

Advisory Opinion 17-005

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2016). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

Joe Begich requested an advisory opinion regarding the Independent School District 2154 – Eveleth-Gilbert Public Schools – school board members’ conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML). Joel B. Lewicki, attorney for ISD 2154, responded on behalf of the Board

A summary of the facts as provided by Mr. Begich follows. Four members of the 2016 Eveleth-Gilbert School Board (the Board) sent a signed letter to the Commissioner at the Iron Range Resource and Rehabilitation Board (IRRRB). The IRRRB Commissioner provided the letter to Mr. Begich and others.

Mr. Begich wrote:

I believe that the four members listed [in the opinion request], as a quorum of the 2016 School Board, violated the Minnesota Open Meeting Law by (in whatever fashion), meeting, discussing, deciding, and then taking action in sending their letter regarding School Board business to Commissioner Phillips, as is evidenced by the *existence* of the letter and Commissioner Phillips’ *receipt* of it.

There is no evidence in any official District meeting minutes or videotapes... that the School Board as a whole and at a legally noticed public meeting, ever discussed or decided upon the content, drafting, or sending of such a letter. [Emphasis provided.]

Issue:

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

Did the School Board of Independent School District 2154, Eveleth-Gilbert, comply with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when four members of the Board sent a letter to a commissioner of the Iron Range Resources and Rehabilitation Board (IRRRB)?

Discussion:

The Minnesota Supreme Court has recognized several purposes for the OML:

(1) “to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies’] decisions or to detect improper influences”; (2) “to assure the public’s right to be informed”; and (3) “to afford the public an opportunity to present its views to the [public body].” These purposes are deeply rooted in the fundamental proposition that a well-informed populace is essential to the vitality of our democratic form of government.

Because the Open Meeting Law was enacted for the public benefit, we construe it in favor of public access. [Citations and footnote omitted.] *Prior Lake American v. Mader*, 642 N.W. 2d 729, 735 (Minn. 2002).

The OML requires meetings of public bodies to be open to the public, with limited exceptions. Minnesota Statutes, 13D.01, subdivision 1(b) provides:

All meetings, including executive sessions, must be open to the public

(b) of the governing body of a

(1) school district however organized.

While the Legislature did not define “meeting” in the OML, the Minnesota Supreme Court held the following:

‘Meetings’ subject to the requirements of the Open Meeting Law are 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. *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) (*Moberg*).

A majority of voting members of a school board constitutes a quorum. (Minnesota Statutes, section 123B.09, subdivision 6.) The District’s Board of Education is made up of seven members and therefore, four members make a quorum.

The Commissioner opined about the type of conduct that should take place at a public meeting in Advisory Opinion 06-017. In that opinion, a City needed to hire an accountant. The first candidate declined the offer and the second candidate quit shortly after starting the job. The Council then had to decide whether to extend an offer to the third candidate. To do so, the City Administrator called four members of the Council (a quorum) and they each stated that an offer should be extended to the third candidate. While there was a factual dispute in that opinion, the Commissioner concluded:

If . . . a majority of the members of the Council took action with respect to the hiring of the accountant, then the OML has been violated. That the city administrator served as the go-between among the members should not change the outcome, given the manner in which the OML is to be construed.

Here, in response to the Commissioner of Administration, the Board wrote:

In early October, Michael Peterson [board member] individually drafted a letter to Mark Phillips, IRRRB Commissioner, but did not send it. Mr. Peterson sent that letter draft to

Superintendent Jeff Carey, who made minor revisions. The revised letter was then placed on Eveleth-Gilbert Public Schools letterhead and given individually to Keith Young, Board Chair; Michael Peterson, Vice-Chair; Mona Putzel, Clerk; and Leon Schanlaub, Treasurer for their signatures.

At no point did a quorum of the Board meet, discuss, decide, or take action on the issue(s) described in the letter, the contents of the letter, or the drafting or sending of the letter. (Citations omitted.)

In this case, a quorum of the school board effectively took the action of deciding to write a letter to the commissioner of the IRRRB stating a quorum of the board's concerns, and position relative to various conversations and actions that were occurring. The Board's assertion that it did not discuss, decide, or take action on the contents of the letter or sending the letter is not plausible based on the very existence of a letter purporting to be from "the Board" and bearing the signatures of a quorum of members of the Board. The subject line is "RE: Official Correspondence." In it, the Board members wrote:

ISD 2154 is governed by elected representatives, and by the Superintendent who takes direction from the Board as a whole, not in part. It is disheartening to see individual Board members and community members muddy the waters that we have already cleared and would appreciate if they would not be given an audience in the future as they do not represent the Board of Education that was elected to make these decisions.

The Board did not provide any other explanation about how the Board could have drafted and issued the letter (including determining which members should sign the letter) without participating in some form of group decision-making. There is nothing in the records of Board meetings about the letter and the Board does not seem to maintain any official records about it. In response to a data request for, "any and all public government data that the District has in relation to the letter [to the IRRRB]," the District replied that it did not have any responsive data. (For a government entity's responsibility to create and maintain official records, see Minnesota Statutes, section 15.17.) In sum, the Board clearly took official action almost entirely outside of the public purview.

Moreover, as the Board stated in its letter to the IRRRB Commissioner, the Superintendent "takes direction from the Board as a whole, not in part," and thus, any actions that the Superintendent took in revising the draft letter, placing it on District letterhead, distributing it to a quorum of members for signatures, and sending it to the IRRRB would have required direction from "the Board" (i.e., communication from a quorum of members where they agreed on the Superintendent's tasks related to the letter).

Finally, the Board argued that written communication does not constitute a "meeting." In support of its argument, the Board cited an unpublished case of the Court of Appeals that held that written communications are not "meetings" under the OML. (*O'Keefe v. Carter*, a12-0811, 2012 WL 6734463 (Minn. Ct. App. Dec. 31, 2012.)) Unpublished opinions of the Court of Appeals are not precedential, pursuant to Minnesota Statutes, section 480A.08, subdivision 3(c). The Board's argument is not relevant here, though, because the official action a quorum of the board took in agreeing to the contents of the letter prior to sending the letter should have occurred at an open meeting. Ultimately, it is not permissible for an individual member of the Board to send a draft

letter to the superintendent to distribute individually to a quorum of the Board in order to avoid taking official action in a public meeting.

However, to address the Board's argument, the Commissioner continues to endorse the reasoning in Advisory Opinion 09-020, that more contemporary forms of written communication (e.g., email and text) could constitute a meeting and that the focus should not be on the media or form, but on the number (a quorum) and the conduct (reaching consensus and taking action) of public body members. As in Opinion 09-020, the Commissioner continues to encourage the Legislature to clarify the extent to which written communication may violate the OML.

Opinion:

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

The School Board of Independent School District 2154, Eveleth-Gilbert, did not comply with the OML when four of members of the Board sent a letter to a commissioner of the Iron Range Resources and Rehabilitation Board (IRRRB).



Matthew Massman
Commissioner

June 22, 2017