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### **Advisory Opinion 14-015**

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 August 25, 2014, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Michelle Gross, President of Communities United Against Police Brutality (CUAPB), dated August 24, 2014. In her request, Ms. Gross asked the Commissioner to issue an advisory opinion regarding the Crystal City Council members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML). IPAD required additional information/clarification, which Ms. Gross provided on September 3, 2014.

On September 9, 2014, IPAD wrote to Crystal City Mayor Jim Adams, Chair of the City Council, to inform him of Ms. Gross's request and give the members of the Council an opportunity to explain their position. On September 23, 2014, IPAD received a response, dated same, from Michael Norton and Susan Torgerson, attorneys for the Council.

A summary of the facts as provided by Ms. Gross follows. CUAPB alleges that the City Council violated various provisions of the OML at numerous Council meetings in 2013 and 2014 (discussed in detail below).

#### **Issues:**

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

1. Did the City of Crystal City Council comply with Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law, in email communications with the City Manager on July 31, 2013?
2. Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the Council meeting held August 5, 2013?
3. Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the meeting held on August 20, 2013?
4. Did the City Council comply with Minnesota Statutes, Chapter 13D, at the meeting held on September 3, 2013?

5. Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), section 13D.04, and section 13D.05, at the meeting held on September 17, 2013?
6. Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the meeting held on October 1, 2013?
7. Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), section 13D.04, and section 13D.05, at the meeting held on December 3, 12 and 17, 2013?
8. Did the City Council comply with Minnesota Statutes, section 13D.01, section 13D.04, and section 13D.05, at the meeting held on February 18, 2014?

### **Discussion:**

The Minnesota Supreme Court has found that the provisions of the Open Meeting Law are to be interpreted in favor of the public. The Court said:

Because the Open Meeting Law was enacted for the public benefit, we construe it in favor of public access. *State by Archabal v. County of Hennepin*, 505 N.W. 2d 294, 297 (Minn. 1993); *see St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W. 2d at 6 (stating that the Open Meeting Law “will be liberally construed in order to protect the public’s right to full access to the decision-making process of public bodies.”) *See Prior Lake American v. Mader*, 642 N.W. 2d 729, 735 (Minn. 2002).

**Issue 1.** *Did the City of Crystal City Council comply with Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law, in email communications with the City Manager on July 31, 2013?*

The City Manager emailed all council members, recommending that they postpone an item on the agenda for the August 5, 2013, meeting about a proposed ordinance. She wrote:

In light of the proposed Communities United rally on Monday and the Council’s need to NOT discuss any of Communities United issues due to pending litigation, I am concerned about how it might be perceived if the Council proceeds with consideration of the ordinance amending the city code regarding chickens (the perception that you’re not discussing allegations regarding corruption in the PD but you are willing to consider changes in the city code to allow chickens). I recommend you consider rescheduling the chicken discussion to August 20 - but it is your meeting. Just offering my thoughts - let me know yours.

At least a quorum (four or five) responded only to her; she forwarded each response to all members. In their responses, two members said “yes” or “no,” two discussed community perceptions and gave their reasons for their positions; two used the word “vote” regarding their preferences.

Ms. Gross wrote, “[a] meeting was conducted via email exchange among council members in which voting occurred.... The topic discussed concerned a strategy for managing public perceptions of issues raised by [CUAPB] at their next meeting while still being able to deal with another issue.”

In their response to the Commissioner, Mr. Norton and Ms. Torgerson stated that the council did not hold an improper meeting via email:

Rather, the emails show simply that the City Manager gave information to Council members about a meeting agenda scheduling issue. Some of members gave feedback, but they did not discuss the matter amongst Council members, and they did not make a decision - the decision was made by the City Manager. They did not “vote”, but conveyed some individual opinions to the City Manager.

The Minnesota Supreme Court provided guidance about what constitutes a “meeting” under the OML: “...those gatherings of a quorum or more members of the governing body . . . at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.” (See *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).)

The Commissioner has previously opined that communication via telephone or the exchange of emails can lead to a violation of the OML. (See Advisory Opinions 06-017, 09-020 and 13-015.) In Advisory Opinion 09-020, a quorum of a public body exchanged emails in an attempt to agree on language for a press release. The Commissioner said that a quorum “commented on and provided direction” to the Chair. The Commissioner concluded that the exchange was tantamount to a virtual meeting that was required to be open pursuant to the OML.

Here, the administrator emailed each Council member, a quorum responded to her, and she then forwarded all of their responses to all members. IPAD reviewed the emails Ms. Gross submitted. She characterized the exchange as a discussion of a public relations matter, which is an issue related to official business (similar to the situation in 09-020), but Mr. Norton and Ms. Torgerson asserted that some Council members simply gave feedback to the administrator. Given the differences in opinion here, the Commissioner cannot determine that the Council violated the OML. However, the Commissioner strongly cautions the Council per *Moberg* and *St. Cloud Newspapers, Inc.*, not to “discuss, decide, or receive information as a group,” which would constitute a meeting required to be public.

**Issue 2.** *Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the Council meeting held August 5, 2013?*

**Part A. Special meetings.** 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 a public body to keep a schedule on file at its primary offices. No additional notice is required. 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 on its principal bulletin board or regular meeting room door at least three days before the meeting and it must include the date, time, place, and purpose for the meeting on the notice. (Emergency meetings are not at issue here.)

According to Ms. Gross, the August 5 work session was not listed on the City’s schedule of regular meetings, “... making it a special meeting.”

Mr. Norton and Ms. Torgerson responded to the Commissioner that the Council followed proper procedures, as evidenced by the minutes of the August 5 regular meeting and August 5 work session. They wrote that the Council treats the workshops as regular meetings, “and appropriate notice is given even if they were to be seen as special meetings. The city posts notice of the workshops on its bulletin board and website by Friday of the prior week for Tuesday meetings and by Thursday of the prior week for Monday meetings.” As evidence of those postings, they referred to the workshop agenda.

The Commissioner respectfully disagrees that the August 5 workshop session was a regular meeting. It was not listed on the Council’s regular meeting schedule, and as such was a special meeting, subject to the notice requirements of section 13D.04, subdivision 2.

***Part B. Special Meeting Notice.*** Mr. Norton and Ms. Torgerson stated that the Council posts notice of the workshops “on its bulletin board and website by Friday of the prior week for Tuesday meetings and by Thursday of the prior week for Monday meetings,” thus fulfilling the special meeting notice requirements. The only documentation they provided in support are meeting minutes and a preliminary agenda for the workshop, neither of which definitively documents that the Council posted notice on its bulletin board at least three days prior to the August 5 special meeting work session.

Ms. Gross stated, “... this special meeting was not properly noticed as there was no listing in the newspaper of note for the city, the Sun Post.” However, the Council was not required to post notice of the special meeting in the newspaper, unless it had received a written request for notice of special meetings. If so, then publishing in the newspaper of record is one way a public body may fulfill its obligation to provide notice to persons who have specifically asked to be notified of special meetings. (See section 13D.04, subdivision 2.)

The agenda indicated that the Council would hold a closed work session immediately following the regular council meeting in Conference Room A, and stated that the purpose of the closed work session would be to “discuss pending personnel litigation regarding [two City peace officers].”

The parties disagree and the Commissioner cannot verify that the Council properly noticed the August 5 special meeting work session. The August 5 *agenda* does contain the required content for notice of a special meeting, i.e., the date, time, place, and purpose of the meeting. If the Council posted the agenda as its special meeting notice on its bulletin board three days prior to the meeting, it fulfilled its obligation under section 13D.04, subdivision 2.

***Part C. Closed Meetings: Statement on the Record.*** Ms. Gross also contends that the Council did not make the required statement on the record before closing the workshop meeting. Minnesota Statutes, section 13D.01, subdivision 3, states, “[b]efore 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 closing a meeting: (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. Per Advisory Opinion 06-020:

The Court of Appeals has provided direction on how this language is to be interpreted. In *The Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004), the Court was asked to decide if a statement that a meeting is “being closed for a discussion of pending litigation under the attorney-client privilege” met the requirements of section 13D.01, subdivision 3. In analyzing that statement used by Blue Earth County, the Court found that “attorney client privilege” provided the grounds and “pending litigation” *identified* the subject to be discussed, but did not *describe* the subject as required by the statute. *The Free Press* at 476 (emphasis in the original).

Ms. Gross wrote:

Mayor Adams mentions the closed meeting to follow the regular council meeting but no formal statement on the record was made. .... Adams merely stated the purpose was to hear from staff regarding complaints related to [two police officers]. .... There was no claim that the meeting was being closed for attorney-client privilege.

Mr. Norton and Ms. Torgerson stated that the Council began the work session as an open meeting. They wrote, “[a]fter the start of the work session, the Mayor introduced a closed session for attorney client privileged discussion about pending litigation.” Per *Free Press*, the Mayor’s statement does not adequately describe the subject.

Further, according to the work session meeting minutes, the Council voted to close the session, “for discussion regarding pending litigation.” The only support Mr. Norton and Ms. Torgerson provided was the agenda, which was created before the meeting, and the minutes, which were created afterwards. Neither provides the evidence that the Council made the required verbal statement on the record, giving the specific grounds allowing it to close the meeting, and describing the subject to be discussed. As discussed in Advisory Opinion 14-014:

Chapter 13D does not define the phrase “on the record” in sections 13D.01 and 13D.05. However, the Commissioner has issued numerous opinions on the requirements to close a meeting (see Advisory Opinions 07-018, 13-012, 14-004, and 14-005) and has consistently interpreted those provisions to mean a verbal statement in open session.

Accordingly, based on the record as presented to the Commissioner, and per the holding in *The Free Press*, the City did not comply with section 13D.01, subdivision 3.

***Part D. Closed Meetings: Permissible Topics.*** After a public body gives the statement on the record, it can discuss only those items it adequately described in the statement, and which are permissible topics to discuss in closed session.

Ms. Gross contends that the Council discussed a number of issues that were not described on the agenda, including talking points “for addressing community concerns over a crime Crystal police had refused to investigate and ways to deflect community concerns over police administration corruption....” She provided copies of emails among Council members, City administration, and a private citizen “confirming that these matters were discussed during the closed session.”

Mr. Norton and Ms. Torgerson wrote, “[t]he discussion was privileged, and the emails provided as “proof” of the improper discussion are not supportive of the allegation. .... Litigation status and strategy were the sole topics of the meeting.”

The Commissioner respectfully disagrees with Mr. Norton and Ms. Torgerson. The Minnesota Supreme Court has held that the attorney-client privilege exception to close a meeting 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 has held that an entity as a defendant in a lawsuit can properly close a 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.) (See *Minneapolis Star and Tribune v. the Housing and Redevelopment Authority*, 251 NW 2d 620 (Minn. 1976) and *Prior Lake American v. Mader*, 642 NW 2d 729 (Minn. 2002)).

The City Administrator sent an email to Council members (and the attorney and staff) on August 6, 2013:

As discussed last night, attached is a draft of talking points for use regarding last night’s closed session discussion. Please review and let me know if you’re okay with it. If so, I will use it in responding to calls from the media as well as residents. As we discussed last night, it’s important that we all have use [sic] the same message.

The Administrator also sent the following to a member of the public:

At its August 5 meeting, the Crystal City Council met in closed session to discuss matters protected by attorney-client privilege. A summary of the Council’s discussion during this session is:

- The city council has full confidence in city and police management ....
- The council has been briefed on [certain officers] ... [and] understands the seriousness of personnel issues.
- The council has faith in the process currently underway, but acknowledges that ....
- The council’s goal is to have the process completed and issues resolved as expeditiously as possible.
- Once the process is complete, the council will provide further information to the public

....

The content of the emails demonstrates that the Council’s discussion in closed meeting went beyond “litigation status and strategy,” as evidenced by the bulleted statements above, and the OML does not provide grounds for closing a meeting to discuss those additional topics. Accordingly, the Council improperly discussed the issues detailed above in closed session, because those topics are not among those allowable under Chapter 13D. (See Advisory Opinion 04-004.)

**Issue 3.** *Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the meeting held on August 20, 2013?*

Ms. Gross wrote:

According to the minutes of the closed work session, the council concluded the closed meeting then voted to open the meeting. However, they stayed in the closed meeting room and did not return to the regular council chambers nor did they notify the public, so individuals would not have known they could now enter the meeting to attend the public portion.

Mr. Norton and Ms. Torgerson stated:

The Requestor misunderstands the format of the Council meeting. First, the regular meeting convenes in the large Council chambers. After the regular meeting concludes, the Council holds another open meeting as a “work session” in a smaller room. The work session began as an open meeting. Then the Council may close the meeting with a statement as required by the OML. No violation of the OML occurred. The meeting was closed for attorney-client privileged discussion of pending litigation regarding employee RE. The discussion held was proper and the process for closing and reopening the meeting was appropriate. There is no “closed meeting room”, just a smaller conference room often used for part of the Council meetings.

The purpose of the OML is to provide the public with full access to the decision-making process of public bodies. In Advisory Opinion 12-008, the Commissioner commented, “...the Board needs to review its process and procedures regarding its schedule of regular meetings, and its ‘workshops’ in order to avoid the kind of confusion that resulted here.” The same advice holds for the Council’s meeting format, as it functionally does not assure the public’s right to be informed about the Council’s official actions.

Also in Advisory Opinion 12-008, the Commissioner noted:

Although the OML is silent on whether a public body may adjourn a meeting in closed session, it is the Commissioner’s opinion that meetings should be adjourned or otherwise concluded in open session. Otherwise, the public cannot know if a meeting is adjourned, recessed or continued. As the issues Mr. Wentz raised illustrate, whether or not a meeting has been adjourned, rather than recessed or continued, has implications for a public body’s conduct at subsequent meetings. (See Minnesota Statutes, section 13D.05, subdivision 2(b), and section 13D.04, subdivision 4.)

See also discussion of *Issue 2*, Part A (special meetings), B (special meeting notice) and C (statement on the record), for other issues Ms. Gross raised about this meeting.

**Issue 4.** *Did the City Council comply with Minnesota Statutes, Chapter 13D, at the meeting held on September 3, 2013?*

According to Ms. Gross:

The mayor suddenly announced at the beginning of the open forum that the council will not accept public comment on certain subjects.... This prohibition was not posted on the meeting agenda or meeting notice, which people relied upon to decide to attend the meeting. One person spoke up to respectfully object. The Mayor recessed the meeting to avoid hearing from people. This prevented a community member from speaking about a concern having nothing to do with one of the prohibited subjects. After some time, the meeting reconvened. Individuals attempted to re-enter the meeting however the chamber doors were closed and police blocked people out of the balance of the meeting. Police stated that under orders of the mayor, no members of the public would be allowed back into the room.

Mr. Norton and Ms. Torgerson responded:

The Requestor alleges that a change to procedures for the “open forum” somehow violated the OML. However, local open forum procedures are not an appropriate topic for this review. No provision of the OML applies to this allegation. The Council is allowed to regulate the length and topics addressed in the open forum. *Minn. Stat. 412.191 Subd 2.*

The Requestor alleges that the City’s refusal to allow boisterous persons into the Council chamber somehow created an illegal “closed” meeting. That is not the case. Disruptive individuals need not be allowed into the public meeting room. The Council may maintain order at its meetings. *Minn. Stat. 412.191 Subd 2.*

Mr. Norton and Ms. Torgerson are correct; the OML does not require public bodies to allow for public comment, nor does it prohibit it. In addition, a public body may alter the agenda of a regular meeting as it sees fit. While the result may disappoint or inconvenience a member of the public, the Council’s conduct did not violate the OML.

According to statements Ms. Gross submitted, the Council barred members of the public who remained silent. The Council could properly bar disruptive persons under section 412.191, but did not have authority under the OML to exclude all non-disruptive members of the public, thereby creating a *de facto* closed meeting.

**Issue 5.** *Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), section 13D.04, and section 13D.05, at the meeting held on September 17, 2013?*

See discussion of **Issue 2**, Part A (special meetings), B (special meeting notice) and C (statement on the record).

**Issue 6.** *Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), and section 13D.05, at the meeting held on October 1, 2013?*

See discussion of **Issue 2**, Part A (special meetings), B (special meeting notice) and C (statement on the record).

**Issue 7.** *Did the City Council comply with Minnesota Statutes, section 13D.01, subdivision 3(a), section 13D.04, and section 13D.05, at the meeting held on December 3, 12 and 17, 2013?*

According to Ms. Gross and Mr. Norton,

At the December 3 work session, the Council postponed its evaluation of the City Manager until December 12. That work session was convened as an open meeting and was then closed to discuss labor negotiations and the evaluation of the City Manager. The council held a work session on December 17. At its January 7, 2014, meeting, the Council passed a resolution summarizing its evaluation and reappointing the City Manager.

Pursuant to section 13D.05, subdivision 3(a), a public body may close a meeting “to evaluate the performance of an individual who is subject to its authority. .... At its next open meeting, the public body shall summarize its conclusions regarding the evaluation...”

The Council evaluated the City Manager's performance at its December 12, 2013, meeting. Its next open meeting was December 17, 2013, but it did not summarize its evaluation at that meeting, as it was required to do. Thus, the Council did not comply with the OML regarding its summarization of the City Manager's performance evaluation.

See also discussion of *Issue 2*, Part A (special meetings), B (special meeting notice) and C (statement on the record).

**Issue 8.** *Did the City Council comply with Minnesota Statutes, section 13D.01, section 13D.04, and section 13D.05, at the meeting held on February 18, 2014?*

Ms. Gross wrote:

During the open forum section of the city council meeting, the mayor abruptly stated that the meeting was recessed [at 7:37 p.m.]. .... Council members (except for one member) left the chambers.

After several minutes, police officers came to the chambers and spoke privately to individuals to tell them that the meeting was resuming in another location .... Members of the public were not notified of the new location of the meeting or that it had resumed and thus, they continued to wait for the city council members to return to chambers. Throughout this period, notice was projected on the screen in the council chambers, in the lobby, and on the public access television that the meeting was in recess.

According to statements submitted to the Commissioner, three members of the public followed the officers, and discovered that the Council had resumed meeting in a downstairs room, which was locked. Officers standing at the doors would not admit them without the police chief's approval, which she gave a few minutes later. One of the three returned to the regular meeting room and notified some other members of the public that the Council had resumed the meeting downstairs. At 8:33 p.m., the City Manager told those remaining in the regular meeting room that the meeting was in progress in the other room.

According to Ms. Gross:

While the regular city council meeting was in recess, the council began work session 2 listed on the agenda as starting after the council meeting. They completed one item on that work session agenda, adjourned the work session (using that exact language) and then reconvened the recessed city council meeting. At 8:57 p.m. ... they adjourned the regular council meeting and returned to the work session 2 agenda although that meeting was previously adjourned. Later, the mayor "adjourned" the work session without receiving a motion to adjourn.

During the meetings downstairs, no documents related to the meetings were available to the public.

Mr. Norton and Ms. Torgerson responded:

The allegation is that the meeting was recessed and reconvened in another location. As shown in the minutes ... the Mayor called for a recess because of disruption of the

meeting by certain persons who were refusing to comply with open forum requirements ... The Mayor then reconvened the meeting in another location within the building.

Those who had engaged in the disruption were allowed to attend the continued meeting once they had ceased their disruptive behavior. The Mayor is allowed to adjourn or relocate a meeting because of disruption/disorderly behavior in the meeting. *Minn. Stat. 412.191 Subd 2.*

See discussion of *Issue 4*. Again, Mr. Norton and Ms. Torgerson are correct that the Council may eject individuals who disrupt a meeting, and the OML is silent regarding a public body's right to reconvene a public meeting in a different room. However, by not giving notice to the public, those who remained in the regular meeting room waiting for the recess to end had no opportunity to attend the public meeting the Council was conducting in the downstairs room.

Also, Mr. Norton and Ms. Torgerson did not refute Ms. Gross's statement that a public copy of members' materials was not available in the downstairs meeting room, as required under section 13D.01, subdivision 6.

For the above reasons, the Council did not comply with the OML in its conduct of the meeting.

**Opinion:**

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

1. The Commissioner cannot determine whether the City of Crystal City Council complied with Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law, in email communications with the City Manager on July 31, 2013.
2. The Council's August 5, 2013, "workshop meeting" was a special, not regular meeting. The Commissioner cannot determine whether the City complied with the notice requirements of the OML, regarding Part A (special meetings), or B (special meeting notice). The Council did not properly close the meeting, per section 13D.01, subdivision 3, and section 13D.05 (Part C, statement on the record), and discussed impermissible topics in closed session (Part D).
3. The Council's August 20, 2013, workshop was a special meeting. The Commissioner cannot determine whether the City complied with the notice requirements of the OML. The Council did not properly close the meeting, per section 13D.01, subdivision 3, and section 13D.05 (Part C).
4. The Council did not comply with Minnesota Statutes, Chapter 13D, at the meeting held on September 3, 2013, because it improperly excluded members of the public who were not disruptive.
5. See 2, regarding Part A (special meetings), B (special meeting notice) and C (statement on the record).

6. See 2, regarding Part A (special meetings), B (special meeting notice) and C (statement on the record).
7. See 2, regarding Part A (special meetings), B (special meeting notice) and C (statement on the record). The City Council did not comply with Minnesota Statutes, section 13D.05, subdivision 3(a), at the December 17, 2013, meeting, because it did not provide the summary of its evaluation of the City Manager's performance.
8. See 4. Also, at the meeting held on February 18, 2014, the Council did not comply with Minnesota Statutes, section 13D.01, subdivision 6, because a public copy of members' materials was not available in the downstairs meeting room.



Matthew Massman  
Acting Commissioner

October 23, 2014