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Minnesota House of Representatives

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TO: Sally Olson, Commission Assistant
Legislative Coordinating Commission

FROM: Matt Gehring, 651-296-5052
Mark Shepard, 651-296-5051

RE: Regent Candidate Advisory Council Procedures

You asked us some questions relating to Regent Candidate Advisory Council procedures and operations. This memo provides general guidance to the council and to the Legislative Coordinating Commission. If you would like more detailed legal analysis or applicable case law citations, please let us know.

Quorum

The Regent Candidate Advisory Council has 24 members. The law creating the council (Minn. Stat. § 137.0245) does not set any special requirement for a quorum, so the general rule applies that a quorum is a majority of the membership—in this case, 13 members. If a council establishes committees or subcommittees, a quorum is a majority of the members of that group.

Open Meeting Law

The council likely is subject to the Open Meeting Law in Minnesota Statutes, chapter 13D.[1] For a detailed summary of the Open Meeting Law, see:

http://www.house.leg.state.mn.us/hrd/pubs/openmtg.pdf

The primary requirement of the Open Meeting Law is that meetings must be open to the public. A gathering is subject to the Open Meeting Law if a quorum is present. Minnesota courts also have stated that public bodies should not attempt to avoid the Open Meeting Law by conducting serial meetings of less than a quorum. The Open Meeting Law also applies to a committee or

[1] It could be argued that the councils are not subject to the Open Meeting Law because they are advisory groups. It is not clear if this argument would be upheld by a court. Our understanding is that it has been the practice of these councils, as well as other state councils, to conduct open meetings, so we are assuming the council will follow that law.

subcommittee of a public body, so if the council establishes committees or subcommittees, meetings of a quorum of those groups must be held openly.

A quorum of the council (or any committees that may be established) should not discuss business by telephone or other electronic means, except under conditions prescribed in the Open Meeting Law (Minn. Stat. § 13D.015). Although the Open Meeting Law does not specifically address e-mail, it is a good practice for a quorum of a public body not to use e-mail to discuss business of the public body. One practical application of this concept is that if an e-mail message is sent to all members of the council (e.g., by a citizen or a staff person), council members should not use the "reply to all" feature of the e-mail system to discuss council business.

Data Practices

It is likely that the applications of individuals seeking a position on the Board of Regents are subject to the Minnesota Government Data Practices Act. The part of the act that is most directly applicable to applications received by the council is Minnesota Statutes, section 13.601, subdivision 3, which governs "data about applicants for appointment to a public body collected by a government entity as a result of the applicant's application for appointment to the public body." We believe Minnesota Statutes, section 13.601, governs applications submitted to the Regent Candidate Advisory Council, despite some legal arguments that could be made to the contrary.[2]

Minnesota Statutes, section 13.601, subdivision 3, provides a default that data on applicants for appointment to a public body are private data, except that a list of specific items (including name, city of residence, education and training, employment history, volunteer work, awards and honors, prior government service, and veteran status) are public. In creating candidate application forms, it would be a good practice to disclose to applicants the list of data that this subdivision classifies as public. If an applicant is appointed to the Board of Regents, additional

[2] The legal status of the Regent Candidate Advisory Council under the Data Practices Act is unclear. While the Legislative Coordinating Commission (LCC) is a legislative entity and generally takes the position that it is not subject to the act, the statute establishing the council does not specify directly that the council is an entity of the legislative branch (despite directions to the LCC to provide administrative and support services to the council). This memo is written presuming that the council either is subject to the Data Practices Act, or chooses to follow the terms and spirit of the act even if not legally required to do so.

Minnesota Statutes, section 13.601, applies to applicants for "appointment" to a "public body." While there is not a definition of the term "public body" in the Data Practices Act, we think it is highly likely that a court would interpret it to include the Board of Regents. Additionally, though Minnesota Statutes, section 13.601, subdivision 3, refers only to applicants for "appointment" to a public body, a strong argument can be made that the spirit of the law is intended to also include the process for recommending members of the Board of Regents, even though the legislature eventually elects, instead of appoints, these members. The advisory council's process for screening applicants and making regent candidate recommendations to the legislature is very similar to the process of screening applicants who are ultimately appointed to a position by an appointing authority and do not reflect a more traditional "election" in the way it would likely be understood within the context of the Data Practices Act.

If it were determined that the Data Practices Act applies to the Regent Candidate Advisory Council, but that Minnesota Statutes, section 13.601, subdivision 3, does not apply, then all data contained in a candidate's application would presumptively be public. Because of the sensitive personal nature of some data that an applicant may choose to submit, the best practice may be to err on the side of choosing to protect the application data to the extent permitted under subdivision 3.

data from the application form become public data: residential address, and either a telephone number or e-mail address where the appointee can be reached (or both at the request of the appointee).

Private Data Discussed in an Open Meeting

Special issues arise when the council may wish to discuss private data on applicants. For example, references for applicants are not public data. It does not matter if the references are provided orally or in writing, or if the written document involved contains only the notes of the person checking the reference in a conversation. However, there is no exception to the Open Meeting Law that allows the meeting to be closed to discuss the references. How then does the council discuss the references in an open meeting?

A practical approach is to have the references in written form – and if obtained in a conversation, reduced to written form by the person checking the reference – and then assign each reference a "code" that the council members will use in the open meeting discussion. For example, the written notes of council member Jones on the reference check to Professor X regarding applicant 1, could be labeled "A." In discussing the reference, each member of the council would have the written document that identifies the applicant, the reference, and the staff or council member who obtained the reference but refer only to "A" in discussion. The documents would be available only to the members of the public body and not the public.

The council chair may wish to explain to those attending the meeting what and why the council is doing with respect to reference; that they are about to discuss references, references are not-public data under the law and so the discussion will be in a form meant to protect the subjects of the data. This may help alleviate confusion and preempt requests for data that is not public.

Data that is discussed at an open meeting retains its original classification under the Data Practices Act. For example, private data on references remains private even if it is discussed at a public meeting. However, the record of the meeting is public, regardless of the form. Minn. Stat. § 13D.05, subd. 1(c). Therefore, not-public data that is discussed at an open meeting should not be specifically detailed in the minutes.

Finally, to the extent not-public data is discussed at an open meeting, the public body may do so without liability or penalty if both of the following criteria are met:

- the disclosure relates to a matter within the scope of the public body's authority; and
- the disclosure is necessary to conduct the business or agenda item before the public body. Minn. Stat. § 13D.05, subd. 1(b).

The full text of Minnesota Statutes, section 13.601, subdivision 3, is reproduced at the end of this memo.

Tennessen Warning

If the application form requests that the applicant submit any data beyond those specified as public in Minnesota Statutes, section 13.601, subdivision 3 (responses to essay questions, names

of references, etc.), the data are private data. When requesting private data, Minnesota Statutes, section 13.04, subdivision 2, requires the applicant be provided a Tennessen warning. This statute requires that the individual be informed of the following:

(a) the purpose and intended use of the requested data within the collecting government entity;

(b) whether the individual may refuse or is legally required to supply the requested data;

(c) any known consequence arising from supplying or refusing to supply private or confidential data; and

(d) the identity of other persons or entities authorized by state or federal law to receive the data.

As a best practice, the Tennessen warning should probably appear at the front of the application document. For more information on Tennessen warnings, see:
http://www.ipad.state.mn.us/docs/tw.html

We hope this information is useful; we would be happy to look into this further or provide other assistance to the council on these issues if you would like us to do so.

MG/MS/jv
Attachment

13.601 ELECTED AND APPOINTED OFFICIALS

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Subd. 3. **Applicants for appointment.**

(a) Data about applicants for appointment to a public body collected by a government entity as a result of the applicant's application for appointment to the public body are private data on individuals except that the following are public:

(1) name;
(2) city of residence, except when the appointment has a residency requirement that requires the entire address to be public;
(3) education and training;
(4) employment history;
(5) volunteer work;
(6) awards and honors;
(7) prior government service;
(8) any data required to be provided or that are voluntarily provided in an application for appointment to a multimember agency pursuant to section 15.0597; and
(9) veteran status.

(b) Once an individual is appointed to a public body, the following additional items of data are public:

(1) residential address;
(2) either a telephone number or electronic mail address where the appointee can be reached, or both at the request of the appointee;
(3) first and last dates of service on the public body;
(4) the existence and status of any complaints or charges against an appointee; and
(5) upon completion of an investigation of a complaint or charge against an appointee, the final investigative report is public, unless access to the data would jeopardize an active investigation.

(c) Notwithstanding paragraph (b), any electronic mail address or telephone number provided by a public body for use by an appointee shall be public. An appointee may use an electronic mail address or telephone number provided by the public body as the designated electronic mail address or telephone number at which the appointee can be reached."