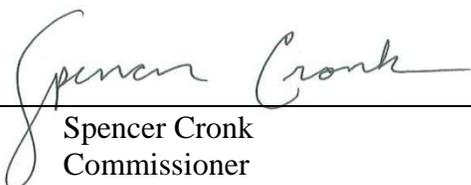
Thus, based on the holding in *Sullivan*, even though the OCRRA did not give proper notice for its January 18, 2011, meeting, the votes taken at the meeting are valid.

That said, however, the fact that a public body can hold an illegal meeting and take votes, which are valid, does not seem in keeping with the spirit of the Open Meeting Law. The Commissioner is aware of instances in similar circumstances where other public bodies have willingly held properly noticed subsequent meetings to reconsider and re-vote on specific issues.

**Opinion:**

Based on the facts and information provided, the Commissioner’s opinion on the issues that Ms. King and Mr. Johnson raised is as follows:

1. The Olmsted County Regional Rail Authority Board did not comply with the notice requirements set forth in Minnesota Statutes, section 13D.04, in regards to its January 18, 2011.
2. Votes the Olmsted County Regional Rail Authority Board took during its January 18, 2011, meeting are valid.

Signed:   
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 Spencer Cronk  
 Commissioner

Dated: \_\_\_\_\_  
 April 8, 2011