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### Advisory Opinion 16-003

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2015). It is based on the facts and information available to the Commissioner as described below.

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

Brenda Halvorson of the *Staples World* newspaper requested an advisory opinion regarding Motley City Council (Council) members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

Adam Ripple, attorney for the Council, submitted comments.

The *Staples World* provided a summary of the facts as follows. The *Staples World* received notice of a special, closed meeting of the Motley Council.

The notice stated:

Notice is hereby given that the Motley City Council will meet in Closed Session on Monday, March 21<sup>st</sup> @ 6:30 p.m. The purpose of the Closed Session is for consideration of the following item:

Discussion of a proposal of a separation agreement with City Clerk.

The *Staples World* wrote:

When we received the initial notice of [the March 21, 2016] closed meeting, the reason given did not seem to me to fit any of the exceptions to the Open Meeting Law. The reporter, Dawn Timbs, asked for the statute under which they were closing the meeting.... The reply was received from [Councilmember] Hutchinson who forwarded an email from the council's labor attorney, Pamela Steckman of Rinke Noonan, St. Cloud, which read "The notice should state 'Closed Session under Minn. Stat. 13D.05, subd. 3.(b) [sic] attorney-client privileged discussion of potential separation agreement with city clerk.'"

The newspaper challenged the closing of the meeting for a couple of reasons, including that the attorney/client privilege exemption did not apply to the March 21, 2016, meeting for the purpose stated in the notice. Neither the attorney nor the Council indicated there was any pending or threatened litigation when asked.

#### **Issue:**

Based on the opinion request, the Commissioner agreed to address the following issue:

Did the Motley City Council comply with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when it closed a special meeting on March 21, 2016, on the basis of attorney-client privilege, Minnesota Statutes, section 13D.05, subdivision 3(b)?

**Discussion:**

The Open Meeting Law requires most meetings of public bodies to be open. One exception to this general rule is that public bodies may close a meeting based on attorney-client privilege. (Minnesota Statutes, section 13D.05, subd. 3(b).)

The Minnesota Supreme Court established the test for the appropriate application of the exception:

To determine whether the attorney-client privilege exception to the Open Meeting Law applies, we balance the purposes served by the attorney-client privilege against those served by the Open Meeting Law. The exception applies when this balancing dictates the need for absolute confidentiality.

*Prior Lake American v. Mader*, 642 NW2d 729, 732 (Minn. 2002) (*Prior Lake American*). (See also *Minneapolis Star and Tribune v. the Housing and Redevelopment Authority*, 251 NW2d 620 (Minn. 1976) (*HRA*).)

The Court further held that because the exception only applies when absolute confidentiality is required, “the scope of the privilege is narrower for public bodies than it is for private clients.” *Prior Lake American* at 737. And that the exception “would almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency.” *HRA* at 626.

Additionally, the Commissioner has issued a number of advisory opinions on this exception. (See Advisory Opinion 99-003, 14-005, 14-015, and 14-017).

In response to the Commissioner, the Council wrote:

At the closed meeting of March 21, 2016, the only item that was discussed was the terms of a proposed separation agreement. Issues had arisen with the clerk working for the City of Motley. Her attorney had threatened litigation. The proposed settlement agreement was meant to resolve the threatened litigation. However, before voting to bind the City to the separation agreement, the City Council had to be advised on the legal ramifications of the proposed terms. The City Council had to be offered advice on whether their legal position with regards to the threatened litigation put them in a position of strength or weakness. Absolute confidentiality was required for this limited discussion.

The Council provided the Commissioner with additional information that was not available to the *Staples World* when it requested this advisory opinion: the City Clerk had retained an attorney and the attorney had threatened the City with litigation. While that information alone is not necessarily a justification to close a meeting, it does represent a significant factor in considering the need for absolute confidentiality.

In weighing the purposes of the privilege, the Council wrote:

This matter had taken the first steps towards litigation. The City needed frank legal advice outside the earshot of the potential opposing litigant. Absolute confidentiality between attorney and client was required under these circumstances to facilitate candid and open discussion between the City Council and the City Attorney regarding matters that could affect litigation, including defense strategy and possible areas of reconciliation.

In weighing the purposes of the OML and the public's right to be informed, the Council determined:

[T]he burden on the interest served by the [OML] is in this case very limited. The public was not deprived of any openly available facts which give rise to the preparation of a separation agreement. The only information the public missed by closing this meeting was the technical details of a legal document and the explanation thereof from the City's attorney.... [U]pon complete resolution of the claims, the final separation agreement will be approved at a public meeting and will become a public document. There is almost no detriment to the public in holding the limited closed session at issue, but there would be great harm to the public had the attorney-client privilege been waived and the meeting opened to the opposing party.

The Commissioner agrees that the balancing test in these circumstances dictates the need for absolute confidentiality and therefore, the Council appropriately relied on the attorney-client privilege exception to the OML.

The Commissioner offers the following additional guidance. Special meeting notices must include the time, date, place and purpose of the meeting. (Minnesota Statutes, section 13D.04, subdivision 2.) Here, the notice did not identify the "place" of the meeting. Also, it would have been helpful for the Council to include the fact that there was threatened litigation in the "purpose" portion of the notice, so that the *Staples World* – and the public in general – could identify and evaluate the authority to close the meeting more easily. Additionally, when closing a meeting, a public body must state on the record the grounds for closing the meeting and describe the subject to be discussed. (Minnesota Statutes, section 13D.01, subdivision 3; see also, *The Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004).) The Commissioner encourages public bodies to make the required statement clearly and unequivocally. (See Advisory Opinions 12-008, 14-014, and 14-015, where the Commissioner opines that public bodies should make the statement on the record in open session, prior to closing the meeting.)

These provisions of the OML, while technical in nature, ensure that the public has some information in the limited circumstances, like those at issue here, where it is excluded from observing the discussion and activity of its public officials.

**Opinion:**

Based on the facts and information provided, the Commissioner's opinion on the issue raised is as follows:

The Motley City Council complied with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when it closed a special meeting on March 21, 2016, on the basis of attorney-client privilege, Minnesota Statutes, section 13D.05, subdivision 3(b).



Matthew Massman  
Commissioner  
June 22, 2016