I. RESPONDING TO DATA REQUESTS

A. Initial Considerations. Upon receipt of a data request, consider the following questions as soon as possible in order to develop an appropriate and timely response:

1. Is the request a proper request for data under the Minnesota Government Data Practices Act (“MGDPA”)?
2. Who is requesting the data? Is the requestor a subject of the data?
3. What is the time period for responding?
4. What data exist and where are the data located?
5. How are the data classified?
6. How much can be charged for responding to the request?
B. **To Whom Must a Data Request be Submitted?** A data request must be submitted to a government entity’s “responsible authority” or a “designee” in order to trigger the obligation to respond. In 2017, the Minnesota Court of Appeals expressly ruled that a “person seeking data from a government entity must make his request to the government entity’s specified responsible authority or designee before claiming an MGDPA failure to provide data or failure to provide a reason for denial.” *Scheffler v. City of Anoka*, 890 N.W.2d 437, 447 (Minn. App. 2017), *review denied* (April 26, 2017).

1. **Responsible Authority.** The “responsible authority” is the individual designated by the school board as “the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data, unless otherwise provided by state law.” Minn. Stat. § 13.02, subd. 16(b). The default rule is that a Superintendent serves as the responsible authority until someone else is designated to assume that role. In addition to responding to data requests, the MGDPA imposes many obligations on the responsible authority. See, e.g., Minn. Stat. § 13.08.

   a. The responsible authority should be designated by name, not position. The Department of Administration has taken the position that an “individual” must be designated as responsible authority and that merely designating a position such as “Superintendent” is insufficient. See IPAD Adv. Op. 05, 010, 05-008 & 02-035.

   b. Administrative rules developed by the Department of Administration provide that the responsible authority should create a document to inform the public of his or her name, job title, and business address, along with the names and job titles of any “designees” selected by the responsible authority. This document should be made available to the public and posted in a “conspicuous place.” Minn. R. 1205.1200, subp. 2.

2. **Designee.** A “designee” under the MGDPA is “any person designated by a responsible authority to be in charge of individual files or systems containing government data and to receive and comply with requests for government data.” Minn. Stat. § 13.02, subd. 6. If the responsible authority appoints a designee, the appointment should be made pursuant to a written appointment order. Minn. R. 1205.1100. In addition, the following instruction should be provided to a designee “if the responsible authority deems it necessary:”

   a. A distribution of written materials describing the requirements of the MGDPA and its implementing rules;

   b. Preparation of training programs whose objective is to familiarize personnel with the requirements of the MGDPA and its implementing rules; and
c. Required attendance of designees and other personnel at training programs held within the school district or an outside entity.

C. **What is Government Data?** Any data that is collected, created, received, maintained, or disseminated by any government entity regardless of its form. This includes paper records and files, microfilm, electronic data, etc.

1. **Must Be Recorded.** In order to be “government data” under the MGDPA, information must be recorded in some form.

   a. In *Keezer v. Spickard*, 493 N.W.2d 614 (Minn. App. 1992), a plaintiff sued a county for releasing private data about him. The claim was based upon a conversation between two county employees that was overheard by a citizen. The plaintiff did not recover on his claim because the information had never actually been recorded and never became government data. The mere fact that government employees had heard or were aware of the information did not cause it to become government data.

   b. Once recorded, data become government data regardless of their physical form, storage media, or the conditions of the data’s use. Minn. Stat. § 13.02, subd. 7; see also Minn. Rules, Part 1205.0200, subp. 4. This is true under both the MGDPA and the Records Retention Act (Minn. Stat. § 138.17). The Records Retention Act requires that data or information be created or received in connection with the transaction of public business in order to be subject to its records retention requirements.

   c. The fact that government data may be maintained for only a short period of time is not relevant to determining whether it is “recorded.” For example, in the recent case of *Echo Newspaper v. St. Louis Park Pub. Schools*, 2018 WL 3826264 (Minn. App. Aug. 13, 2018), a student newspaper tried to obtain a copy of school video showing two students allegedly involved in an altercation. The student newspaper tried to argue the school video was not educational data because it was not “maintained” by the school district by virtue of the fact that the school district generally did not retain archived copies of school video and instead only retained footage until it was relooped. The Court of Appeals rejected this argument, noting that the duration of the existence of data is not relevant to compliance with the MGDPA. See also Minn. R. 1205.0200, subp. 4.

   d. The fact that an employee uses his or her own device does not, on its face, mean the data created or received on that device are not government data. See IPAD Adv. Op. 08-028, 12-019. Data on a school district representative’s personal device or in a personal e-mail or social media account is government data if it was created in the course of conducting government business.
2. **Data Derived From Recorded Data.** While data that is not “recorded” in some way is generally not considered “government data” and the *Keezer* decision stands for the proposition that a person’s unrecorded mental impressions are not “government data,” a person’s mental impressions that are derived directly from data recorded in some physical form or storage media could be considered a form of government data. In *Navarre v. South Washington County Schools*, 652 N.W.2d 9 (Minn. 2002), a teacher sued her employer after the employer made a series of written and oral statements related to complaints against the teacher. One of the issues involved in the lawsuit centered on whether statements made by an administrator to a newspaper reporter improperly disclosed private data on the teacher. The Supreme Court ruled that some of the administrator’s statements involved mental impressions that were derived directly from documentation related to allegations against the teacher and were considered private data on the teacher.

3. **Requests Not Covered by MGDPA.** It is fairly common for an individual to try to use the MGDPA to make a request for information that is not a proper data request. The MGDPA requires a response to a request to “inspect or copy information that exists in a recorded form.” See, e.g., IPAD Adv. Op. 99-046. Certain types of information requests are not covered by the MGDPA.

   a. Questions and requests for information that go beyond asking for existing government data are not governed by the MGDPA. IPAD Adv. Op. 99-046, 06-029. For example, a request to create documentation that does not already exist is not a proper data request. Nor is a request for a government official to provide an explanation for a particular course of action or decision if the explanation is not already documented in a recorded form.

   b. The MGDPA does not require government entities to create data, only to provide access (inspection or copies) to data currently in existence. See IPAD Adv. Op. 97-046. A request to organize or reconfigure existing data into a different format, such as a chart, is not a true data practices request. See id.; IPAD Adv. Op. 01-012.

   c. Purely “personal” data is generally not considered government data. The Department of Administration has recognized that there may be situations in which a government entity is in possession of data that are “beyond the purview” of the MGDPA. IPAD Adv. Op. 05-017. For example, if employees are allowed personal use of Internet access, e-mail, or government-owned equipment, data created by an employee in a purely personal capacity is not considered government data if: (1) the employee did not create the data while acting as a government employee or representative and (2) the purpose of the data is not related to the operation of government. Id. In Advisory Opinion 05-017, the Commissioner of Administration opined that the personal e-mails of an employee created pursuant to a policy allowing some personal use of government e-mail and Internet access are not subject to the provisions of the MGDPA.
D. **Data Classifications.** All government data is presumed public and accessible by the public unless otherwise classified in the MGDPA or another federal or state law. Data is not public if “classified by statute, federal law, or temporary classification as confidential, private, nonpublic, or protected nonpublic.” Minn. Stat. § 13.02, subd. 8a.

1. **Data on Individuals.** Data on individuals is “data in which any individual is or can be identified as the subject of that data,” except when identifying information is only incidental to the data and the data are not accessed by the name or other identifying data or other identifying data of any individual. Minn. Stat. § 13.02, subd. 4. The Department of Administration interprets this rather broadly, including data that can be used with other data elements to identify an individual. For example, data specifically identifying “the director of human resources” when the entity employs only one director of human resources would theoretically qualify as data on an individual. Data on individuals is classified into three categories: public data, private data, and confidential data.

   a. **Public.** Data accessible to the public under section 13.03.

   b. **Private.** Data made not public by federal or state law and accessible to the individual data subject. Data is classified as private if a state statute or federal law generally indicates that information is only available to the person whom the data is about or his or her designated representative. Private data on individuals cannot be disclosed to the public unless a valid statute authorizes its disclosure or the individual data subject provides his or her informed consent.

   c. **Confidential.** Data made not public and not accessible to the individual data subject. Pursuant to the Department of Administration’s rules, “data is confidential only if a state statute or federal law provides substantially that certain data shall not be available either to the public or to the data subject; or certain data shall not be available to anyone for any reason except agencies which need the data for agency purposes.” Minn. R. 1205.0200, subp. 3.

2. **Other Types of Data.** Data unrelated to individuals generally involves three classifications: private, non-public, and protected non-public.

   a. **Public.** Data accessible to the public.

   b. **Non-Public.** Data made accessible to the subject of the data, if any, but not the public.

   c. **Protected Non-Public.** Data not accessible to the public or to the subject of the data, if any.

3. **Recent Developments.** A discussion of the specific classifications of various types of data maintained by school districts and charter schools is beyond the scope of this presentation. However, recent developments regarding the treatment
of a data subject’s rights, personnel data and educational data contained on school video are worth noting.

a. **Data Subject Rights.** In 2016, the Minnesota Supreme Court ruled that an individual who is or can be identified as the subject of data has the right to access that data, even if the data identifies other individuals. *Burks v. Metro. Council*, 884 N.W.2d 338, 342 (Minn. 2016). The *Burks* decision involved a citizen’s request for Metro Transit bus video footage showing an altercation between the citizen and a bus driver. The Metropolitan Council unsuccessfully tried to argue that the citizen should not have access to the video because it contained private personnel data on the bus driver. It is unclear how Minnesota’s appellate courts will apply *Burks* under circumstances where educational data is involved, such as a situation involving a video showing a dispute between a student and employee. Educational data is protected from disclosure by state and federal law, which leaves open the argument that *Burks* is preempted by federal law with respect to the disclosure of educational data.

b. **Personnel Data.** In a companion case to *Burks*, the Minnesota Supreme Court developed a “single purpose” standard for determining whether government data is considered personnel data on an employee. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 348 (Minn. 2016). Under this standard, government data is not considered personnel data unless it is maintained because someone is employed by a government entity. If the data are maintained for multiple reasons, the data are not personnel data even if one of the reasons the data are maintained is personnel-related. The “single purpose” standard is applied at the time a data request is made, not at the time data are created.

c. **School Video.** Access to school video has been a hot topic recently, particularly in light of the *Burks* decision and recent advisory information released by the United States Department of Education (“DOE”). In the 2018 case of *Echo Newspaper v. St. Louis Park Public Schools*, 2018 WL 3826264 (Aug. 13, 2018), the Minnesota Court of Appeals held that a school surveillance video showing two students engaged in an altercation is classified as private educational data on the students. In our view, the best approach to take when a parent requests a copy of school video containing educational data on multiple students is to do the following:

i. Deny access to the video footage if it shows multiple students engaged in specific conduct (as opposed to simply being present in a hallway, common area, or on a bus).

ii. Summarize the information about the parent’s child that is depicted in the videos in a way that does not disclose information on other students. This guidance is based on the Department of
Administration’s guidance for audio records as outlined in Advisory Opinion 17-101.

NOTE: The DOE’s current “FAQ” guidance on the treatment of school videos under Family Educational Rights and Privacy Act (“FERPA”), outlines a different approach while acknowledging that the DOE does not provide guidance on state data privacy laws. The DOE’s most recent position is that schools should first try to redact video showing data on multiple students before showing the video to a parent. However, if redaction is not possible or would destroy the meaning of the video, the DOE’s position is that “the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to access the entire record even though it also directly relates to other students.” In our view, the DOE’s guidance is contrary to FERPA’s language explicitly stating that parents may only be informed of information about their child under circumstances where an education record contains information on more than one student. See 20 U.S.C. § 1232g(a)(1)(A).

E. **Right to Access Data.** Any person may access data that are classified as “public” and, upon request, must be informed of the data’s meaning. Minn. Stat. § 13.03, subd. 3(a). An individual who is the subject of data has the following rights (Minn. Stat. § 13.04, subd. 3):

1. Upon request to the responsible authority or designee, the individual must be informed whether he or she is the subject of stored data on individuals, and whether it is classified as public, private or confidential.

2. The individual who is the subject of stored private or public data must be shown the data without charge and, if desired, must be informed of the content and meaning of that data.

3. After the individual has been shown the private data and informed of its meaning, the data need not be disclosed again for six months unless a dispute or action under the MGDPA is pending or additional data on the individual has been collected or created.

F. **Deadlines for Responding to Requests for Data.** The time frame for responding to a request for data depends on the nature of the data being requested.

1. **Subject of the Data.** When an individual requests access to private data of which he or she is the subject, or a parent requests access to data on a minor child, the school district must provide access to the data within ten (10) days, excluding Saturdays, Sundays and legal holidays, if immediate compliance is not possible. Minn. Stat. § 13.04, subd. 3. The definition of “individual” includes a parent or guardian, or one acting as a parent or guardian in the absence of a parent or guardian, where the subject of the data is a minor or a person adjudged mentally incompetent. Minn. Stat. 13.02, subd. 8.
2. **Other Data Requests.** Unless an individual is requesting data of which he or she is the subject, a school district or charter school must reply within a reasonable time. Minn. Stat. § 13.03, subd. 1 & 3(c); Minn. R. 1205.0300. The definition of “reasonable time” may vary on a case by case basis depending on the complexity of the data request. However, the request should be addressed as soon as possible.

3. **Determining a “Reasonable Time.”** There is no bright-line rule for determining how much time is “reasonable” for responding to a data request that is not subject to the ten-day standard outlined above. With that said, the MGDPA imposes obligations that are clearly designed to eliminate unnecessary delays caused by tracking down data or a government entity’s failure to have established procedures for handling data requests.

   a. The MGDPA requires government entities to maintain records in “such an arrangement and condition as to make them easily accessible for convenient use.” Minn. Stat. § 13.03, subd. 1. The Department of Administration, which issues advisory opinions regarding MGDPA compliance, routinely references this statutory requirement when it is asked to weigh in on whether a response to a particular data request was timely.

   b. There is a separate requirement that government entities develop procedures to ensure that data requests are received and complied with in an appropriate and prompt manner. Minn. Stat. § 13.03, subd. 2(a). While the Minnesota Supreme Court has observed that procedures do not need to be written down in order to comply with this requirement, an untimely response to a data request is evidence that a government entity’s “established procedures” are not adequate. *Webster v. Hennepin Cty.*, 910 N.W.2d 420, 432 (Minn. 2018).

G. **Inspection vs. Copying and Permissible Charges.**

1. **Inspection.** A person cannot be assessed a charge for inspecting government data. Inspection of data is free. Minn. Stat. § 13.03, subd. 2(a).

   a. Inspection generally includes a visual inspection of paper, electronic, or similar types of data. Minn. Stat. § 13.03, subd. 3(b). Inspection does not include printing copies, unless printing a copy is the only method through which the district may provide for inspection of data. *Id.*

   b. A person’s ability to inspect data may be limited to reasonable times and locations. For example, it is reasonable to require individuals to inspect data in a suitable location on school grounds during normal business hours.

   c. An individual may use a personal device, such as a smartphone camera, portable scanner, or portable printer, to scan or print copies of data while conducting an inspection without having to pay the charge that would
otherwise apply to a request for copies. The Department of Administration has opined that it is not reasonable for a government entity to impose a charge when an individual uses personal equipment to scan, photograph, or make physical copies of data absent exceptional circumstances where a government entity can show the requestor is using a measurable amount of government resources to create copies of data. See, e.g., IPAD Adv. Op. 01-086.

2. **Copying.** A person may be assessed a charge for obtaining copies of government data. The scope of permissible charges depends on the nature of the data request.

a. **Redaction Costs Cannot Be Recovered.** A person may not be charged for the costs associated with separating public from nonpublic data (i.e. “redacting” documents prior to disclosure). Minn. Stat. § 13.03, subd. 3(c).

b. **Permissible Costs for Data Subject.** If a person requests copies of data and is the subject of the requested data, the person may be charged the “actual costs of making and certifying copies.” Minn. Stat. § 13.04, subd. 3. This will be a modest amount of money in almost all cases.

c. **Permissible Costs Generally.** If a person requests copies and is not the subject of the requested data, there is a larger universe of permissible charges.

i. The general standard is that the person may be charged “the actual costs of searching for and retrieving government data, including the cost of employee time, and for making, certifying, and electronically transmitting the copies of the data or data.” Minn. Stat. § 13.03, subd. 3(c).

ii. If 100 or fewer pages of black and white, letter or legal size paper copies are requested, “actual costs” are not used and the government entity may instead impose a charge of no more than 25 cents for each page copied. Minn. Stat. § 13.03, subd. 3(c).

iii. If a government entity maintains data that has “commercial value” and is compiled or created in a way that involved a significant expenditure of public funds, a person may be required to pay a reasonable fee associated with the actual development costs of the information. Minn. Stat. § 13.03, subd. 3(d). (NOTE: This scenario is extremely rare).

d. **Calculating “Actual Costs.”** “Actual costs” are construed fairly narrowly. When it comes to staff time, the district is limited to specific time spent searching for the data, retrieving the data, and actually making the copies/transmitting the data. See, e.g., IPAD Op. 04-003; IPAD Op. 05-016. In addition, depreciation of equipment or other overhead
expenses almost always may not be included in the “actual costs” computation because equipment such as a copier is often used for purposes beyond simply responding to data requests. See IPAD Op. 01-066. The following factors may be used by the district for guidance in determining what constitutes a reasonable fee: (Minn. R. 1205.0300, subp. 4)

i. The cost of materials, including paper, used to provide the copies;

ii. The cost of the labor required to prepare the copies;

iii. Any schedule of standard copying charges as established by the District in its normal course of operations (NOTE: The existence of a fee schedule does not automatically justify copying charges; the charge listed on the schedule must be based on the actual costs of making copies and must not be designed to impose an additional fee above that amount. See, e.g., IPAD Adv. Op. 03-013);

iv. Any special costs necessary to produce the copies from machine based record keeping systems, including computers and microfilm systems; and

v. Mailing costs.

Another factor to consider when determining the actual cost of searching for and retrieving data is the fact that the district is required to maintain its data such that they are easily accessible for convenient use. Minn. Stat. § 13.03, subd. 1.

e. Employee Time. When employee time is incorporated into a charge for responding to a data request, a government entity must use the rate of the lowest compensated person qualified to handle a particular task. For example, it is not appropriate to charge the rate of an administrator, such as the Superintendent, for work that could be performed by a clerical employee. Benefits and salary may be used to calculate a rate for employee time. See, e.g., IPAD Op. 04-055.

f. When is a Requestor Responsible for Payment? The obligation to pay for copies of government data is triggered when an individual makes a request for copies, not when the individual actually receives copies of data. Wotzka v. Minnesota Dept. of Ag., 2011 WL 5829346 (Minn. App. Nov. 21, 2011). In Wotzka, an individual made a request to inspect approximately 11,000 documents. He was informed that he would be allowed to inspect data at no cost, but would be charged $1.67 per document if he made any copies. He then requested copies of 3,477 documents for which he was assessed a fee of $5,806.59. He did not pay the fee and did not receive copies of any documents. When he attempted to challenge the fee in a lawsuit, the Minnesota Court of Appeals upheld the fee and ruled that the requestor’s obligation to pay the fee was triggered at the time he requested copies of data. The court noted that the
requestor knew of the fee at the time he requested copies and that the only reason the requestor did not receive data was that he refused to pay the fee.

3. **Hybrid Requests.** If a person initially asks to inspect documents and, upon inspection, requests copies of only certain documents, the appropriate charge for “searching and retrieving” the documents is a pro-rated amount based on the amount of data actually copied and the total time it took to gather documents for the person’s inspection. See, e.g., IPAD Adv. Op. 04-038 (June 4, 2004); Wotzka, 2011 WL 5829346 (Minn. App. Nov. 21, 2011).

4. **Summary Data.** “Summary data” are “statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable.” Minn. Stat. § 13.02, subd. 19. Costs associated with the preparation of summary data are to be borne by the individual who requests the data. Minn. R. 1205.0700, subp. 7. The anticipated costs may be collected from the requestor “prior to preparing or supplying the summary data.” Id. Within ten days of receiving a request for summary data, a school district generally must either provide the summary data requested or provide a written statement describing a time schedule for preparing the summary data, including the reasons for any delays. Id. at subp. 4.

**H. When May Identification be Required?** Generally, a school district may not require an individual who is making a data request to disclose his or her identity or the reasons for a request. However, it may be reasonable to ask for a requestor’s contact information in order to facilitate the preparation and disclosure of copies. In addition, government entities are responsible for establishing reasonable measures to ensure that an individual who claims to be the subject of data requested or the authorized representative of the subject of the data requested is, in fact, who the person claims to be. Minn. R. 1205.0400, subp. 3. For example, a government entity could:

1. Require the person seeking to gain access to appear at the offices of the entity to gain such access or, in lieu of a personal appearance, require the signature of any data subject who is unable to appear at the offices of the entity; and

2. Require the person to provide reasonable identification.

**I. Format for Responding to Data Requests.** The best practice is to respond to a data request in writing, although a written response is not specifically required under the MGDPA. If there are no data responsive to a data request, the requestor should be so informed. If the requested data are protected from disclosure, the requestor must be informed orally at the time of the request (or in writing as soon thereafter as possible) of the fact that the data are protected from disclosure, along with the specific authority protecting the data from disclosure. Minn. Stat. § 13.03, subd. 3(f). Upon request from the person denied access, a government entity must certify in writing that a data request was denied and cite the specific legal basis for denying the request. Id.
**J. Informed Consent for Release of Private Data.** A data subject may consent to the disclosure of his or her private or confidential information to a third party. Consent must be *informed*, meaning “the data subject possesses and exercises sufficient mental capacity to make a decision which reflects an appreciation of the consequences of allowing the entity to initiate a new purpose or use of the data in question.” Minn. R. 1205.1400, subp.

1. Consent must be provided in writing.

2. Consent can be partial. In other words, a data subject may consent to the disclosure of some private data, but withhold his or her consent for the disclosure of other private data.

3. A data subject may withdraw his or her consent at any time. Consent automatically terminates one year from the data of authorization, unless an earlier data is specifically provided in the written consent or the data subject revokes his or her consent.

**K. No “Undue Burden” Exception.** Minnesota courts do not currently recognize an “unduly burdensome” exception that would allow government entities to refuse to respond to burdensome data requests. The Minnesota Court of Appeals specifically declined to read this type of exception into the MGDPA in a 2017 lawsuit involving extensive data requests submitted to Hennepin County. *Webster v. Hennepin Cty.*, 2017 WL 1316109, at *6 (Minn. Ct. App. Apr. 10, 2017), *review granted* (May 30, 2017), *aff’d in part, rev’d in part, dismissed in part*, 910 N.W.2d 420 (Minn. 2018). However, the Department of Administration has previously opined that a government entity is not required to respond to a data request when responding to the data request would yield an “absurd and unreasonable” result. In that situation, an individual demonstrated a clear and consistent pattern of asking for enormous volumes of data to be prepared for her by multiple government agencies and then refused to view the data that was prepared for her unless it was provided only as she specified. The Department of Administration opined that it would make a “mockery” of the MGDPA to require the agencies to ignore that history and prepare “huge amounts of data that might never be examined.” *IPAD Adv. Op. 01-031."

**L. Ten Tips for Dealing with Difficult Requestors.**

1. Require a data request to be reduced to writing and directed to the appropriate person. A data request must be submitted to the responsible authority or another employee properly designated by the responsible authority to handle data requests. For example, data requests should not be submitted to school board members.

2. Promptly acknowledge data requests in writing, even if the acknowledgment simply states that the request was received and is being reviewed. Providing the requestor with periodic updates about the status of the request will be helpful if the requestor tries to argue that he or she did not receive a timely response.
3. If a person makes a vague or confusing request, define how the school district will interpret the request, inform the requestor in writing how the school district is interpreting the request, and notify the requestor that he or she is responsible for providing clarification if there is disagreement about how the school district interprets the nature of the request.

4. Unless there is a political reason to do so, avoid providing responses that are not required under the MGDPA. As noted above, the MGDPA does not require a response to requests or demands that do not involve a request to inspect or copy information that exists in a recorded form. Similarly, a school district is not required to create data in response to a data request.

5. Do not provide copies when a person is only asking to inspect data. For example, a request to “inspect” data by receiving a copy of a record by e-mail is a request for a copy, not a request for inspection. A person who asks to inspect data should be required to inspect the data at a suitable location on school district grounds during normal business hours.

6. Require payment before providing copies of data. As noted in the Wotzka decision, an individual’s obligation to pay for copies arises when the request is made and not when copies are actually provided.

7. If responding to a data request will require a significant amount of employee time, consider requiring prepayment of estimated charges before starting the process of gathering data. This practice is consistent with the Wotzka decision, which stands for the proposition an individual is obligated to pay costs associated with a data request at the time the request for data is made.

8. Avoid engaging in e-mail exchanges with individuals who cannot use e-mail in a professional and respectful manner. Often times, difficult requestors will use e-mail to demand immediate responses to data requests, make numerous data requests within a short period of time, or to otherwise engage in personal attacks and disrespectful behavior. A good technique for responding to inappropriate e-mail behavior is to send responses by U.S. Mail in lieu of e-mail. In addition, in extreme cases, school districts have the right to block e-mails from individuals who utilize e-mail as a tool to engage in harassing behavior.

9. Always be mindful of the deadline for responding to a request. If a reasonable time for responding to a data request will be weeks or, in extreme cases, months, the requestor should be periodically informed of the status of the request and the reasons for any delays in responding to the request.

10. Always respond to a data request in writing. If there are no data in response to a request, the written response should notify the requestor that no data exist. If data are being withheld, the written response should inform the requestor of the specific legal basis for not disclosing any data that are being withheld.
II. PUBLIC PARTICIPATION IN OPEN MEETINGS

A. What is a meeting? Although the Open Meeting Law does not include a definition of a “meeting,” the Minnesota Supreme Court has defined a meeting under the Open Meeting Law as a “gathering 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 Sch. Dist. No. 281*, 336 N.W.2d 510 (Minn. 1983) (emphasis added).

1. Essentially, any “scheduled” gathering of all members of the Board must comply with the requirements of the Open Meeting Law, whether or not action is taken. *Moberg*, 336 N.W.2d at 516.

2. Even if a quorum of the public body is present, “chance or social gatherings” are not covered by the law. A gathering of this nature, however, cannot be used to conduct official business unless the notice requirements discussed below have been met. *St. Cloud Newspapers v. District 742 Cmty. Schs.*., 332 N.W.2d 1 (Minn. 1983); *Moberg*, 336 N.W.2d at 516.

B. What is a serial meeting? A serial meeting is essentially a string of communications between individual Board members that would collectively equate to communications among a quorum of Board members. For example, an e-mail chain that eventually is circulated to a quorum of Board members or a series of telephone calls from one Board member to another that eventually includes a quorum of Board members.

1. Serial meetings of less than a quorum may be found to violate the law if the facts and circumstances indicate the purpose was to avoid the requirements of the Open Meeting Law or to reach an agreement on an issue before a public meeting. *Moberg*, 336 N.W.2d at 518.

2. The Minnesota Supreme Court has rejected the argument that a discussion between two Board members, outside of an open meeting, about a matter pending before the Board is an absolute or automatic violation of the law. The Court noted that public officials have a duty to persuade each other in an attempt to resolve issues, and the public benefits from this, so long as the discussion is not “designed to avoid public discussion altogether, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.” *Moberg*, 336 N.W.2d at 517-18.

C. School Board Committees and Subcommittees. The requirements of the OML also apply to committees and subcommittees of School Boards if the committee or subcommittee possesses decision-making authority on behalf of a School Board. See, e.g., Minn. Stat. § 13D.01, subd. 1; *Minnesota Daily*, 432 N.W.2d at 189. Decision-making authority will be presumed where members of the committee constitute a quorum of the governing body. *Sovereign v. Dunn*, 498 N.W.2d 62 (Minn. App. 1993).
making authority can also arise when the Board delegates the authority to a committee. *Id.*

**D. Notice Requirements.** The notice requirements of the Open Meeting Law vary depending on the type of meeting: regular, special, emergency, and recessed/continued.

1. **Regular Meetings.** A schedule of the Board’s regular meetings must be kept on file at a School District’s primary office. Minn. Stat. § 13D.04, subd. 1. If a regular meeting is going to be held at a time or place different than listed on its schedule, the board must provide notice of the meeting in the same manner as for a special meeting. *Id.*

2. **Special Meetings.** Notice of a special meeting generally must be posted three days in advance of the meeting. Minn. Stat. § 13D.04, subd. 2(a). Three days means 72 hours. The notice must state the date, time, place and purpose of the meeting, and it must be posted on the School Board’s principal bulletin board. *Id.* The principal bulletin board has to be located in a place that is “reasonably accessible to the public.” *Rupp v. Mayasich,* 533 N.W.2d 893 (Minn. App. 1995). If there is no principal bulletin board, it must be posted on the door of the regular meeting room. Minn. Stat. § 13D.04, subd. 2(a). Notice of the special meeting must also be provided by mail or another form of delivery to each person who has filed a written request for notice of special meetings. *Id.*, subd. 2(b). In the alternative, the Board can publish notice in an official newspaper three days before the special meeting. *Id.*, subd. 2(c).

3. **When is a Special Meeting Notice Required?** The School Board should post a special meeting notice for any meeting or work session that is not listed on the School Board’s schedule of regularly scheduled meetings. See IPAD Adv. Op. 14-015.

4. **Emergency Meetings.** An emergency meeting is defined as a meeting called because of circumstances that, in the judgment of the public body, require immediate consideration by the public body. Minn. Stat. § 13D.04, subd. 3(e).

   a. **Emergency Meeting Notice.** Notice of the emergency meeting shall be given by telephone or by any other reasonable method to members of the public body. Minn. Stat. § 13D.04, subd. 3(b). The public body must also make a good faith effort to provide notice to news media that have filed a request for notice of emergency meetings if the request includes the news medium’s telephone number. *Id.*, subd. 3(a).

   b. **Emergency Meeting Topics.** The emergency meeting notice must include the subject of the meeting. Posted or published notice of an emergency meeting is not required. Minn. Stat. § 13D.04, subd. 3(d). However, if matters not directly related to the emergency are discussed or acted upon at an emergency meeting, the meeting minutes shall include a specific description of the matters discussed. *Id.*, subd. 3(f).
5. **Recessed or Continued Meetings.** Published or mailed notice is unnecessary for a recessed or continued meeting as long as the time and place of the meeting were established during the previous meeting and recorded in the previous meeting’s minutes. Minn. Stat. § 13D.04, subd. 4(a).

6. **Closed Meetings.** The same notice requirements apply to a regular, special or emergency meeting that is closed. Minn. Stat. § 13D.04, subd. 5.

**E. Materials for the Meeting.**

1. **Materials Available to the Public.** At least one copy of the agenda and any other written materials that are: 1) distributed to all members at the meeting; 2) distributed to all members before the meeting; or 3) available to all members in the meeting room must also be available in the meeting room for public inspection while the public body considers the subject matter. Minn. Stat. § 13D.01, subd. 6(a).

2. **Materials Not Available to the Public.** There are two general exceptions: 1) data classified as non-public under the MGDPA; and 2) data relating to matters discussed at a closed meeting. See Minn. Stat. § 13D.01, subd. 6(b).

**F. Records of Proceedings.** A School Board is required to maintain records of the votes of School Board members in a journal that must be available to the public. Minn. Stat. § 13D.01, subds. 4, 5. In addition, Minnesota’s Official Records act requires a School Board to “make and preserve all records necessary to a full and accurate knowledge of [its] official activities. Minn. Stat. § 15.17.

**G. Closing a Meeting.** A meeting cannot be closed simply because private or confidential data will be discussed, unless one of the exceptions discussed below is met. So long as the meeting is not required to be closed, private data can be discussed in public without liability or penalty if the disclosure relates to a matter within the scope of the public body’s authority and is reasonably necessary to conduct the public body’s business. Data discussed in an open meeting will retain the data’s original classification, but a record of the meeting, regardless of form, shall be public. Minn. Stat. § 13D.05, subd. 1

**H. Circumstances in Which a Closed Session is Required**

1. **Discussion of Certain Types of Data.** Any portion of a meeting must be closed if expressly required by a specific law or if the following types of data are discussed, including but not limited to:

   a. Data identifying victims or reporters of criminal sexual conduct, domestic abuse, maltreatment of minors or vulnerable adults.
b. Active investigation data relating to child abuse or neglect, as defined in Minn. Stat. § 13.82.

c. Internal affairs data relating to allegations of law enforcement personnel misconduct.

d. Education data, health data, medical data, welfare data and/or mental health data defined as not public data under the MGDPA.

**NOTE:** Private personnel data is not specifically included in this list. Unless data on an employee falls within one of the categories listed above, a meeting cannot be closed to generally discuss “private personnel data.”

2. **Preliminary Consideration of Charges Against an Employee.** A meeting must be closed for preliminary consideration of allegations or charges against an employee or another individual under the school district’s authority. Minn. Stat. § 13D.05, subd. 2(b).

   a. **Open Upon Request.** The meeting must be open if the employee requests an open meeting. Since an employee cannot exercise this right if he or she is not aware of the closed session, we generally advise school districts to notify an employee who will be the subject of a closed session in advance of the meeting.

   b. **Effect of Determination that Discipline is Warranted.** If the public body concludes that discipline may be warranted as a result of the allegations or charges, future meetings related to the allegations or charges must be open. *Id.*

I. **Circumstances in Which a Closed Session is Permitted, but not Required**

1. **Labor Negotiations.** A meeting may be closed to discuss strategy for labor negotiations, but the closed meeting must be tape recorded and the tape retained for two years after the contract is signed. Minn. Stat. § 13D.03. The recording must be available to the public after all contracts are settled for the current budget period. *Id.*, subd. 2(b). A majority vote is required to close the meeting. *Id.*, subd. 1(b). A written roll must be taken of the members and other persons present at the closed meeting and made available to the public after the meeting. *Id.*, subd. 1(d).

2. **Performance Evaluations.** A meeting may be closed to evaluate an employee’s performance. Minn. Stat. § 13D.05, subd. 3(a). The meeting must be open if the employee requests that it be open. *Id.* Before the meeting is closed, the employee must be identified. *Id.* If the meeting is closed, it must be tape recorded, and at the next open meeting, the public body must summarize its conclusions regarding the evaluation. *Id.*
a. IPAD has opined that the board must “summarize each salient point of the evaluation so that the public is given the opportunity to get the best possible sense of the performance – good, bad, or indifferent – of the public employee.” IPAD Adv. Op. 15-002.

b. IPAD has concluded that the following statements were insufficient to fulfill a public body’s statutory obligation to summarize its conclusions regarding an evaluation:

i. “[The board] discussed the superintendent’s strengths and weaknesses.”

ii. “As a result of that review, strengths were noted and areas of improvement were defined. The board developed goals regarding communication and leadership.”

iii. “Areas of growth were identified and [the superintendent’s] evaluation is an ongoing process.”

iv. Regarding an evaluation that was conducted at a workshop, “I wasn’t at the actual workshop because I was out of town. But I’ll summarize what I think happened and you guys can affirm it. Basically we talked about [the city administrator’s] performance, her strengths, weaknesses, where she needs improvement. Overall, I think it was satisfactory.” Two council members responded, “Nope, that’s about right” and “That’s pretty close.”

3. **Attorney-Client Privilege.** A meeting may be closed if permitted by the attorney-client privilege. Minn. Stat. § 13D.05, subd. 3(b). The extent of the privilege for closing an open meeting, however, is not as broad as the privilege in other contexts. Generally, a meeting may be closed to discuss matters pertaining to pending or threatened litigation. A meeting cannot be closed to seek general legal advice that is basic to the deliberative process of any public body. This exception to open meeting requirements is reserved for situations in which there is a need for “absolute confidentiality.” *Prior Lake American v. City of Prior Lake*, 642 N.W.2d 729, 737 (Minn. App. 2002).

4. **Acquisition/Sale of Land.** A school board may close a meeting to: (1) determine the asking price for real or personal property to be sold by the school district; (2) to review an appraisal of real property that is classified as confidential or nonpublic under Minn. Stat. § 13.44, subd. 3; and (3) to develop or consider offers or counteroffers for the purchase or sale of real or personal property.

a. Before holding a closed meeting under this paragraph, the public body must identify on the record the particular real or personal property that is the subject of the closed meeting.
b. The proceedings of a meeting closed under this paragraph must be tape recorded at the expense of the school board. The recording must be preserved for eight years after the date of the meeting and made available to the public after all real or personal property discussed at the meeting has been purchased or sold or the school board has abandoned the purchase or sale. The real or personal property that is the subject of the closed meeting must be specifically identified on the tape.

c. A list of members and all other persons present at the closed meeting must be made available to the public after the closed meeting.

d. An agreement reached that is based on an offer considered at a closed meeting is contingent upon approval of the public body at an open meeting. The actual purchase or sale must be approved at an open meeting.

5. Security Briefing. A meeting may also be closed to receive security briefings and reports, to discuss issues related to security systems, to discuss emergency response procedures and to discuss security deficiencies in or recommendations regarding public services, infrastructure and facilities, if disclosure of that information would pose a danger to public safety or compromise security procedures or responses. Minn. Stat. § 13D.05, subd. 3(d).

   a. Financial Decisions. Financial issues related to security matters must be discussed and all related financial decisions must be made during open session.

   b. Subject of Security Briefing. Before closing the meeting, the public body must describe the subject to be discussed and refer to the facilities, systems, procedures, services or infrastructure to be considered during the closed meeting. The closed meeting must be tape recorded, and the tape preserved for at least four years.

J. Procedures for Closed Meetings

1. Statement by the Board on the Record Required. During the open portion of the meeting, the public body must state the specific basis for closing the meeting and describe the subject matter that will be discussed in the closed portion of the meeting. Minn. Stat. § 13D.01, subd. 3. The specific basis should not include any non-public data. An advisory opinion from IPAD stands for the proposition that a school’s legal counsel or executive director cannot satisfy this statutory requirement. IPAD Op. Adv. 14-005. Instead, the board itself must make the required statement on the record.

2. Vote. The School Board should vote to go into a closed session. A member should make the motion to go into closed session, the motion should be seconded, and then the School Board should vote on the matter.
3. **Statement Example.** A best practice is to have the School Board Chair make the required statement on the record before the School Board votes to go into a closed session. The following is an example of a statement a Board Chair could make prior to closing a meeting for preliminary consideration of allegations against an employee. Note that this statement also includes a motion to close the meeting.

   The next item on the agenda is a closed session for preliminary consideration of allegations against an employee. Minnesota’s Open Meeting Law, specifically Minnesota Statutes Section 13D.05, subdivision 2(b), states that a School Board must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority unless the individual requests an open meeting. In this case, the individual has not requested an open meeting. While in closed session, the Board will discuss the allegations. Pursuant to the law I have cited, I hereby move to close the meeting for preliminary consideration of allegations against an employee.

4. **Recording.** All closed meetings must be recorded at the expense of the School Board, unless the meeting is closed under the attorney-client privilege. Unless the Open Meeting Law or another law specifically provides otherwise, the recordings must be preserved for at least three years after the date of the meeting. Minn. Stat. § 13D.05, subd. 1(d).

5. **Materials.** Materials reviewed in a closed meeting should not be distributed to the public. The meeting minutes should simply state that a closed meeting was held and describe the legal basis for closing the meeting.

K. **Remote Participation.**

1. **Interactive Television.** A school board may use interactive television to conduct a meeting if the school board complies with the following requirements:

   a. All members of the board must be able to hear and see one another and hear and see all discussion and testimony presented at any location at which at least one member is present.

   b. Members of the public present at the regular meeting location must be able to hear and see all discussion and all votes of board members.

   c. At least one member of the board must be physically present at the regular meeting location.

   d. Each location at which a member of the board is present must be open and accessible to the public.
e. To the extent practical, the board must allow a person to monitor the meeting electronically from a remote location. The board may require the person to pay for the “documented marginal costs” the board incurs as a result of the additional connection.

f. The board must provide notice of the meeting location and notice of any site where a member of the board will be participating in the meeting.

2. **Examples of Interactive Television.** Skype and video conferencing are examples of interactive television. See IPAD Adv. Op. 13-009 (city complied with the law when it held a meeting at which a city council member attended via Skype from a remote location because the meeting met each of the requirements of Minnesota Statutes section 13D.02); IPAD Adv. Op. 08-034 ((if task force met the requirements listed in section 13D.02, it could conduct meetings using interactive television (video conferencing)).

3. **Other Interactive Technology.** A school board conducting a meeting under this section may use interactive technology with an audio and visual link to conduct the meeting if the school board complies with all other requirements outlined above. Minn. Stat. § 13D.02, subd. 5.

4. **Telephone Meeting.** Participation in meetings by telephone conference is generally not allowed for school boards unless the board’s presiding officer, chief legal counsel, or the school’s chief administrative officer determines that an in-person meeting or a meeting conducted by interactive technology is not practical or prudent because of a health pandemic or other emergency. Under these circumstances, other specific requirements will apply. See Minn. Stat. § 13D.021.

**L. Penalties for Violations**

1. **Civil Penalty/Personal Liability.** Each person who intentionally violates the Open Meeting Law can be fined up to $300 for each violation, and the penalty cannot be paid by the School District. Minn. Stat. § 13D.06, subd. 1. In light of this penalty and the removal consequence described below, members of a School Board are responsible for familiarizing themselves with the requirements of the Open Meeting Law.

2. **Removal.** If a member of the Board is involved in three separate violations of the Open Meeting Law, the member could be removed from office. Minn. Stat. § 13D.06, subd. 3(a).

3. **Costs and Attorneys’ Fees.** A court may award up to $13,000 for a plaintiff’s costs and attorneys’ fees. Minn. Stat. § 13D.06, subd. 4(a). A School District may, but is not required to, pay the award in a lawsuit brought against a Board member. *Id.*, subd. 4(c). Similar costs and attorneys’ fees may be awarded to the school district or Board member in the event of a frivolous lawsuit. *Id.*, subd. 4(b).
M. Significant Legal Principles for Regulating Public Participation at Meetings

1. The School Board controls its own meetings, agendas, parliamentary procedure, and all other aspects of its own business and function. See Minn. Stat. § 123B.09, subd. 7.

2. The public has the right to receive notice of, and to attend, all regular, special, and emergency meetings of the full school board and its committees with final decision making authority, unless the meeting is closed in accordance with the Open Meeting Law.

3. The Open Meeting Law permits but does not mandate an opportunity for public comment during school board meetings.

4. Speech on public issues and political matters lies at the heart of protected speech. Freedom of speech, however, is not absolute. The government may restrict speech when it has a legally sufficient justification.

5. The extent to which a school district may restrict speech or expressive activity on public property depends, in part, upon the character of the public property in question. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 44 (1983).

6. The Perry Case categorized public property in three ways for purposes of defining First Amendment free speech rights:
   a. “Traditional public forum” such as public parks and streets;
   b. “Non-public forum” such as public building that has never opened for public communication either by tradition or designation;
   c. “Designated public forum” or the “limited public forum.”

7. When a school board affords the public an opportunity to address the board at its meeting, at a minimum the board creates a “limited public forum.” Courts recognize that a school board may reasonably restrict public access to speaking at a board meeting “based on the subject matter of the speech, on the identity or status of the speaker, or on the practical need to restrict access for reasons of manageability or the lack of resources to meet total demand.” Green v. Nocciero, 676 F.3d 748, 753–54 (8th Cir. 2012). This includes the right to remove an “unruly or disruptive member of the audience” to prevent misconduct such as “badgering, constant interruptions, and disregard for the rules of decorum.” Id. While a school board may limit public comment to designated topics, it may not discriminate against speakers based on their viewpoint with respect to the designated topic. Id.
N. Examples of Permissible Time, Place and Manner Restrictions. The examples below are reasonable restrictions that may be utilized to maintain order and decorum at contentious public meetings:

1. Persons wishing to address the Board shall sign in prior to the meeting, listing their name, address, and the matter on which they will speak.

2. Persons addressing the Board shall speak in the order in which they sign in.

3. A person addressing the Board shall give his or her name and address and be recognized by the Presiding Officer.

4. The Presiding Officer shall limit the comments of each person addressing the Board to three minutes. (NOTE: In a recent case, the Minnesota Court of Appeals upheld a three-minute limitation and also rejected an argument that individual speakers should have been allowed to merge their time in order to allow one person to speak for more than three minutes during a school closure hearing. See 834 VOICE v. Indep. Sch. Dist. No. 834, Stillwater, 893 N.W.2d 649, 654 (Minn. App. 2017)).

5. Persons addressing the Board shall confine their comments to matters pertaining to the agenda or germane to matters of administrative concern.

6. There shall be no demonstrations during or at the conclusion of any speaker’s presentation.

7. A person addressing the School Board shall refrain from the following:
   a. Attempting to engage individual Board members in conversation;
   b. Insults;
   c. Obscenity or profanity;
   d. Attacks against any person in his or her personal capacity;
   e. Physical violence or threat thereof;
   f. Comments that are not relevant to matters on the agenda or to matters of administrative concern;
   g. Comments that are unduly repetitious; and
   h. Comments that exceed the five-minute time limit, or other such comments or conduct that disrupts, disturbs, or otherwise impedes the orderly conduct of any Board meeting.
8. Any person who breaches these rules shall, at the discretion of the Presiding Officer or a majority of the Board, be given an oral warning by the Presiding Officer to refrain from disturbing or disrupting the meeting. If, after receiving such a warning, the person continues to breach these rules, he or she will be barred from further audience before the Board at that meeting.

9. If, after receiving an oral warning from the Presiding Officer and being barred from further audience before the Board at a meeting, a person persists in disturbing or disrupting that meeting, the Presiding Officer may order him to leave the meeting. If such person does not leave, the Presiding Officer may request a law enforcement officer who is on duty at the meeting as sergeant-at-arms to remove that person from the meeting.

10. It is the intention of the Board, by adoption of these rules, to ensure that the affairs of the Board are conducted in an open, orderly and efficient manner, that persons desiring to address the Board on matters pertaining to the agenda or germane to matters of District legislation or administrative concern are afforded an opportunity to speak in the order in which they sign up to speak, that persons in attendance may observe and hear the proceedings of the Board without distraction, and that the member of the Board and its employees are able to transact the business of the Board with minimal disruption.

O. Additional Tips for Dealing with Large Crowds

1. Large crowds should be advised of the procedure to be followed before the meeting or hearing begins, including, but not limited to, as any time limits or signature requirements.

2. Inform the crowd that the Board will receive and consider written materials, and that individuals are discouraged from reading letters at the podium.

3. Do not permit members of the public to cross-examine others; inform participants that all comments should be addressed to the Board.

4. Encourage individuals to not only express their opinion, but the reasons for their opinion.