



Advisory Opinion 15-002

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 February 23, 2015, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Jennifer Janovy, dated February 22, 2015. In her letter, Ms. Janovy asked the Commissioner to issue an advisory opinion regarding the Edina City Council (Council) members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML). IPAD asked Ms. Janovy to provide additional information and clarification, which she submitted on March 16, 2015.

On March 20, 2015, IPAD wrote to Mayor James Hovland, Chair of the Council. In its letter, IPAD informed Mr. Hovland of Ms. Janovy's request and gave the members of the Council an opportunity to explain their position. On April 2, 2015, IPAD received a response, dated same, from Roger Knutson, City Attorney.

In her request for an advisory opinion, Ms. Janovy stated: "I am writing to request an Open Meeting Law advisory opinion related to how the Edina City Council handled the Edina City Manager's performance review in January 2015." According to Ms. Janovy's opinion request, the Council held two closed meetings, one on January 6, 2015, and one on January 20, 2015, to evaluate the performance of the City Manager. Specifically, Ms. Janovy asked whether the notice for the January 20, 2015, meeting was sufficient, whether the Council properly conducted the meetings, and whether the summary of the performance evaluation was sufficient.

Issues:

Based on Ms. Janovy's opinion request, the Commissioner agreed to address the following issues:

1. Did the Edina City Council comply with Minnesota Statutes, section 13D.04, subdivision 2(a), regarding notice for the January 20, 2015, special meeting?
2. Did the Edina City Council comply with Minnesota Statutes, Chapter 13D when it closed meetings on January 6, 2015, and January 20, 2015, pursuant to Minnesota Statutes, section 13D.05, subdivision 3(a), to evaluate the performance of an individual subject to its authority?

3. Did the Edina City Council comply with Minnesota Statutes, section 13D.05, subdivision 3(a), regarding its summary of the City Manager's performance evaluation at the February 3, 2015, meeting?

Discussion:

Issue 1. Did the Edina City Council comply with Minnesota Statutes, section 13D.04, subdivision 2(a), regarding notice for the January 20, 2015, special meeting?

Any meeting that is not on the regular schedule of meetings on file at a public body's primary offices must be noticed as a special meeting. For a special meeting, a public body must post written notice of the date, time, place and purpose of the meeting on the principal bulletin board or the door of the usual meeting room at least three days before the meeting. (See Minnesota Statutes, section 13D.04, subdivision 2.) At issue here, is whether the stated purpose of the meeting was sufficient.

The Commissioner has previously opined that a special meeting notice must provide detail about the purpose of the meeting. The public body's discussion is then confined to the purpose stated on the notice. (See Advisory Opinions 07-014 and 10-013.) These requirements inform the public and also allow public bodies to fulfill the requirement to provide special meeting notice to individuals who specifically request notice about particular topics. (See section 13D.04, subdivision 2(d), and Advisory Opinion 04-004.)

Here, the January 20, 2015, special meeting notice provided:

THE CITY OF EDINA WITH THIS GIVES NOTICE that the Edina City Council will hold a closed work session for the purposes of completing the City Manager performance review, Tuesday, January 20, 2015, at 5:00 p.m. The work session will be held in the Community Room located on the second floor of Edina City Hall, 4801 West 50th Street, Edina, Minnesota.

The work session will be closed to the public.

In her opinion request, Ms. Janovy wrote:

A discussion about an employment agreement may be incidental to a performance evaluation; however, the facts indicate that the primary purpose of the closed session was to review the City Manager's employment agreement. This conflicts with the meeting notice, which only provided notice of the performance evaluation. That the City Council intended to discuss the performance evaluation is not disputed.

Mr. Knutson, on behalf of the Council, wrote:

The meeting notice stated that the purpose of the closed meeting was "completing the City Manager performance review." As an integral part of that performance review the City Council discussed the City Manager's compensation and prospective extension of his employment agreement. These issues are directly linked to his performance.

The Commissioner agrees with Mr. Knutson that it is reasonable for an evaluation of an employee's performance to include a discussion of the employee's continued employment and compensation. Therefore, "for the purposes of completing the City Manager performance review" provides adequate notice to identify the purpose of the special meeting.

Issue 2. Did the Edina City Council comply with Minnesota Statutes, Chapter 13D when it closed meetings on January 6, 2015, and January 20, 2015, pursuant to Minnesota Statutes, section 13D.05, subdivision 3(a), to evaluate the performance of an individual subject to its authority?

Section 13D.05, subdivision 3(a), provides, in part:

A public body may close a meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated prior to closing a meeting.

Mr. Knutson wrote to the Commissioner:

The Council did not complete its performance review discussion at the closed session meeting on January 6. The January 6 closed meeting was adjourned and a new closed session was held on January 20 to enable the Council to complete Mr. Neal's performance evaluation... The statute does not limit the number of closed meetings that can be held to evaluate an employee.

The Commissioner has previously opined that when a public body must hold multiple closed sessions to evaluate an employee under its authority, it should recess and resume the meeting, rather than adjourning and holding subsequent closed meetings. In Advisory Opinion 06-020 the Commissioner concluded:

If the Board identified the superintendent as the employee about to be evaluated in July 2005, and if the meeting was recessed and resumed, then it appears that the Board has complied with section 13D.05, subdivision 3(a).

If the Board did not identify the superintendent as the employee it was about to evaluate in July 2005, *or if the meeting was not recessed and resumed*, then the Board is not in compliance. [Emphasis added.]

Here, the City Council convened and adjourned two separate closed meetings. Consistent with Advisory Opinion 06-020, the City should have recessed or continued the closed session to evaluate the performance of the City Manager.

Ms. Janovy also provided the Commissioner with a copy of a memo written by the City Manager following the January meetings. In it, he states that the Council met in closed session on January 6 to discuss his evaluation with the consultant hired to perform the review. Following that meeting, the Council tasked the City Manager with drafting a proposed employment agreement. The City Manager wrote:

I met with Mayor Hovland and Council Member Swenson on January 9. I presented them a proposed employment agreement. They subsequently reviewed that proposal, and *then scheduled a closed session to review it with City Council Members on January 20*. HR Director Lisa Schaefer also attended the closed session to assist the Council's discussion about the proposed agreement. [Emphasis provided.]

Ms. Janovy noted that the consultant who performed the review did not attend the second meeting.

While these facts alone do not establish that the January 20 closed meeting went beyond the scope of the performance evaluation, the following comments are in order. The Open Meeting Law does not contain a provision allowing public bodies to close meetings for general personnel reasons; meetings can only be closed in the specific circumstances described in section 13D.05 or by other statutes. As discussed in Issue 1, a performance evaluation may naturally include references to "compensation and prospective extension of [an] employment agreement." However, once a public body has determined that the employee will remain employed with a possible change in pay based on his performance, and the discussion logically turns to the specifics about the employment agreement, the Council is no longer evaluating the performance of an individual per section 13D.05, subdivision 3(a). In these circumstances, contract negotiations must be done in an open meeting.

Ms. Janovy also raised the issue of whether the Council properly closed the January meetings by making the required statements on the record. When a public body closes a meeting, it must state the specific grounds allowing or requiring the meeting to be closed and describe the subject to be discussed. (See Minnesota Statutes, section 13D.01, subdivision 4.) Mr. Knutson wrote, "Before closing the meeting [sic] Mayor Hovland stated they were closing the meetings for purposes of evaluating the City Manager's performance."

According to emails between Ms. Janovy and the Edina City Clerk, the Council recorded only the public portion of the January 6, 2015, meeting following the closed session. Neither Ms. Janovy nor Mr. Knutson provided the statement closing the meeting. Therefore, the Commissioner cannot determine whether the Council's statement was sufficient, with regard to the January 6, meeting.

The Council recorded the open and closed portions of the January 20, 2015, meeting. However, because the Commissioner determined that closing the additional meeting for a performance evaluation was improper, the sufficiency of the January 20 statement is immaterial.

Additionally, section 13D.05, requires that public bodies record all closed meetings, except those closed per attorney-client privilege. Because the Council did not do so on January 6, it did not comply with that provision of the Open Meeting Law. While Mr. Knutson did not address this issue in his letter to the Commissioner, Mr. Hovland wrote, in a February 20, 2015, email to Ms. Janovy, "Going forward, the City staff and the Council will take greater care to refrain from such errors. City staff is committed to being more careful about this responsibility in the future." The Commissioner is encouraged by Mr. Hovland's comments.

Issue 3. *Did the Edina City Council comply with Minnesota Statutes, section 13D.05, subdivision 3(a), regarding its summary of the City Manager's performance evaluation at the February 3, 2015, meeting?*

Pursuant to section 13D.05, subdivision 3(a), when a public body closes a meeting for a performance evaluation, "at its next open meeting, the public body shall summarize its conclusions regarding the evaluation."

Here, Ms. Janovy raised concerns regarding both the timing and the content of the summary provided by the Council. The Council held separate meetings on January 6 and January 20 and provided the summary at its open meeting on February 3, 2015. However, the "next open meeting" following the January 6, meeting, was the open portion of the January 20 meeting, right before the Council went into closed session. Therefore, the summary was not timely. Had the Council announced its intent to *continue* the January 6 meeting to January 20 (by recessing and reconvening, instead of adjourning), so that it could finish the performance evaluation, the public would have known to expect the summary at the February 3, meeting, i.e., its next open meeting. (See also, Advisory Opinion 12-008.)

Regarding the content of the summary, the Commissioner offered the following guidance in Advisory Opinion 02-021:

Government entities seeking guidance on what to summarize can look to the language of the Open Meeting Law. Specifically, Chapter 13D directs a governing body to "summarize its conclusions" regarding a personnel evaluation. How a public body approaches the evaluation will determine exactly which data it should summarize. The public body should carefully review the specific points it established in reaching a conclusion about the performance evaluation. Clearly, the language of the Open Meeting Law indicates that the governing body ought to summarize each salient point of the evaluation so that the public is given the opportunity to get the best possible sense of the performance - good, bad, or indifferent - of the public employee.

The Commissioner addressed the sufficiency of several summaries in Advisory Opinion 14-007:

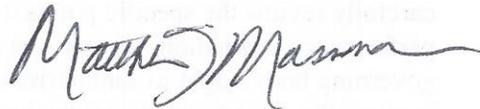
[In Advisory Opinions 99-018, 02-021, and 02-035] the Commissioner concluded that the following statements were insufficient to fulfill the public bodies' statutory obligations: "[the Board] discussed the superintendent's strengths and weaknesses"; "As a result of that review, strengths were noted and areas of improvement were defined. The board developed goals regarding communication and leadership"; and "areas of growth were identified and [the Superintendent's] evaluation is an ongoing process."

At the February 3 meeting, Mr. Hovland provided the following summary: "summarizing the conclusions of that evaluation, the council concluded that [the City Manager is] doing an excellent job and it's being reflected in this employment agreement that we are working on." While the statement provided by Mr. Hovland included a conclusion that the City Manager was "doing an excellent job," the City did not provide information consistent with guidance in prior advisory opinions that direct public bodies "to summarize each salient point of the evaluation so that the public is given the opportunity to get the best possible sense of the performance - good, bad, or indifferent - of the public employee." (See Advisory Opinion 02-021.)

Opinion:

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

1. The Edina City Council complied with Minnesota Statutes, section 13D.04, subdivision 2(a), regarding notice for the January 20, 2015, special meeting.
2. The Edina City Council did not comply with Minnesota Statutes, Chapter 13D when it closed meetings on January 6, 2015, and January 20, 2015; the Council held two meetings to evaluate the performance of the City Manager and it failed to record the January 6, 2015, meeting. The Commissioner cannot determine if the Council made a proper statement on the record to close the January 6 meeting.
3. The Edina City Council did not comply with Minnesota Statutes, section 13D.05, subdivision 3(a), regarding the summary of the City Manager's performance evaluation because it should have provided a summary of the January 6 closed meeting during the open portion of January 20 meeting. As noted in previous opinions, a performance evaluation summary should include salient points of the evaluation so that the public is aware of the rationale upon which the public body based its conclusion.



Matthew Massman
Commissioner
May 7, 2015