



Advisory Opinion 14-017

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2014). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On September 8, 2014, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Steve Wagner of the *Grand Forks Herald*, dated September 5, 2014. In his letter, Mr. Wagner asked the Commissioner to issue an advisory opinion regarding the City of East Grand Forks City Council (Council) and the East Grand Forks Economic Development and Housing Authority Board (Board) members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

On September 12, 2014, IPAD wrote to Craig Buckalew, City Council President. In its letter, IPAD informed Mr. Buckalew of Mr. Wagner's request and gave the members of the Council and the Board an opportunity to explain their position. On September 29, 2014, IPAD received a response, dated same, from Brad Sinclair, attorney for the public bodies.

A summary of the facts as provided by Mr. Wagner follows.

[W]e believe the East Grand Forks City Council and the [Economic Development and Housing Authority] board violated the state's open meetings law on June 24, 2014, and Aug. 11, 2014....

The Newspaper contends the attorney-client privilege didn't apply in either instance, and the boards didn't meet the standards for excluding the public.

For the June 11 [sic] meeting, the City Council announced it would close the meeting, which included the EDHA board, to discuss "possible litigation." However, there was no indication that East Grand Forks faced the threat of a lawsuit, particularly since it was the aggrieved party claiming it had not been paid for \$510,000 loan to Boardwalk Enterprises.

...

To date, no lawsuit has been filed in state district court to collect the money owed to the city by Boardwalk Enterprises.

At the August 11 meeting between the City Council and EDHA board members, officials again elected to close proceedings to the public, citing attorney-client privilege. Again, the Herald, on behalf of the public, argues this was an improper action and notes that Boardwalk Enterprises met with the Council and EDHA members. The newspaper

argues the attorney-client privilege does not apply when adverse parties are gathered to discuss the matter.

On behalf of the Council and the Board, Mr. Sinclair provided additional facts. In October of 1999, the City of East Grand Forks made a loan to Boardwalk Enterprises in the amount of \$510,000. Boardwalk Enterprises agreed to begin repayment in 2003. This year, the City discovered that Boardwalk Enterprises had not yet started to repay the loan. Mr. Sinclair wrote: “The Promissory Note provides if a default under the Note occurs, a 60 day written notice of default must be sent to the Borrower and if the Borrower fails to cure the default, [the City] may move forward with enforcement of the Note and the underlying collateral, the Real Estate Mortgage.” At the June 24, 2014, meeting, Mr. Sinclair “made a presentation to the [Council and Board members] solely related to the legal issues surrounding Boardwalk’s Promissory Note and Real Estate Mortgage. The sole purpose of the meeting was to discuss Boardwalk’s obligation, the enforceability of the obligation, defenses to the enforcement, counterclaim and legal strategies.”

Regarding the August 11, 2014, meeting, Mr. Sinclair wrote:

The purpose of the August 11, 2014, meeting was to allow Boardwalk to respond to [the City’s] 60 day Notice of Default, discuss settlement... After the Boardwalk representatives presented their offer of settlement..., [the Council and Board] discussed the settlement offer and implemented further litigation strategy.

Issues:

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

1. Pursuant to Minnesota Statutes, sections 13D.05, subdivision 2(b), did the East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board properly close the June 24, 2014, meeting on the basis of attorney-client privilege?
2. Pursuant to Minnesota Statutes, sections 13D.05, subdivision 2(b), did the East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board properly close the August 11, 2014, meeting on the basis of attorney-client privilege?

Discussion:

Issue 1. *Pursuant to Minnesota Statutes, sections 13D.05, subdivision 2(b), did the East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board properly close the June 24, 2014, meeting on the basis of attorney-client privilege?*

The Legislature enacted the Open Meeting Law for the public benefit and “[t]he statute will be liberally construed in order to protect the public’s right to full access to the decision-making process of public bodies.” *St. Cloud Newspapers v. District 742 Community Schools*, 332 NW2d 1, 6 (Minn. 1983).

Pursuant to Minnesota Statutes, section 13D.01, subdivision 1, all meetings of a public body must be open to the public. Minnesota Statutes, section 13D.05, subdivision 3(b), permits a public body to close a meeting on the basis of attorney-client privilege. While the Legislature enacted subdivision 3(b) in 1990, the Minnesota Supreme Court recognized an attorney-client privilege exception to the OML in 1976. See *Minneapolis Star and Tribune v. the Housing and Redevelopment Authority*, 251 NW 2d 620 (Minn. 1976) (*HRA*).

In recognizing the common law exception in *HRA*, the Minnesota Supreme Court held that the exception will only apply when balancing the purposes of the attorney-client privilege against the purposes of the OML dictates the need for *absolute confidentiality*. While the Court held that *HRA*, as the defendant in a lawsuit, properly closed the meeting, it cautioned that the exception “is to be employed or invoked cautiously and *seldom in situations other than in relation to threatened or pending litigation*.” (Emphasis added.) *HRA* at 626.

In 2002, the Supreme Court held that the statutory exception in section 13D.05, subd. 3(b), was consistent with its holding in *HRA*. See *Prior Lake American v. Mader*, 642 NW2d 729 (Minn. 2002). The Court considered the issue of whether the exception would apply in situations where the public body had received a potential threat of litigation. In holding that the public body violated the OML, the Court wrote, “[b]alancing the policies behind the attorney-client privilege and the Open Meeting Law, it is clear to us that when a public body is deciding a matter within its jurisdiction, the threat that litigation might be a consequence of deciding the matter one way or another does not, by itself, justify closing the meeting.” *Prior Lake American* at 741.

Both *HRA* and *Prior Lake American* advised against using the privilege for general advice. (See also *Northwest Publications, Inc. v. City of St. Paul*, 435 NW 2d 64, 68 (Minn. Ct. App. 1989): “The privilege is not available, however, when a governing body seeks instead to discuss the strengths and weaknesses of the underlying proposed enactment which may give rise to future litigation.”) And the *Prior Lake American* Court stated that the scope of the privilege is narrower for public bodies than it is for private clients. See *Prior Lake American* at 737.

The Supreme Court has declined to endorse a bright-line rule with regard to the timing of when the privilege might apply and instead established the balancing test. The privilege does not automatically apply when a public body is threatened with or engaged in active litigation; conversely, the privilege is not always prohibited prior to pending or threatened litigation. The Commissioner is not aware of a court case that examines the application of the attorney-client privilege exception when the public body is a potential plaintiff in a lawsuit, as is the situation here, or how that might affect the balancing of purposes of the privilege and the OML. Nevertheless, the Supreme Court’s limitations on the privilege, taken together with the obligation to construe the OML in favor of the public, sets a high standard for public bodies.

Mr. Sinclair wrote, “the sole purpose of the meeting was to discuss Boardwalk’s obligation, the enforceability of the obligation, defenses to the enforcement, counterclaim and legal strategies.”

Boardwalk’s obligation under the promissory note is public, as is, to some extent, the enforceability of the note itself. Mr. Sinclair also noted that the Council and Board held several open meetings in May 2014 and again on June 3, 2014, where they discussed the promissory note and mortgage and the decision to hire outside counsel (Mr. Sinclair) to advise them in the matter. He also stated that the promissory note required the City to serve Boardwalk Enterprises

with a 60 day notice of default before being able to initiate litigation. At the time of the June 24, 2014, meeting, the City had not yet decided whether to send the notice. Thus, similar to the *Prior Lake American* case, the City had not yet decided the underlying issue that may have given rise to actual litigation.

In turning to the purposes of the OML, collecting on a loan is undoubtedly a subject of public concern about which the public has a right to be informed. Similarly, a public body's deliberations over whether to pursue litigation may have a significant impact on a community, both fiscally and politically. The public's right to see its elected officials make decisions about matters of significance to the communities they serve is at the heart of the policy behind the OML.

Based on the Supreme Court's rulings on the broad interpretation of the law, the narrow application of the privilege, and because public bodies may not invoke the exception for general legal advice, the fact that the City had not yet made the underlying decision to serve Boardwalk Enterprises with the notice of default tips the scales in favor of an open meeting. Because the circumstances here did not meet the high standard of dictating the need for absolute confidentiality, the Council and Board did not comply with the OML when it closed the June 24, 2014, meeting.

Issue 2. *Pursuant to Minnesota Statutes, sections 13D.05, subdivision 2(b), did the East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board properly close the August 11, 2014, meeting on the basis of attorney-client privilege?*

See analysis in Issue 1.

At the August 11, 2014, meeting, Mr. Wagner noted, and Mr. Sinclair confirmed, that representatives of Boardwalk Enterprises met with the Council and Board in closed session. In applying the balancing test from *HRA* and *Prior Lake American* to that part of the meeting, the Commissioner concludes the participation of Boardwalk Enterprises conflicts with the need for absolute confidentiality between the City and its attorney; the presence of a third-party in these circumstances essentially invalidates the application of the attorney-client privilege. Therefore, the closed portion of the meeting that included Boardwalk Enterprises did not comply with the OML.

Had the parties' attorneys, or less than a quorum of the Council or Board, met with Boardwalk Enterprises (i.e., in gatherings that would not be subject to the OML), there would not have been an issue. Then, based on the result of such a gathering, Mr. Sinclair could have met with the Council and Board in closed session in the context of deciding whether to pursue litigation, i.e., for litigation strategy, as discussed below.

While Mr. Wagner properly argued that the privilege did not apply when the adverse parties met in closed session, the Commissioner does not conclude that remainder of the meeting was likewise improper. Mr. Sinclair wrote to the Commissioner: "after the Boardwalk representatives presented their offer of settlement..., [the Council and Board] discussed the settlement offer and implemented further litigation strategy." The meeting minutes report that after the closed session, Mr. Galstad provided a summary: "settlement options were discussed and it was determined that more information was needed. The attorney representing the City

informed both the City Council and the [Board] about their options along with legal strategy for each option.”

Here, the Commissioner concludes that the Council and Board’s need to confer with legal counsel in closed session, as described by Mr. Sinclair and Mr. Galstad, outweighs the purposes of the OML. The City had taken the first steps toward litigation – serving the notice of default and entering into settlement negotiations. Allowing the opposing party to be privy to the City’s conversation with its attorney at an open meeting at that juncture could have revealed legal advice and put the City at a significant disadvantage in pursuing the public’s interest in the matter.

Opinion:

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

1. Pursuant to Minnesota Statutes, sections 13D.05, subdivision 2(b), the East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board did not properly close the June 24, 2014, meeting on the basis of attorney-client privilege.
2. The East Grand Forks City Council and the East Grand Forks Economic Development/Housing Authority Board did not properly close the first portion of the August 11, 2014, meeting on the basis of attorney-client privilege, at which members of Boardwalk Enterprises were present. The remainder of the closed meeting of the Council, Board, and their attorney was properly closed per the privilege.



Matthew Massman
Acting Commissioner
October 28, 2014