



Advisory Opinion 14-004

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 March 19, 2014, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Mark Anfinson on behalf of the St. Cloud Times (the Times), dated same. In his letter, Mr. Anfinson asked the Commissioner to issue an advisory opinion regarding the Cold Spring City Council members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

On March 27, 2014, IPAD wrote to Mayor Doug Schmitz, Chair of the public body. In its letter, IPAD informed Mr. Schmitz of Mr. Anfinson's request and gave the members of the City Council an opportunity to explain their position. On April 14, 2014, IPAD received a response, dated same, from Susan Kadlec, attorney for the City.

A summary of the facts as provided by Mr. Anfinson follows. In the course of hiring a new police chief, the City of Cold Spring considered the application of Eric Johnson. The City interviewed Mr. Johnson and subsequently extended him an offer of employment, provided he pass several examinations. On February 10, 2014, the City Administrator, Paul Hetland, emailed Mr. Johnson and told him that he had passed his examinations and that he could resign his current position so as to take up the position in Cold Spring.

Mr. Anfinson wrote:

However, on February 11... the City Council held a regular council meeting. The last item on the agenda for this meeting was a closed session to discuss the potential sale of a parcel of property in the city's business park (a copy of the agenda is enclosed). The Council cited Minn. Stat. §13D.05, subd. 3(c) as the basis for closing the meeting. No other grounds for closing the meeting were stated, yet it appears that the Council also discussed issues relating to Mr. Johnson in this closed meeting.

... As we understand it, the Council never resumed a public meeting after discussing the possible land sale in closed session, but instead moved directly to a discussion concerning the allegations against Johnson in the same closed meeting.

The minutes of the February 11 closed meeting also state that during the meeting, a "no-confidence" motion was made relating to Johnson, and that the motion was adopted on a 3-0 vote ...

On February 26, the City Council held another regular meeting. The agenda included an item described as “Closed Session Regarding the Contract for Chief of Police”.

... When pressed for the specific statutory basis for closing its meeting on February 26, the Council responded by citing Minn. Stat. §13D.05, subd. 2(b), claiming that it needed to review the allegations against Johnson, and that he was “an individual subject to its authority” within the meaning of this Open Meeting Law exception.

Issues:

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

1. Did the Cold Spring City Council comply with Minnesota Statutes, Chapter 13D, at the February 11, 2014, closed meeting?
2. Did the Cold Spring City Council comply with Minnesota Statutes, Chapter 13D, when it closed the February 26, 2014, meeting pursuant to Minnesota Statutes, section 13D.05, subdivision 2(b)?

Discussion:

Issue 1. Did the Cold Spring City Council comply with Minnesota Statutes, Chapter 13D, at the February 11, 2014, closed meeting?

Minnesota Statutes, section 13D.01, subdivision 3 states:

Before closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.

This subdivision requires that a public body do three things before a meeting is closed: (1) make a statement on the record; (2) give the specific grounds permitting the closure of the meeting; and (3) describe the subject to be discussed.

Minnesota Statutes, section 13D.05, subdivision 2(b) states:

A public body shall close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open....

On behalf of the Council, Ms. Kadlec, wrote:

For the purpose of this response, the City does not contest that no express statement was provided to the public prior to closing the meeting on February 11, 2014, to indicate that Mr. Johnson would be discussed during the closed session. It is the City’s position, however, that both the February 11, 2014, and February 26, 2014, were properly closed under Minn. Stat. §13D.05, Subd. 2(b), for preliminary discussion of allegations against Mr. Johnson.

The salient question, then, is whether Mr. Johnson is, “an individual subject to [the City Council’s] authority.” Ms. Kadlec argued that he is:

...The City Council can determine whether the conclusions of the investigation will have an impact on Mr. Johnson’s commencement and/or continuation of employment with the City of Cold Spring.

...
[Section 13D.05, subdivision 2(b)] should be considered in conjunction with the treatment of personnel data under the Data Practices Act [Minnesota Statutes, Chapter 13]. Under Minn. Stat. § 13.43, subd. 4, the allegations considered by the City Council are private data – as to an applicant, the allegations remain private data in perpetuity.

The Commissioner respectfully disagrees. Firstly, while there is certainly interplay between the Data Practices Act (Chapter 13) and the Open Meeting Law (Chapter 13D), the classification of data as not public pursuant to Chapter 13 does not necessarily require or permit the closing of meetings under Chapter 13D. Indeed, section 13D.05, subdivision 1, specifically allows public bodies to discuss not public data in open meetings when the data relate to a matter within the scope of the body’s authority and is reasonably necessary to conduct business. Additionally, the plain language of subdivision 2(a) requires meetings to be closed based on the “types of data” to be discussed and refers to specific provisions in Chapter 13. (Subdivision 2(a) cites Minnesota Statutes, sections 13.82, 13.32, 13.3805, 13.384, and 13.46.) By contrast, subdivision 2(b) does not refer to “data” and does not contain a reference to section 13.43 (personnel data). As the Commissioner has previously stated, Chapter 13D does not contain a general exception that would allow meetings to be closed to discuss general personnel matters.

Secondly, the Legislature did not define the phrase, “an individual subject to its authority.” Under Minnesota Statutes, section 645.08, “words and phrases are construed according to rules of grammar and according to their common and approved usage.” Merriam Webster’s Collegiate Dictionary, Tenth Edition, defines “subject” as “owing obedience or allegiance to the power or dominion of another.” The second sentence of section 13D.05, subdivision 2(b) provides additional context. That sentence states that if a public body decides to impose discipline on the individual, the subsequent meetings must be open. Thus, a public body’s ability to impose discipline and an individual’s obligation to submit to the authority of the body are what make an individual subject to that authority.

Here, Mr. Johnson has been extended a conditional offer of employment. The City considers him an applicant; he is not currently an employee. As such, the City has no authority to discipline Mr. Johnson or indeed, to direct his actions in any way. Mr. Johnson has the ability to decline the position and act irrespective of the City’s authority. It is the Commissioner’s opinion that the ability to hire is insufficient to subject an individual to the City’s authority, for purposes of section 13D.05, subdivision 2(b).

Because the Cold Spring City Council did not have authority to close the meeting for a discussion regarding the Mr. Johnson, the City’s lack of statement on the record at the February 11, 2014, meeting is irrelevant.

An additional concern raised by the Times is the Council’s no-confidence vote at the February 11, 2014, meeting. Mr. Anfinson’s letter to the Commissioner states: “[t]he minutes of the

February 11 closed meeting also state that during the meeting, a “no-confidence” motion was made relating to Johnson, and that the motion was adopted.”

Ms. Kadlec, in her response to the Commissioner wrote:

As shown in the minutes for the February 11, 2014, meeting, *following the closed session*, the Council adopted a “vote of no confidence for Eric Johnson to be appointed as Chief” and the meeting was thereafter adjourned.” (Emphasis added.)

The meeting minutes reflect a two minute recess prior to closing the meeting for consideration of the sale of land to “resituate” for the closed session. The next entry is, “Closed session: consideration of the sale of land in the Cold Spring Business Park.” The following item is, “Police Chief contract negotiation,” and the accompanying description notes a motion for a no confidence vote. There is an inconsistency between Mr. Anfinson’s account and Ms. Kadlec’s account; it is not clear whether the vote occurred in closed session or in open session and the meeting minutes do not provide clarification. The Commissioner cannot resolve factual disputes. To the extent that the Council conducted the no confidence vote in closed session, it did not comply with Chapter 13D. (See *Mankato Free Press v. City of Mankato*, 563 N.W.2d 291 (Minn.App. 1997), holding that a City should not hold secret votes, even if the results are made public at a later date and time.) If on the other hand, the members voted in open session, the vote itself did not violate Chapter 13D.

The Commissioner notes, however, that given the potential effect on future meetings or issues that may come before the Council, the Council should be able to demonstrate when a meeting is open and when it is closed. For instance, on the basis of the minutes as submitted to the Commissioner, it is not clear whether the Council adjourned the February 11, 2014, meeting in open or closed session. (See also Advisory Opinion 12-008.)

Issue 2. *Did the Cold Spring City Council comply with Minnesota Statutes, Chapter 13D, when it closed the February 26, 2014, meeting pursuant to Minnesota Statutes, section 13D.05, subdivision 2(b)?*

The City did not have authority to close the meeting pursuant to section 13D.05, subdivision 2(b), because the individual discussed was not subject to the City Council’s authority.

See issue 1.

Opinion:

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

1. The Cold Spring City Council did not comply with Minnesota Statutes, Chapter 13D, when it closed the February 11, 2014, because it lacked statutory authority; the individual discussed was not subject to the City Council’s authority and votes must be conducted in open session.

2. The Cold Spring City Council did not comply with Minnesota Statutes, Chapter 13D, when it closed the February 26, 2014, meeting pursuant to Minnesota Statutes, section 13D.05, subdivision 2(b), because the individual discussed was not subject to the City Council's authority.



Spencer Cronk
Commissioner

May 12, 2014