

September 11, 2024

To Sally Olson, Legislative Coordinating Commission  
From Nathan Hopkins, Legislative Analyst  
Subject Regent Candidate Advisory Council Procedures

You asked for an update of the August 9, 2012, House Research memorandum<sup>1</sup> regarding legally mandated procedures for the Regent Candidate Advisory Council (RCAC). This memo covers the same subject matter as the 2012 memo, but has been updated to reflect current law—specifically the change in Laws 2023, chapter 62, article 2, section 89, which provides that RCAC meetings are subject to Minnesota Statutes, section 3.055.

### Quorum

The RCAC has 24 members. The law creating the council (Minn. Stat. § 137.0245<sup>2</sup>) states that the RCAC is subject to the legislative Open Meeting Law (Minn. Stat. § 3.055), which provides that a meeting occurs when a quorum is present. But neither law sets any special requirement for what constitutes 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. Furthermore, under section 3.055, a member participating in a meeting remotely via “interactive television” is considered present at the meeting for purposes of determining a quorum.

### Open Meeting Requirements

The RCAC’s statute provides that its meetings (and meetings of any of its subcommittees) “must be open to the public and are subject to section 3.055.” Minnesota Statutes, section 3.055, is the open meeting statute applicable to the legislature. It requires meetings to be open to the public, and defines meeting as any instance where (1) “a quorum is present,” and (2) “action is taken regarding a matter within jurisdiction of the body.” Section 3.055 is enforced exclusively through the legislature’s internal rules and procedures. The law also allows for meetings to be conducted by “interactive television,” which includes online video conferencing tools.

### Data Practices

The RCAC’s statute does not state whether the council is subject to Minnesota’s Government Data Practices Act (GDPA) (Minn. Stat. ch. 13). The legislature and entities within the

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<sup>1</sup> See appendix item A.

<sup>2</sup> The full text of this section is attached as appendix item B.

legislature—e.g. the Legislative Coordinating Commission (LCC)—are not subject to the GDPA,<sup>3</sup> but the RCAC statute also does not clearly state whether the RCAC is a part of the legislature.

For at least four reasons, a court would likely hold that the RCAC *is* a part of the legislature for purposes of the GDPA and therefore is *not* subject to the GDPA's requirements. First, the RCAC was created for the exclusive purpose of assisting the legislature with its unique responsibility of selecting Regents to the University of Minnesota. Second, RCAC members are selected exclusively by the House and Senate leadership (no other person or entity determines any part of RCAC's membership), and the statute anticipates up to one-third of the members being current or former legislators. Third, the statute directs the LCC, which is a part of the legislature, to provide administrative and support services for the advisory council. Fourth, the RCAC is specifically subject to the legislature's open meeting rule (Minn. Stat. § 3.055), not the Open Meeting Law to which other state governmental bodies are subject (Minn. Stat. ch. 13D). All these factors weigh in favor of considering the RCAC a part of the legislature and therefore not subject to the GDPA.

Nevertheless, the GDPA provides governmental bodies with best practices for balancing transparency and privacy. For this reason, the RCAC has historically tried to align its procedures with the requirements of the GDPA. I advise continuing that custom, especially given the law's lack of clarity regarding RCAC's status under the GDPA.

The part of the GDPA 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."<sup>4</sup>

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 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

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<sup>3</sup> This is because the legislature is not included in the GDPA's definition of a "government entity." See Minn. Stat. § 13.02, subd. 7a ("Government entity means a state agency, statewide system, or political subdivision.") These terms are further defined in subdivisions 11, 17, and 18, of that section and do not include the legislative branch.

<sup>4</sup> The full text of Minnesota Statutes, section 13.601, subdivision 3, is reproduced at the end of this memo as appendix item C.

person checking the reference in a conversation. However, there is no exception to the open meeting requirement of section 3.055 that would allow 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. Therefore, not-public data that is discussed at an open meeting should not be specifically detailed in the minutes.

### ***Tennessee 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 Tennessee 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 Tennessee warning should probably appear at the front of the application document. For more information on Tennessee warnings, see:

<https://mn.gov/admin/data-practices/data/warnings/tennessen/>

I hope this information is useful. I would be happy to look into this further or provide other assistance to the council on these issues if needed.

NH/mc

Attachment

# Research Department

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# Minnesota House of Representatives

August 9, 2012

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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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.

### ***Tennessee 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 Tennessee 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 Tennessee warning should probably appear at the front of the application document. For more information on Tennessee 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.”

**137.0245 REGENT CANDIDATE ADVISORY COUNCIL.**

Subdivision 1. **Establishment.** A Regent Candidate Advisory Council is established to assist in determining criteria for, and identifying and recruiting qualified candidates for membership on the Board of Regents and making recommendations to the joint legislative committee described in section 137.0246, subdivision 2.

Subd. 2. **Membership.** The Regent Candidate Advisory Council shall consist of 24 members. Twelve members shall be appointed by the majority leader of the senate. Twelve members shall be appointed by the speaker of the house. Each appointing authority must appoint one member who is a student enrolled in a degree program at the University of Minnesota at the time of appointment. No more than one-third of the members appointed by each appointing authority may be current or former legislators. No more than two-thirds of the members appointed by each appointing authority may belong to the same political party; however, political activity or affiliation is not required for the appointment of any member. Geographical representation must be taken into consideration when making appointments. Section 15.0575 shall govern the advisory council, except that:

(1) the members shall be appointed to six-year terms with one-third appointed each even-numbered year; and

(2) student members are appointed to two-year terms with two students appointed each even-numbered year.

A member may not serve more than two full terms.

Subd. 3. **Duties.** (a) The advisory council shall:

(1) develop, in consultation with current and former regents and the administration of the University of Minnesota, a statement of the selection criteria to be applied and a description of the responsibilities and duties of a regent, and shall distribute this to potential candidates; and

(2) for each position on the board, identify and recruit qualified candidates for the Board of Regents, based on the background and experience of the candidates, their potential for discharging the responsibilities of a member of the Board of Regents, and the needs of the board. The selection criteria must not include a limitation on the number of terms an individual may serve on the Board of Regents.

(b) The selection criteria developed under paragraph (a), clause (1), must include a criterion that regents represent diversity in geography; gender; race; occupation, including business and labor; and experience.

(c) The selection criterion must include an identification of the membership needs of the board for individual skills relevant to the governance of the University of Minnesota and the needs for certain individual characteristics. Individual characteristics relate to qualities such as gender, race, and geographic location of residence.

Subd. 4. **Recommendations.** (a) The advisory council shall recommend at least two and not more than four candidates. By January 15 of each odd-numbered year, the advisory council shall submit its recommendations to the joint legislative committee described in section 137.0246, subdivision 2.

(b) The advisory council must submit a report to the joint committee on the needs criterion identified under subdivision 3, paragraph (c), at the same time it submits its recommendations.

Subd. 5. **Support services.** The Legislative Coordinating Commission shall provide administrative and support services for the advisory council.

Subd. 6. **Public meetings.** Meetings of the council or subcommittees of the council must be open to the public and are subject to section 3.055.

**History:** *1988 c 703 art 1 s 16; 1990 c 383 s 1; 2003 c 133 art 3 s 25; 2005 c 107 art 2 s 47-49; 2007 c 144 art 2 s 44,45; 2009 c 95 art 2 s 32; 2023 c 62 art 2 s 88,89*

**13.601 ELECTED AND APPOINTED OFFICIALS.**

Subdivision 1. **Financial disclosure statements.** Financial disclosure statements of elected or appointed officials which, by requirement of the political subdivision, are filed with the political subdivision, are public data on individuals.

Subd. 2. **Correspondence.** Correspondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient.

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.

**History:** 1979 c 328 s 22; 1981 c 311 s 39; 1982 c 545 s 24; 1984 c 436 s 27; 1999 c 227 s 22; 2005 c 163 s 43; 2008 c 315 s 10; 2012 c 290 s 37