

Matt Ehling
Interim chair, Minnesota Coalition on Government Information
1539 Grand Ave.
St. Paul, MN 55105

July 31, 2022

Hennepin County Board of Commissioners
A-2400 Government Center
300 South 6th Street
Minneapolis, MN 55487-0240

RE: Open forum policy

Dear Commissioners,

I am writing to you on behalf of the Minnesota Coalition on Government Information (MNCOGI) - an all-volunteer, non-partisan, non-profit organization focused on government transparency policy. Each year, MNCOGI is active at the Minnesota legislature tracking bills that impact government transparency matters, including those involving the state's Data Practices Act and Open Meeting Law.

We were heavily involved with the most recent legislative update to the remote meeting provisions of Minnesota's Open Meeting Law (OML), and I write to you today regarding that law, and its interaction with the proposed changes you are considering to Hennepin County's "open forum" public comment period.

As Minnesota's largest county government, the actions of the Hennepin County Board will be looked to by other government entities as they evaluate their own meeting policies. As such, MNCOGI believes it is important that the policies implemented by Hennepin County reflect all pertinent requirements of Minnesota law.

MNCOGI has some technical comments regarding the proposed amendment to the Hennepin County Rules of Public Participation (numbered 22-0231). In summary form, those comments are as follow:

Technical comments

1. When a public comment forum is offered during a meeting covered by the OML, that forum is part of the meeting.

2. There are certain situations where broadcasting public comments offered during an OML meeting is a requirement, and not an option.

The detail behind each comment is listed below:

1. When a public comment forum is offered during a meeting covered by the OML, that forum is part of the meeting.

During previous board hearings on amendment 22-0231, some statements were made that the proposed open forum period would not be part of any subcommittee meetings, and that those meetings would actually start once the open forum periods were complete. However, for the purposes of the OML, a “meeting” cannot be subdivided in such a way.

Under the OML as interpreted by the Minnesota Supreme Court, a “meeting” is triggered by the presence of a quorum or more of the members of a governing body who are making decisions; or discussing or receiving information:

“We therefore hold that “meetings” subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, 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. (1983)

Therefore, once a quorum of the members of a governing body are present - and those members have gathered to make decisions or receive information - then the “meeting” has started for the purposes of the OML. If a public comment period occurs while that quorum is present, then the public comment period is *part of the meeting* - it cannot be severed from the meeting, so long as a quorum is present. In the case of the proposed subcommittee open forum, that forum would be part of the larger subcommittee meeting, and would be subject to the OML, just like any other part of that same meeting.

This first point informs the question of whether any broadcast of the open forum would be required by the OML.

2. There are certain situations where broadcasting public comments offered during an OML meeting is a requirement, and not an option.

Generally, the OML does not require a “meeting” to be broadcast or live-streamed. The

OML was first implemented in the 1950s, and its key requirement then (and still today) is that the meetings of certain government bodies be physically open to the public. (*See* Minn. Stat. 13D.01).

As communications technologies have evolved, and as those technologies have been incorporated into governmental meetings, the OML has been updated to include references to such technologies. Where those technologies are permitted by the OML, *specific rules and requirements apply*. The OML has specifically designated sections for technology-enhanced meetings. As relevant to the Hennepin County Board, they are:

1. Minn. Stat. 13D.02, which governs meetings in which some members of a public body can appear via remote technology, and;
2. Minn. Stat. 13D.021, which governs meetings in which all members of a governing body can appear via remote technology - specifically when the regular meeting location has been closed due to an emergency.

Under 13D.02, a commissioner can appear via remote (interactive) technology while their colleagues appear at the regular in-person meeting site (which under 13D.02 is still required to be open to the public.) Under 13D.021, all commissioners can appear via remote technology, in the event that the regular in-person meeting location has been closed due to an emergency determination.

In both of these circumstances, the OML *requires* that these technology-enhanced meetings be broadcast to the public unless technical failures or other emergency circumstances interfere:

“Subd. 3.**Monitoring from remote site.** If interactive technology is used to conduct a meeting, to the extent practical, a public body shall allow a person to monitor the meeting electronically from a remote location.”

- Minn. Stat. 13D.02

“ Subd. 3.**Monitoring from remote site.** If telephone or interactive technology is used to conduct a meeting, to the extent practical, the body shall allow a person to monitor the meeting electronically from a remote location.”

- Minn. Stat. 13D.021

These specific provisions of the OML provide that technology-enhanced meetings “shall”

be broadcast or live-streamed (so that the public can “monitor [them] from a remote location.”) The statute does not use the permissive language of “may” but the directive language of “shall.” Such broadcasts are thus a *requirement* of the OML, and not an option, so long as the broadcast is technically possible.

Therefore, if a Hennepin County Board (or board subcommittee) meeting is held under Minn. Stat. 13D.02 or 13D.021 (and the county is technically able to broadcast the meeting), broadcasting such a meeting is *required* by the OML. For instance, the upcoming public hearings on August 9 are being held under 13D.021:

https://www.hennepin.us/-/media/hennepinus/your-government/leadership/documents/BCD_7-12_-_Legal_Note-Public_Hearing_-_Finance_and_Commerce.pdf

Therefore, those hearings (which will be “meetings” under the OML) are required to be broadcast to the public. (And according to the Hennepin County Board website, it appears that they will be).

Impact on proposed amendment

All of this impacts amendment 22-0231 in the following way:

If the rules are amended to exclude the open forum from being broadcast, then any subcommittee meetings held under 13D.02 or 13D.021 that include an open forum would violate the OML.

Since a quorum of board members would be present for the open forum, a “meeting” under the OML would be underway at that point. If the subcommittee was meeting under 13D.02 or 13D.021, and the open forum was not being broadcast to the public, the meeting would be in violation of the requirements of 13D.02 and 13D.021.

If the subcommittee is operating solely under 13D.01 - the “regular” OML procedures - then there are no broadcast requirements, and broadcasting the meeting (or any portion thereof) would be at the discretion of the public body. However, when the subcommittee (or board) operates under 13D.02 or 13D.021, then the broadcast mandates of the OML are triggered.

Since the Hennepin County Board still appears to be operating under 13D.021 in certain circumstances, this should bear on the board’s consideration of changes to the public participation rules. Specifically, any changes to the public participation policy need to reflect and incorporate the corresponding broadcast requirements of the OML.

Policy recommendation - keep broadcasting open forum period

In addition to the technical comments above, MNCOGI also offers a policy recommendation related to the proposed rules change.

As the purpose of broadcasting meetings of the Hennepin County Board (and its subcommittees) is to permit the public to witness the full operations of these meetings, we feel that the entire meeting - including the open forum period - should be made available as part of the broadcast.

As previously discussed, there will have to be changes made to amendment 22-0231 to ensure that 13D.02 and 13D.021 meetings - and any open forums that are included within them - are broadcast as required by Minnesota law. And if certain open forums would need to be broadcast to comply with 13D.02 and 13D.021, we feel that it makes sense for all other subcommittee open forums (i.e., those occurring at 13D.01 meetings) to be similarly broadcast for the sake of consistency, since the board would already be broadcasting the rest of those 13D.01 meetings.

I plan to appear at Tuesday's board meeting to enter a summary version of these comments into the record, and to be available for any questions by commissioners.

In the meantime, please feel free to contact me at 651-335-2037 or mncogi@gmail.com if you would like to discuss this matter further. Thank you for your consideration.

Sincerely,

Matt Ehling
Interim chair, MNCOGI