



Advisory Opinion 13-015

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2013). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On October 30, 2013, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Jim Reitter, dated October 28, 2013. In his letter, Mr. Reitter asked the Commissioner to issue an advisory opinion regarding the Florence Township Board of Supervisors (the Board) members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

IPAD requested additional information, which Mr. Reitter provided on November 6, 2013.

On November 12, 2013, IPAD wrote to Mike Blair, Chair of the Board. In its letter, IPAD informed Mr. Blair of Mr. Reitter's request and gave the members of the Board an opportunity to explain their position. On December 5, 2013, IPAD received a response, dated same, from Einar Hanson, attorney for the Board.

A summary of the facts provided by Mr. Reitter follows.

On August 19, 2013, the Florence Township Park Commission held a regularly scheduled meeting at the Township Hall, which Mr. Reitter attended and recorded. During the meeting, Mr. Reitter asked for and received a copy of the agenda. He then inquired as to whether the Commission made agendas available prior to the meetings, and the Chairman, Brad Stone, responded that the Commission did not publish agendas.

The Park Commission meeting also included a discussion of an email that Mr. Stone had sent to a number of people, including all other Park Commission members, chairs of the other Township commissions, a Township Board supervisor, and several members of the public. The Park Commission provided Mr. Reitter a copy of the email to review during the meeting and Mr. Stone later sent Mr. Reitter a copy. The email encouraged the recipients to attend the August 19, 2013, Park Commission meeting and the August 26, 2013, Township Board meeting. The email also provided information about the possible sale of certain property within the Township and arguments for opposing the sale.

Mr. Reitter continued:

On Sunday, August 25, I went to the Florence Township Town Hall and reviewed an announcement which had been posted for a special meeting identified as “Florence Township will have a special meeting on Monday, August 26th at 7:00 p.m. at the Town Hall for approval of an updated comprehensive plan.”

I arrived to attend the Florence Township Board regularly scheduled meeting on August 26, 2013 scheduled for 6 p.m. at the Florence Township Town Hall. Upon arriving at the town hall, there was an announcement posted that the meeting location had been moved to the Florence Township Community Center. The meeting started at 6:15...

...

At 7:00 p.m., an announcement was made that the remainder of the regular town board meeting was going to be suspended/postponed so that the special meeting to review the updated comprehensive plan could occur... After the review of the updated comprehensive plan, it was announced that the remainder of the regular town board meeting would continue and the township board business from the prior suspended/postponed agenda continued.

Issues:

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

1. Is the Florence Township Park Commission subject to the Open Meeting Law, Minnesota Statutes, Chapter 13D?
2. Did the Chair of the Park Commission comply with Minnesota Statutes, Chapter 13D, when he sent an email to various members of the public and the government?
3. Pursuant to Minnesota Statutes, Chapter 13D, are the Florence Township commissions required to provide copies of agendas?
4. Did the Florence Township Board comply with Minnesota Statutes, Chapter 13D, at the August 26, 2013 special meeting?

Discussion:

Issue 1. Is the Florence Township Park Commission subject to the Open Meeting Law, Minnesota Statutes, Chapter 13D?

There is no dispute that the Florence Township Board of Supervisors is subject to the OML. The question before the Commissioner is whether the Township Park Commission is also subject to the law.

Minnesota Statutes, section 13D.01, subdivision 1, states in pertinent part:

All meetings, including executive sessions, must be open to the public
 (c) of any
 (1) committee,
 (2) subcommittee,
 (3) board,
 (4) department, or
 (5) commission,
 of a public body....

In his response to the Commissioner, Mr. Hanson described the Park Commission as being, “under the authority of the Board of Supervisors” and that it “provides recommendations to the Board of Supervisors concerning matters within the scope of the Commission’s duties, as expressly stated in the ordinance creating it.” Mr. Hanson provided the Commissioner with a copy of the ordinance. Article 1 establishes the Commission and provides that the Commission will be made up of five residents and an ex-officio member, all selected by the Board. Article 2, establishes the Commission’s powers, duties and procedures. Amongst these, are the powers: to advise the other Township commissions; to draft and maintain a park management plan; to draft and maintain an application procedure for Town residents; to recommend to the Board the acquisition of land; and to recommend to the Board the use of eminent domain and variances.

Section 2.01, subsection (1) of Article 2, also states:

Business shall be conducted by the Commission at regularly scheduled public meetings as prescribed in its bylaws and the Minnesota Open Meeting Law. The Commission shall make every effort to preserve the public nature of its meetings.

Mr. Hanson argued that the Park Commission is not subject to Chapter 13D based on the holding in *Sovereign v. Dunn*, 498 N.W.2d 62, 67 (Minn. Ct. App. 1993) (*rev. denied*). However, the Commissioner is not persuaded that *Sovereign* applies here based on the plain language of section 13D.01, subdivision 1(c) and the ordinance creating the Commission.

The Commissioner has previously addressed the issue of an all-citizen advisory panel that was created in statute, with duties both complementary and distinct from the public body under which it was created. (See Advisory Opinion 08-007.) In concluding that the advisory panel was subject to Chapter 13D, as a “committee of a public body,” the Commissioner opined:

All of these functions are actions taken on behalf of citizens who will be impacted by the decisions that are made about providing energy to the Rock Tenn recycling operation. As stated by the Minnesota Supreme Court in the *Prior Lake American* case, these are the types of discussions that should occur in public and any decision should be made in public.

The Commissioner concludes that the Park Commission is a “commission of a public body,” and subject to the requirements of the OML.

Issue 2. Did the Chair of the Park Commission comply with Minnesota Statutes, Chapter 13D, when he sent an email to various members of the public and the government?

The Commissioner has previously opined that the exchange of emails can lead to a violation of the OML. (See Advisory Opinion 09-020.) In that opinion, a quorum of the Metro Gang Strike Force Advisory Board exchanged at least seven emails in an attempt to agree on language for a press release. The Commissioner concluded that the exchange was tantamount to a virtual meeting that was required to be open pursuant to the OML. Per Advisory Opinion 09-020:

The Commissioner is aware that Minnesota courts have not ruled definitively on this issue. However, given the facts here, the Commissioner believes that per [*Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983)] and [*St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983)], the conduct of the Advisory Board

constituted a meeting, which was required to be public, and as such is impermissible under the OML.

If Mr. Allen had sent his suggestion only to Mr. Shaver, and if Mr. Shaver had taken action without consulting a quorum of the Board, then, in the Commissioner's view, that conduct would be permissible. It seems reasonable that one-way communication between the chair and members of a public body is permissible, such as when the chair or staff sends meeting materials via email to all board members, as long as no discussion or decision-making ensues.

Here, Mr. Stone sent an email to various members of the public and to all of his fellow Commission members. However, it is not clear from the record whether he received any response to it or engaged in any further discussion with a quorum or more of his colleagues on the Park Commission. (Any concern about Mr. Stone's communication with the public is not within the scope of the OML.)

To the extent that Mr. Stone's email was a one-way communication, the Commissioner concludes that it did not violate the OML. The Commissioner reminds public bodies to be cautious in their use of email as a tool to conduct public business.

Issue 3. Pursuant to Minnesota Statutes, Chapter 13D, are the Florence Township commissions required to provide copies of agendas?

Chapter 13D is silent with respect to agendas; it neither requires nor prohibits them. However, Minnesota Statutes, section 13D.01, subdivision 6(a), provides:

- (a) In any meeting which under subdivisions 1, 2, 4, and 5, and section 13D.02 must be open to the public, at least one copy of any printed materials relating to the agenda items of the meeting prepared or distributed by or at the direction of the governing body or its employees and:
 - (1) distributed at the meeting to all members of the governing body;
 - (2) distributed before the meeting to all members; or
 - (3) available in the meeting room to all members;
 shall be available in the meeting room for inspection by the public while the governing body considers their subject matter.

Mr. Hanson writes that subdivision 6(a), "does not say that copies of the agenda must be provided." Though Mr. Hanson is correct that the subdivision does not use those specific words, an agenda is comprised of the actual agenda items and as such, an agenda is the clearest example of material "relating to the agenda items of the meeting." Therefore, it is the Commissioner's opinion that it is unreasonable for the Board to take the position that the subdivision would not apply to the agenda itself.

To the extent that an agenda is prepared or distributed to members of the body, Chapter 13D requires that at least one copy is made available to the public at the meeting. (See also, Advisory Opinions 01-058, 07-014, 07-024, and 08-015.) (The Commissioner notes that certain public bodies subject to Chapter 13D may be required to create an agenda pursuant to other authority applicable to those bodies.)

The Commissioner agrees with Mr. Hanson that the OML does not require the Board to make agendas available in advance of meetings. (Non-metro townships are not subject to Minnesota

Statutes, Chapter 13, the Data Practices Act. In government entities subject to Chapter 13, members of the public may request and must receive copies of agendas prior to meetings, if any such agendas exist.)

Issue 4. Did the Florence Township Board comply with Minnesota Statutes, Chapter 13D, at the August 26, 2013 special meeting?

Pursuant to Chapter 13D, public bodies may hold three types of meetings: regular, special, and emergency. For regular meetings, Minnesota Statutes, section 13D.04, subdivision 1, requires public bodies to keep a schedule on file at its primary offices. A meeting that differs in date, time or location from a regular meeting, is a special meeting. Pursuant to subdivision 2, a public body must post written notice of a special meeting at least three days before the meeting and include the date, time, place, and purpose on the notice. An emergency meeting, as defined by subdivision 3(d), is “called because of circumstances that, in the judgment of the public body, require immediate consideration by the public body.”

Here, the Board changed the place and time of the August 26, 2013, regularly scheduled meeting on the day of the meeting. By doing so, that meeting became a special meeting requiring three days’ notice. The Board had previously noticed a special meeting for the same date, for which the location was also changed, thus requiring the Board to re-notice the meeting. Mr. Hanson explained that due to the weather and a lack of air conditioning in the Town Hall meeting room, the Board moved the meetings for the comfort of the attendees. He asserted that the need to move the meeting “could be considered an emergency... and the notice given by posting it at the bulletin board of the regular meeting place was sufficient notice.”

The Commissioner has previously opined that, “examples of emergency situations would include holding a meeting to respond to a natural disaster or to a health epidemic caused by an event such as an accident or terrorist activity.” (See, Advisory Opinion 06-027.) Because an emergency meeting is one in which a public body considers the response to an emergency situation, neither the Board’s regularly-scheduled meeting at 6:00 p.m. nor the special meeting at 7:00 p.m. constituted an emergency meeting, such that a change of location would not require three days’ notice.

When conditions that require a change in the regular or previously-noticed schedule occur but fall short of requiring immediate consideration, the Board must provide three days’ notice that includes the date, time, place, and purpose of the meeting. Changes to any of those notice requirements that occur before the meeting but after notice is posted require an additional three days’ notice.

The Commissioner understands that occasionally unforeseen circumstances arise that might require a reasonable change of location (i.e., a room in a different building nearby). He encourages the Legislature to consider including language in Chapter 13D that would allow a reasonable change of location for meetings that are currently required to be cancelled and rescheduled for a date at least three days later.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issues Mr. Reitter raised is as follows:

1. The Florence Township Park Commission is subject to Minnesota Statutes, Chapter 13D.
2. To the extent that Mr. Stone's email was a one-way communication that did not result in a continued discussion with a quorum or more of the Park Commission members, the email complied with the Open Meeting Law.
3. Minnesota Statutes, Chapter 13D is silent with respect to agendas. To the extent that Florence Township Commissions create agendas, they should be made available to the public as part of the members' materials, pursuant to Minnesota Statutes, section 13D.01, subdivision 6.
4. Because the Board changed the time and location of a regularly scheduled meeting and the location of a previously noticed special meeting, the August 26, 2013 meetings were special meetings requiring a notice of at least three days, which should have included the date, time, place, and purpose.



Spencer Cronk
Commissioner

December 23, 2013