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The Conflict between the Minnesota Data Practices Act and the Minnesota Open Meeting Law. Annandale Advocate v. City of Annandale, 435 N.W.2D 24 (Minn. 1989)

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COMMENT
THE CONFLICT BETWEEN THE MINNESOTA DATA PRACTICES ACT AND THE MINNESOTA OPEN MEETING LAW

[Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989)]

INTRODUCTION

In a case of first impression, the Minnesota Supreme Court recently addressed the issue of whether the Minnesota Open Meeting Law prohibits a government meeting from being closed to the public when information classified as nonpublic under the Minnesota Government Data Practices Act is discussed. In Annandale Advocate v. City of Annandale, the supreme court held that it was proper for the Annandale City Council to close a meeting when discussing "an investigative report regarding the alleged misconduct of Annandale's chief of police." This report was classified as nonpublic under an exception to the Minnesota Government Data Practices Act (Data Practices Act) which provides "that all personnel data on public employees is private unless specifically listed otherwise." The supreme court stated in Annandale Advocate that even though

1. Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989). Respondent Annandale Advocate points out in its appellate brief to the Minnesota Supreme Court that "proper interpretation of the statutory provisions that are at issue has not been previously considered by this Court, and has received only limited attention from the Court of Appeals." Brief for Respondent at 5, Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989) (No. CX-87-1583).


4. 435 N.W.2d at 24.

5. Id. at 25. The investigative report was completed by a private law firm hired by the City of Annandale to investigate allegations of misconduct against William Ledwein, Chief of Police for the City of Annandale, Minnesota. The allegations arose after Ledwein was indicted for reckless discharge of a handgun by a Wright County grand jury. Id. Other allegations included alleged sexual misconduct involving juveniles. Brief for Respondent at 3, Annandale Advocate, (No. CX-87-1583). See infra notes 69-85 and accompanying text.

both the Data Practices Act and the Minnesota Open Meeting Law (Open Meeting Law) adhere to a public policy of governmental openness, personnel data of public employees does not become public under the Data Practices Act until after the "final disposition of [a] disciplinary proceeding" against an employee. The court determined that, where a public employee has a right of review for dismissal or any other disciplinary action by an outside regulatory body, the decision of a government officer or body to discharge the employee does not constitute a final disposition of a disciplinary proceeding. Rather, the decision of the public officer or governmental body to discharge the employee constitutes only the final or last decision of that officer or body on the particular matter. The final disposition of the matter does not occur until there is a "last and final determination of the matter itself." In other words, a final disposition does not occur until all right of review and appeal on a matter is exhausted.

As a result, the supreme court in Annandale Advocate held that the Data Practices Act requires any investigative reports prepared on an employee to remain private personnel data until the final disposition of a disciplinary proceeding is reached. However, once a final disposition occurs, the result "and supporting documentation," such as an investigative report, must be released to the public. While this reasoning is relatively straightforward, the problem arising in Annandale Advocate is that a final disposition of the disciplinary action against the Annandale Police Chief never occurred. Therefore, the investigative report on the Police Chief will never be released.

A final disposition never occurred because the Police Chief requested a Veterans Preference Board Hearing and, before the actual hearing took place, he "agreed to resign in exchange for the city's withdrawal of termination proceedings." This result is problematic. It reveals a potential source of abuse: public employees appealing all decisions in disciplinary proceedings in an attempt to prevent the decision and any supporting documentation from ever being released to the public—a result surely not intended by the legislature when it enacted the Data Practices Act.

7. Annandale Advocate, 435 N.W.2d at 32. The supreme court states that "in both the Open Meeting Law and the Data Practices Act, the legislature has indicated that openness in government is an important public policy." Id.
8. Id. at 29.
9. Id. at 28. The decision of the government body to discharge or discipline the employee is the final decision of only that tribunal. This decision may be subject to appeal and therefore is not final. See infra note 74 and accompanying text.
10. Annandale Advocate, 435 N.W.2d at 28.
11. Id.
In addition to determining when the final disposition of a disciplinary action occurs, the supreme court in Annandale Advocate also determined that it is proper for a city council to close a meeting to the public when discussing an investigative report prepared on a public employee before final disposition. In fact, the court held that a meeting where such a report is discussed must be closed even though the Open Meeting Law ordinarily requires city council meetings, as well as other governmental meetings, to be open to the public. The court reasoned that such meetings must be closed otherwise “the protections given by the Data Practices Act [to the personnel data of public employees would] become illusory” when the public listened to the council discuss the personnel data supposedly protected by the Act.

Annandale Advocate is significant because it settles a longstanding conflict in Minnesota between the Data Practices Act and the Open Meeting Law: whether it is proper to discuss data classified as non-public by the Data Practices Act at an open meeting. In the past this conflict between the two statutes has placed “municipal officials . . . in the unenviable position of having to decide which law to violate.” According to the League of Minnesota Cities, an amicus curiae in Annandale Advocate, many municipal officials have settled the conflict in the past by closing meetings when nonpublic data is discussed because the penalty for a violation of the Open Meeting Law is much less serious than for a violation of the Data Practices Act.

While this case settles the past conflict between the Data Practices Act and the Open Meeting Law, the supreme court noted that its decision relied on statutes which “may be open to differing interpre-

14. Id. at 32.


16. Id. The League of Minnesota Cities recognizes that often municipal officials have resolved the conflict between the Data Practices Act and Open Meeting Law by basing their decisions on the respective penalty provisions of the two acts. Since the Open Meeting Law carries only a $100 civil penalty and the Data Practices Act carries unlimited potential liability, many officials have decided to close their meetings. Others have sought declaratory judgments simply to protect themselves from the consequences of making a wrong decision.

Id. A person who violates the Open Meeting Law is “subject to personal liability in the form of a civil penalty in an amount not to exceed $100 for a single occurrence.” MINN. STAT. § 471.705, subd. 2 (1988). Under the Data Practices Act, however, governmental bodies, including political subdivisions, are liable for any damages sustained by a person because of a violation of the Act, as well as up to $10,000 in exemplary damages for a willful violation. MINN. STAT. § 13.08, subd. 1 (1988). Furthermore, any person who willfully violates the Data Practices Act “is guilty of a misdemeanor” and public employees are subject to “suspension without pay or dismissal . . . .” MINN. STAT. § 13.09 (1988).
tations." As a result, it is doubtful whether the court's decision will provide a final resolution of this conflict. In fact, the court called on the legislature to clarify both the Data Practices Act and the Open Meeting Law if it disagreed with the court's interpretation of the two statutes. The legislature quickly accepted the supreme court's invitation to clarify both the Data Practices Act and the Open Meeting Law. However, the legislature was unable to pass legislation amending either of the statutes during the 1989 session.

I. HISTORY OF THE LAW INVOLVED

A. The Minnesota Government Data Practices Act

The Data Practices Act provides "[a]ll government data collected, created, received, maintained or disseminated by a state agency, political subdivision, or statewide system shall be public unless classified by statute, . . . or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential." With certain exceptions the Act creates a presumption of public access to government data. The purpose of the Data Practices Act is to provide a means for the public to obtain information about their government and to ensure that government data is handled in a manner that is consistent with the principles of openness and accountability. The Act does this by establishing a presumption of public access to government data and by providing exceptions to the presumption of public access. The exceptions to the presumption of public access are based on various interests, including protection of individual privacy, confidentiality, and national security.

17. Annandale Advocate, 435 N.W.2d at 33.
18. Id. at 34.
19. The Legislature did pass a bill at the time of this article's publication which appears to adopt in part many of the propositions contained in this article. However, publication deadlines preclude this author from providing a more detailed analysis of the new statute. See S.F. No. 1874, 77th Minn. Leg. 1990 (signed into law on May 3, 1990).

In addition to the attempt in the Minnesota Legislature to pass legislation to clarify both the Data Practices Act and the Open Meeting Law, Annandale Advocate has sparked much discussion in the legal community. See, e.g., Goldberg, Administrative Law, 1989 MINN. ST. B.A. ADMIN. L. SEC. NEWS 1 at 3, col. 2-4, col. 1 ("this opinion will undoubtedly spawn both legislative and judicial action in the future. . . . For the practitioner, this will be an area to watch closely. It is reasonable to expect continued litigation and legislative proposals in the coming year."); Sections, 46 BENCH & B. OF MINN. 31, 39 (May/June 1989) ("This Supreme Court decision has a major impact upon the functioning of public bodies when they are holding meetings subject to the Open Meeting Law, as well as when they are dealing with data which is other than public under the Data Practices Act.").

20. MINN. STAT. § 13.03, subd. 1 (1988). In order to understand the Data Practices Act, it is first necessary to become familiar with some of the "jargon" used in the Act. Under the Act, "government data" is defined as "all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use." § 13.02, subd. 7 (1988). The Act defines a "political subdivision" as "any county, statutory or home rule charter city, school district, special district and any board, commission, district or authority created pursuant to law, local ordinance or charter provision." § 13.02, subd. 11 (1988). See infra notes 24-28 and accompanying text for other definitions of terms used in the Act.

The Minnesota Data Practices Act is to attempt "to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance those competing rights within a context of effective government operation." As one commentator pointed out, when Minnesota enacted the Data Practices Act it was the first in the country, and was considered to be a model for other states. That conception never became reality. Most jurisdictions have statutes that codify public access to government data, but the Minnesota measure is still the most comprehensive law of its kind.

The Minnesota Data Practices Act divides all government data into two general categories: "data on individuals," and "data not on
individuals.\textsuperscript{25} These categories are then subdivided into public,\textsuperscript{26} nonpublic,\textsuperscript{27} and confidential data.\textsuperscript{28} The Act provides large penalties for violations.\textsuperscript{29}

While the Act creates a presumption that government data is open to the public, it also contains several exceptions. One exception is for personnel data, which is located in section 13.43 of Minnesota’s Data Practices Act.\textsuperscript{30} Personnel data is defined in the Act as “data on individuals collected because the individual is or was an employee of or an applicant for employment by . . . a state agency, statewide system or political subdivision . . . .”\textsuperscript{31} Section 13.43 provides that some general types of personnel data on public employees are public data,\textsuperscript{32} including “the final disposition of any disciplinary action and supporting documentation . . . .”\textsuperscript{33} All other personnel data not specifically listed as public data is presumed to be “private data on indi-

\textsuperscript{25} The Act defines “data not on individuals” as “all government data which is not data on individuals.” Minn. Stat. § 13.02, subd. 4 (1988).

\textsuperscript{26} See supra note 20 and accompanying text.

\textsuperscript{27} Nonpublic data is defined as “data not on individuals that is made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data.” Minn. Stat. § 13.02, subd. 9 (Supp. 1989). The Act defines “private data on individuals” as “data which is made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of that data.” Minn. Stat. § 13.02, subd. 12 (1988).

\textsuperscript{28} The Act defines confidential data not on individuals as “protected non-public data.” Minn. Stat. § 13.02, subd. 13 (1988). Protected nonpublic data is “data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data.” Id. The Act defines “confidential data on individuals” as “data which is made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data.” Minn. Stat. § 13.02, subd. 3 (1988).

\textsuperscript{29} See supra note 16.

\textsuperscript{30} Minn. Stat. § 13.43, subd. 1 (1988).

\textsuperscript{31} Id.

\textsuperscript{32} Section 13.43, subdivision 2 makes public the following personnel data on current and former government employees:

- name; actual gross salary; salary range; contract fees; actual gross pension;
- the value and nature of employer paid fringe benefits; the basis for and the amount of any added renumeration, including expense reimbursement, in addition to salary; job title; job description; education and training background; previous work experience; date of first and last employment; the status of any complaints or charges against the employee, whether or not the complaint or charge resulted in a disciplinary action; and the final disposition of any disciplinary action and supporting documentation; work location; a work telephone number; badge number; honors and awards received; payroll time sheets or other comparable data that are only used to account for employee’s work time for payroll purposes, except to the extent that release of time sheet data would reveal the employee’s reasons for the use of sick or other medical leave or other not public data; and city and county of residence.


\textsuperscript{33} Id.
viduals, but may be released pursuant to a court order.”34

Section 13.43 appears to be clear on its face. But, upon closer examination, it is not clear when a “final disposition of any disciplinary action”35 actually occurs. Does final disposition of any disciplinary action occur when a public body makes its final determination of how to discipline an employee, or does it occur when the employee has exhausted all of his or her rights to appeal the disciplinary sanction imposed by the public body? The Minnesota Supreme Court attempts in Annandale Advocate to answer this difficult question.

B. The Minnesota Open Meeting Law

1. An Overview of the Open Meeting Law

The Open Meeting Law, like the Data Practices Act, creates a presumption of governmental openness to the public. The Open Meeting Law is located in Minnesota Statutes, section 471.705 and provides:

Except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, and the governing body of any school district however organized, unorganized territory, county, city, town, or other public body, and of any committee, subcommittee, board, department or commission thereof, shall be open to the public, except meetings of the board of pardons and the commissioner of corrections.... This section shall not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings.36

The Minnesota Supreme Court has stated that the presumption of openness contained in section 471.705 is “to be construed most favorably to the public.”37 The Open Meeting Law is liberally construed because it is “enacted for the public benefit.”38

In interpreting the Open Meeting Law, Minnesota courts have

34. MINN. STAT. § 13.43, subd. 4 (1988).
35. The Data Practices Act does not define what constitutes a “final disposition” of a disciplinary proceeding.
37. St. Cloud Newspapers, Inc. v. District 742 Community Schools, 332 N.W.2d 1, 4 (Minn. 1983).
38. Id. This proposition of law from St. Cloud Newspapers, 372 N.W.2d at 4, is also cited in: Merz v. Leitch, 342 N.W.2d 141, 145 (Minn. 1984); Northwest Publications, Inc. v. City of St. Paul, 435 N.W.2d 64, 66 (Minn. Ct. App. 1989); Minnesota Daily v. University of Minn., 423 N.W.2d 189, 191 (Minn. Ct. App. 1988) (“The law is to be construed in favor of public access, with only limited exceptions.”); Annandale Advocate v. City of Annandale, 418 N.W.2d 522, 525 (Minn. Ct. App. 1988), rev’d, 435 N.W.2d 24 (Minn. 1989); Itasca County Bd. of Comm’rs v. Olson, 372 N.W.2d 804, 807 (Minn. Ct. App. 1985).

For a discussion of the purposes and benefits of open meeting laws, as well as
found three purposes: "(1) to prevent public bodies from acting secretly without the public having an opportunity to detect improper influences, (2) to assure the public's right to be informed, and (3) to afford an opportunity for members of the public to present their views." More simply, the purpose of the Minnesota Open Meeting Law, as well as other open meeting laws, is to prevent the government from operating secretly behind closed doors in order "to maintain the faith of the public in governmental agencies by allowing citizen attendance and participation in all phases of the decision making process." The Minnesota Supreme Court has stated in support of the Open Meeting Law that "Although it might not be empirically demonstrable, it seems intuitively certain that openness produces better governmental programs, more efficiency in government, and government more responsive to public interest and less susceptible to corruption than does secrecy."
The Minnesota Supreme Court has also recognized, however, that "[t]here is a point beyond which open discussion requirements may serve to immobilize a body and prevent the resolution of important problems." 42 In Moberg v. Independent School District No. 281, 43 the court stated that the determination of when it is in the public’s best interest to close a governmental meeting is made by balancing "the public’s right to be informed . . . against the public’s right to the effective and efficient administration of public bodies." 44

2. Exceptions to the Open Meeting Law

The legislature and the courts have provided some exceptions to the Open Meeting Law in order to allow public bodies to close their doors when the benefit to the body in its ability to administrate outweigh the public’s right to be informed. The exceptions are a recognition that "[t]he open meetings principle is not an absolute. The reasons for excluding the public, however, should be substantive public policy reasons that weigh directly against open public discussion." 45 Commentators have argued that there are several reasons for placing limits on the openness of governmental decision making to the public:

[C]ertain matters, if discussed in public, allow private interests to benefit at the public’s expense (as in matters relating to the purchase of lands); that openness will inhibit free give and take among officials and lead to poorly thought out decisions; that disputes between policy makers and administrators, if publicly aired, will create difficult and inefficient management of programs; that certain matters are too sensitive for public view (certain personnel matters and matters of security); that public officials will waste time in needless speechmaking and other egosalving activities; and, that sensational and irresponsible reporting of news will distort the facts and unjustifiably undermine confidence in public officials.

Although each of these criticisms has some credibility, none is persuasive by itself and all of them together can justify no more than the narrowest of exceptions at most. The arguments for open government simply outweigh them . . . The limits and exceptions to openness must be carefully and narrowly defined. 46

43. 336 N.W.2d 510 (Minn. 1983).
44. Id. at 517.
46. Little & Tompkins, supra note 40, at 475 (footnotes omitted) (emphasis added). Another argument can be made for providing some exceptions to open meeting laws:
The Minnesota Supreme Court has similarly stated that the exceptions to the Open Meeting Law must be limited because the legislature "clearly intended that all meetings of public agencies be open, with rare and carefully restrained exception." Exceptions are "rare and carefully restrained" because public "officials maybe tempted to discuss matters beyond the legitimate scope of the private session."

The potential for abuse by public officials in closed sessions has been taken seriously by the courts. Consequently, the only judicial exception to the Open Meeting Law at present is the attorney-client exception. The attorney-client exception allows a public body to close a meeting only when discussing litigation strategy with its attorneys. Especially in the early stages of working out a particular problem, it makes a good deal of sense for any governmental body to retain a zone of privacy within which its members can air internal disagreements. A position, once publicly taken, is not easily changed; and it seems undesirable to encourage the adoption of "first thoughts" by requiring that all collective governmental thinking be done in public. . . . The value competing against "a right to know" then is not a "right to secrecy," but an assurance of some insulation from the intense heat of public pressure. Priorities must be determined, decisions made, and programs implemented. Absolute openness will detract from the overall public interest in informed and rational governmental decisions.


47. St. Cloud Newspapers, Inc. v. District 742 Community Schools, 332 N.W.2d 1, 5 (Minn. 1983) (emphasis in original); accord Northwest Publications, Inc. v. City of St. Paul, 435 N.W.2d 64, 67 (Minn. Ct. App. 1989); see also In re Occupational License of Hutchinson, 440 N.W.2d 171, 175 (Minn. Ct. App. 1989) (both citing St. Cloud Newspapers, Inc., 332 N.W.2d at 5); cf. Itasca County Bd. of Comm'rs v. Olson, 372 N.W.2d 804, 809 (Minn. Ct. App. 1985) ("The legislature has restricted the manner in which an exception to the Open Meeting Law can be created in order to further its important public purposes.")


49. The attorney-client exception to the Open Meeting Law was created by the supreme court pursuant to its regulation of the practice of law. Minnesota Daily v. University of Minn., 432 N.W.2d 189, 191 (Minn. Ct. App. 1988); accord Itasca County Bd. of Comm'rs v. Olson, 372 N.W.2d 804, 808 (Minn. Ct. App. 1985) (article 3, section 1 of the Minnesota Constitution empowers the supreme court to regulate practice of law).

The Minnesota Supreme Court first developed the attorney-client exception to the Open Meeting Law in Minneapolis Star and Tribune Co. v. Housing and Redevelopment Auth. ex rel City of Minneapolis, 310 Minn. 313, 251 N.W.2d 620 (1976). The court stated in Minneapolis Star that there is an attorney-client exception to the Open Meeting Law "assuming that the public officers and attorneys do not abuse their trust by extending the privilege as a mere conduit to suppress public observation of the decision-making process. The 'in confidence' communication must not be arbitrarily or unreasonably exercised." Id. at 322-23, 251 N.W.2d at 625 (citation omitted).

attorney for "threatened or pending litigation." The exception does not "extend to the mere request for general legal advice or opinion" by a public body to its attorney.

Besides the judicially created attorney-client exception, the Open Meeting Law itself contains several legislatively enacted exceptions. One of these statutory exceptions applies to "any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings." Another exception applies to labor negotiations when a public employer is planning its negotiation strategy. Finally, a statutory exception exists for certain printed materials distributed to public officials at an open meeting. While not per se allowing a public body to close a meeting, this printed materials exception prevents printed materials classified as nonpublic by the Data Practices Act from being viewed by the public at an open meeting.

body seeks legal advice concerning litigation strategy. The privilege is not available, however, when a governing body seeks instead to discuss the strengths and weaknesses of the underlying proposed enactment which may give rise to future litigation." Id.

51. *Minneapolis Star*, 310 Minn. at 324, 251 N.W.2d at 626.

52. *Id.* See also *Northwest Publications*, 435 N.W.2d at 66–67 (citing *Minneapolis Star*, 310 Minn. at 324, 251 N.W.2d at 626) ("While attorney-client privilege exception is operable to implement the confidentiality of the attorney-client relationship, the exception will almost never extend to the mere request for general legal advice or opinion.").

53. *Minn. Stat.* § 471.705, subd. 1 (1988). Like other exceptions to the Open Meeting Law, the quasi-judicial exception for disciplinary proceedings is narrowly construed by the courts:

Only when the agency engages in disciplinary proceedings may meetings involving the exercise of quasi-judicial powers be closed to the public. The exception does not permit an agency to meet in private simply because it is engaged in quasi-judicial activity. . . . [This] narrow exception . . . affords sufficient protection of the rights involved. A disciplinary proceeding, if conducted in public, may significantly injure the reputation of the affected party.

Note, *supra* note 48, at 402–03.

54. *Minn. Stat.* § 471.705, subd. 1a (1988). "The governing body of a public employer may by a majority vote in a public meeting decide to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals . . . ." *Id.*

55. Minnesota Statutes § 471.705, subdivision 1b reads in pertinent part:

In any meeting which under subdivision 1 must be open to the public, at least one copy of any printed materials relating to the agenda items of the meeting which are prepared or distributed by or at the direction of the governing body or its employees and which are:

1. distributed at the meeting to all members of the governing body;
2. distributed before the meeting to all members; or
3. available in the meeting room to all members;

shall be available in the meeting room for inspection by the public. The materials shall be available to the public while the governing body considers their subject matter. This subdivision does not apply to materials classified by law as other
C. The Conflict Between the Data Privacy Act and the Open Meeting Law

For the first time in *Itasca County Board of Commissioners v. Olson*, the Minnesota Court of Appeals addressed the issue of whether the Data Practices Act creates an exception to the Open Meeting Law allowing a public body to close a meeting while discussing nonpublic data. This issue was presented to the court of appeals in *Olson* in the form of a declaratory action. Specifically, the court was asked to determine whether the Itasca County Board of Commissioners should close a meeting when conducting a performance evaluation of the Itasca Memorial Hospital Administrator, Gene Hanson. Hanson argued the meeting should be closed because the evaluation would involve the discussion of "private personnel data" as classified by section 13.43, subdivision 4 of the Data Practices Act.

The court of appeals rejected Hanson’s argument holding that the general language in section 13.43, subdivision 4 was not specific enough to qualify as an exception under the Open Meeting Law. The statute “merely indicates in general terms that certain personnel data should normally be considered private. It does not expressly provide that meetings of public bodies subject to the Open Meeting Law should be closed to the public when personnel data classified as private is discussed.”

The court based its decision on the fact that another section of the Data Practices Act, section 13.03, subdivision 4, requires “[t]he classification of data . . . [to] change if it is required to do so to comply . . . with a specific statute applicable to the data . . .” This requirement, concluded the court, requires the classification of private personnel data “to change to public when it is reasonably necessary for a public body subject to the Open Meeting Law to discuss the data.” The *Olson* court added that only the classification of private personnel

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58. *Id.* at 805. *See supra* notes 30-34 and accompanying text.

59. *Id.* at 808.

60. *Id.* at 809 (emphasis in original) (quoting MINN. STAT. § 13.03, subd. 4 (1984)).

61. *Id.*
data of "managerial or supervisory employees [is changed to public] because their performance is of particular significance to the public, and not data on ministerial employees." The court did not elaborate on how managerial or supervisory employees are to be distinguished from ministerial employees.

In cases subsequent to Olson, the Minnesota Court of Appeals has continued to require data classified as not public by the Data Practices Act to change its classification to public when it is necessary to discuss the data at a meeting required to be open under the Open Meeting Law. This apparent subordination of the Data Practices Act to the Open Meeting Law by the court of appeals has created confusion for public bodies. In particular, the distinction made by

62. Id.
63. Id. The court of appeals stated in Olson that the classification of private personnel data on managerial or supervisory employees is changed to public when it is necessary to discuss the data at an open meeting. The classification of the data changes from private to public because:

The public has an obvious and important interest in obtaining a full disclosure of information relevant to the job performance of its high-level public employees. Those who accept such positions know they become public figures and must have lower expectations of privacy regarding data relevant to their performance. On the other hand, the privacy of ministerial employees will generally not be disturbed because of the Open Meeting Law. Id. The court added, however, somewhat unclearly that "we cannot emphasize too strongly that the Open Meeting Law should not be extended in application to destroy the integrity of the Data Practices Act as it concerns all levels of public employees in their personnel matters." Id. How the integrity of the Data Practices Act is to be protected is far from clear when the court requires personnel data classified as private by the Data Practices Act to be reclassified public when discussed at an open meeting. This requirement seems to leave little to the protections afforded by the Data Practices Act to personnel matters of public employees, i.e., the privacy protections of the Act seem to be rendered non-existent. Furthermore, the distinction between "high-level public employees" and "ministerial employees" is not clearly made by the court.

64. See, e.g., Minnesota Daily v. University of Minn., 432 N.W.2d 189, 193 (Minn. Ct. App. 1988) ("A meeting which is required by statute to be open may not be closed just because the Data Practices Act applies to matters which will be discussed at the meeting."); Annandale Advocate v. City of Annandale, 418 N.W.2d 522 (Minn. Ct. App. 1988), rev'd, 435 N.W.2d 24 (Minn. 1989). A commentator has observed that "[t]he Court of Appeals has generally been more hospitable to claims for access under the Open Meeting and Data Practices statutes than has the Supreme Court. A pattern has emerged in which the appellate court tends to uphold Sunshine claims, ... and the Supreme Court reverses." Tanick, supra note 23, at 24.

65. The League of Minnesota Cities notes in its amicus curiae brief in Annandale Advocate that the apparent subordination of the Data Practices Act to the Open Meeting Law is problematic for several reasons. This apparent subordination is problematic because:

[M]unicipal governing bodies often have to discuss personnel matters relating to all levels of public employment. For example, in 801 of the 855 Minnesota cities all significant personnel actions must be made by the governing body itself. Only in the 47 city manager and 4 strong mayor cities can the city council avoid becoming involved certain personnel matters. Generally
the Olson court between managerial or supervisory employees and ministerial employees is unclear and confusing. In addition, the reasoning has been criticized for not taking into consideration the data privacy exception in section 471.705, subdivision 1b of the Open Meeting Law. This exception prohibits the public from viewing printed materials classified as not public at an open meeting.

The questions raised by Olson and its progeny set the stage for the Minnesota Supreme Court in Annandale Advocate v. City of Annandale to attempt to resolve the conflicts between the Data Practices Act and the Open Meeting Law.

II. FACTS OF ANNANDALE ADVOCATE V. CITY OF ANNANDALE

The facts presented in Annandale Advocate were undisputed. On October 23, 1986, the Annandale Chief of Police, William Ledwein, was indicted by a grand jury for reckless discharge of a handgun. In November of 1986, the Annandale City Council retained private outside counsel to investigate various allegations of misconduct, including sexual misconduct, against Ledwein. On February 27, 1987, the City Council discussed the outside counsel's investigative report prepared on Ledwein at a closed meeting. The City Council closed the meeting under the belief that the Data Practices Act required it to do so when conducting an employee disciplinary pro-

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the council as a body has responsibility to hire, fire, discipline and make all other administrative decisions with regard to personnel, including the lowest level city employees. Additionally, with the increased importance placed on employee due process rights, even persons in the lowest job classifications are often entitled to a hearing before the municipal governing body. Thus the Court of Appeals is wrong in concluding that the governing body will only be involved with personnel decisions relating to high level employees.

Brief for the Amicus Curiae League of Minnesota Cities at 12, Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989).

66. Brief for the Amicus Curiae League of Minnesota Cities at 13. ("If there is a distinction between high level and low level employees for purposes of the Open Meeting Law and the Data Practices Act, the question arises as to what factors determine whether a given employee is a managerial or supervisory employee.")

67. See Tritz, Councils Must Use Care when Disciplining or Dismissing City Employees, 73 MINN. CITIES, Apr. 1988, at 26, 28. The court of appeal's conclusion that private personnel data is reclassified as public data when it must to be discussed "at an open meeting is . . . somewhat puzzling in light of . . . [section 471.705, subdivision 1b] of the Open Meeting Law. . . . If in fact the Legislature intended for private data automatically to become public when discussed at a meeting, there would seem to be no point to this exception." Id.

68. 435 N.W.2d 24 (Minn. 1989).

69. Id. at 25.

70. Id. John Scherer was the attorney hired by the City Council to conduct the investigation.

71. Id. at 25.
ceeding. The City Council's discussion of the report resulted in its passing a resolution to discharge Ledwein.

As an honorably discharged veteran, Chief Ledwein had a right to a hearing before the Veterans Preference Board prior to discharge. Copies of the investigative report that the City Council used to make its decision were not made available to the public. Subsequent to the city council meeting, Ledwein requested and received a hearing date for a Veterans Preference Board review.

Also subsequent to the city council meeting, a local newspaper requested to see the investigative report. When the Annandale City Council denied the request, the newspaper brought a motion to compel the release in Wright County District Court. After an in camera review, "the district court ordered that the investigative report, except information which identified alleged victims of sexual

72. Id. at 25-26. For a complete discussion of the Data Practices Act see infra notes 20-35 and accompanying text.
73. Id. at 26.
74. Id. Ledwein had a right to a hearing before the Veterans Preference Board because of the Veterans Preference Act. The Veterans Preference Act provides:

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.


Under the Veterans Preference Act, a public employer must notify a veteran in writing of a pending discharge and of the veteran's right to request a hearing within 60 days. If a veteran notified of this right does not request a hearing within 60 days, the right to a hearing is waived. The failure to request a hearing waives all other legal remedies for reinstatement. Id.

In Southern Minn. Mun. Power Agency v. Schrader, 394 N.W.2d 796 (Minn. 1986), the Minnesota Supreme Court determined the scope of power of a Veterans Preference Act hearing board. The Veterans Preference Board has the power to modify the employer's disciplinary sanction upon a finding of extenuating circumstances. Id. at 802. The hearing board has two predominant tasks when it conducts a veterans preference hearing. These tasks of the hearing board are to determine whether the employer has acted reasonably, and, to determine whether extenuating circumstances justify a modification in the disciplinary sanction. Id. at 801-02.

The board is to take into consideration several factors when determining whether an employer has acted reasonably. The factors include "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job." Id. at 802. Once the hearing is completed, the Veteran's Preference Board issues a written statement of its findings. Both the veteran and the employer may then appeal the decision of the hearing board in district court. Id.

75. Annandale Advocate, 435 N.W.2d at 26.
76. Id. Ledwein had the right to a Veterans Preference Hearing because he is an honorably discharged veteran. The hearing was set for October of 1987.
77. Id. The Annandale Advocate was the local newspaper.
78. Id. The motion was made on July 15, 1987.
misconduct and that protected by the city's attorney-client privilege be released to the public."79 The district court based the order on its determination "that the meeting at which the city council voted to terminate Ledwein was a 'final disposition' of a disciplinary action."80 Under Minnesota Statutes, section 13.43, subdivision 2 information from a final disposition of a disciplinary action is public.81 Therefore, the investigative report was public data.82

The Minnesota Court of Appeals affirmed the district court's decision.83 The court of appeals also raised an additional issue on appeal not considered by the district court. This issue involved the question of whether the Open Meeting Law required the investigative report on Ledwein to be made public.84 The court held that under the Open Meeting Law the council had no authority to close the meeting where the report was discussed. Since the meeting was a final disposition of a disciplinary action and the meeting should have been open, the court held that the report must be made available to the public.85

III. HOLDING OF THE MINNESOTA SUPREME COURT

The Minnesota Supreme Court addressed two main issues in Annandale Advocate.86 The first issue involved the question of when the "final disposition" of a disciplinary action against a public employee

79. Id. All parties agreed to provide the court with a copy of the investigative report for its in camera review.
80. Id.
81. See supra notes 32-33 and accompanying text.
82. Annandale Advocate, 435 N.W.2d at 26.
84. Id. at 524. The court of appeals raised the question for the first time at oral argument and requested briefing on the issue. Counsel for each party then submitted letter briefs.
85. Id. at 525.
86. The Minnesota Supreme Court also raised the issue of Ledwein's standing to appeal the order of the lower courts to release the investigative report. Annandale Advocate, 435 N.W.2d at 26. The standing issue existed because Ledwein was not a named party in the newspaper's action nor did he seek to intervene. The district court allowed Ledwein to appear and argue at the hearing, although it ruled that he lacked standing. Id. The issue of standing was not addressed by the Minnesota Court of Appeals. It was also not appealed by any of the parties to the Minnesota Supreme Court, but was raised by the court on its own motion. Id.

The court ruled that Ledwein did have standing to appeal the release of the investigative report. Id. at 27. The standard for determining whether a party has standing in Minnesota is, absent evidence of legislative intent to the contrary, whether that party's legitimate interest is "injured in fact." Snyder's Drug Stores v. Minnesota State Bd. of Pharmacy, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974). The court determined that "the release of the report would cause an 'injury in fact' to
occurs under section 13.43, subdivision 2 of the Data Practices Act. The second issue involved the question of whether data classified as private personnel data under the Data Practices Act must be reclassified as public data when discussed at an open meeting.

With respect to the first issue, the supreme court held that the final disposition of a disciplinary action against a public employee occurs when the employee has exhausted all of his or her rights of appeal. Even though the resolution of the City Council "to terminate Ledwein was its final decision, . . . it was not a 'final disposition' of his case because Ledwein had exercised his right . . . to have a further hearing on the matter." Since no final disposition of the disciplinary action against Ledwein had occurred, the investigative report on him did not become public data under section 13.43 of the Data Practices Act. Therefore, the report was not public data and the supreme court reversed the order of the court of appeals compelling release of the report.

With respect to the second issue, the supreme court held that the Open Meeting Law in section 471.705, subdivision 1b "mandates the closure of the portion of a public meeting in which data classified as private by the Data Practices Act is discussed." The Annandale City Council, therefore, was correct in closing its meeting when discussing the investigative report because the report was classified as private personnel data under the Data Practices Act.

Ledwein's legitimate interests of reputation and privacy." Annandale Advocate, 435 N.W.2d at 27.

The conclusion reached by the court on the issue of Ledwein's standing is reasonable, especially in light of what the court has previously stated about the issue of standing:

"An actor who participates, with or without formal pleading or intervention, as an active contestant on the merits for the determination of issues of law or fact, and who by the outcome of the proceeding will be bound and affected either favorably or adversely, with respect to an asserted interest peculiar to him as distinguished from an interest common to the public or other taxpayers in general, is a party to the proceeding."


87. Annandale Advocate, 435 N.W.2d at 26.
88. Id.
89. Id. at 28. A final disposition is the "final determination of the matter itself," and not just the final decision of a body on the matter.
90. Id. Ledwein had a right to a hearing under the Veterans Preference Act.
91. Id. at 29. "[T]he legislature has expressly indicated that confidential personnel data of government employees shall not become public until after a final disposition of the disciplinary proceeding." Id.
92. Id. at 34.
93. Id. at 33.
94. Id. In balancing the issues of private data and open meetings the court found
In a lone dissent, Chief Justice Popovich, then Justice Popovich, strongly argued against the majority's holding. In his opinion, the majority's holding contradicts the purpose of the Open Meeting Law, which guarantees the right of citizens to be informed of how governmental decisions are made. Chief Justice Popovich would have held both that a final disposition of a disciplinary hearing had occurred in this situation and that section 471.705, subdivision 1b does not require a public meeting to be closed when private data is discussed.

IV. Analysis by the Minnesota Supreme Court

A. Final Disposition of Disciplinary Action Under Section 13.43, Subdivision 2

The Minnesota Supreme Court stated in Annandale Advocate that the court of appeals mistakenly appeared to equate "final disposition" with "final decision." The court of appeals made this mistaken assumption when it held that the resolution of the Annandale City Council to discharge Ledwein constituted a final disposition of a disciplinary action under section 13.43, subdivision 2 of the Data Practices Act. The court based this conclusion on the definitions of "final decision" and "final disposition" given in Black's Law Dictionary that "both public policy and legislative intent favor the exceptions of private data from the Open Meeting Law." Id.

95. Chief Justice Popovich's dissent is consistent with the approach of the Minnesota Court of Appeals to the Open Meeting Law and Data Practices Act while he was Chief Judge of that court. Given the court of appeals' approach to claims under these statutes in the past, Chief Justice Popovich's current presence on the Minnesota Supreme Court is significant. As one commentator pointed out:

New Chief Justice Popovich may lead the Supreme Court towards more openness. The appellate court was generally favorable to claimants under the Open Meeting and Data Practices statutes during his tenure as Chief Justice of that tribunal. In the Annandale Advocate case, he wrote a forceful, albeit solo, dissent recognizing the potential far-reaching consequences of the ruling in permitting governmental bodies to meet in secret when considering many kinds of personnel matters, "or any other decision involving private data." He regarded the Court's elevation of "the private interest of individuals above the public interest" to be antagonistic to the broad purposes of public disclosure underlying both the Open Meeting Law and Data Practices Act.

Tanick, supra note 23, at 25 (footnotes omitted).

96. Annandale Advocate, 435 N.W.2d at 34 (Popovich, J., dissenting).

97. Id. at 36 (Popovich, J., dissenting). Chief Justice Popovich concluded that a final disposition had occurred since Ledwein's resignation became effective before the Veterans Preference Hearing was held, thus the resignation fully disposed of the entire disciplinary proceeding. Id.

98. Id. at 34 (Popovich, J., dissenting). Chief Justice Popovich argued that the legislature intended only to restrict distribution of private materials, not the discussion of such materials at an open meeting. Id.

99. Id. at 28.
ARY. Black's defines a "final decision" as follows: "'[J]udgment or decree which terminates action in court which renders it. One which settles rights of parties respecting the subject-matter of the suit and which concludes them until it is reversed or set aside.'"100 A "final disposition," however, is defined in Black's as "'[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.'"101

The court concluded from the definitions in Black's that the phrases "final decision" and "final disposition" have separate and different meanings. A "'final decision' refers to a last decision of a person or body on a matter while 'final disposition' refers to the last and final determination of the matter itself."102 Consequently, since Police Chief Ledwein had exercised his right to a hearing before the Veterans Preference Board, the resolution of the Annandale City Council to discharge him only constituted a final decision.103 The City Council's resolution was not the final disposition of the matter because the Veterans Preference Board has the power under the Veterans Preference Act to review and amend any disciplinary actions taken against public employees who are honorably discharged veterans.104

The supreme court stated in Annandale Advocate that its interpretation of the meaning of "final disposition" in section 13.43 is supported by the apparent intent of the legislature "to extend substantial privacy protection to [the] personnel data" of public employees.105 The intent of the legislature was discernible "by the fact that the legislature, while providing that all government data is public unless specifically classified otherwise, provided in Minn.Stat. § 13.43 that all personnel data on public employees is private unless specifically listed otherwise."106

In dissent, Chief Justice Popovich pointed out that under the majority's analysis the investigative report will never become public because given the majority's definition of "final disposition," no final disposition of Ledwein's disciplinary proceeding will ever occur.107

100. Id. (quoting BLACK'S LAW DICTIONARY 567 (5th ed. 1979)).
101. Annandale Advocate, 435 N.W.2d at 28 (quoting BLACK'S LAW DICTIONARY 567 (5th ed. 1979)).
102. Id.
103. Id.
104. Id.
105. Id. at 29. The newspaper asserted that such an interpretation of "final disposition" would contravene both the plain meaning and purpose of the statute, and particularly so in the case of higher ranking officials. Id. at 28.
106. Id. at 29.
107. Id. at 36 (Popovich, J., dissenting). No final disposition of Ledwein's disciplinary proceeding will ever occur.
Chief Justice Popovich stated that a result like this indicates that the majority's interpretation of the words "final disposition" in the statute is "unreasonable."\textsuperscript{108} This interpretation is unreasonable because "the fact that Ledwein's resignation was submitted and accepted before the Veteran's Preference Hearing was held should be seen as a final disposition of the entire disciplinary proceeding, since there will be no Veteran's Preference Hearing."\textsuperscript{109}

Moreover, Chief Justice Popovich stated that Ledwein's resignation necessarily qualifies as a final disposition, as defined by the majority, because it is "'a conclusive determination of the subject-matter' where 'nothing further remains to fix the rights and obligations of the parties . . . .'"\textsuperscript{110} The conclusion that Ledwein's resignation constituted a final disposition of the matter is further supported by the fact that "[a] settlement would not qualify as a 'final decision' under the majority's definition, which requires that such a decision be evidenced by a 'judgment or decree' from a court."\textsuperscript{111} The problem with this conclusion of Chief Justice Popovich, however, is that it assumes that a settlement is either a "final disposition" or a "final decision" as defined by the Data Practices Act. This is not necessarily the case.

The majority stated that while Chief Justice Popovich's point may be true that the report on Ledwein will never become public under its decision, "the legislature has expressly indicated that confidential personnel data of government employees shall not become public until after a final disposition of the disciplinary proceeding."\textsuperscript{112}

B. The Conflict Between the Data Practices Act and the Open Meeting Law

With respect to the Open Meeting Law, the supreme court in Anandale Advocate first examined the exception in section 471.705, sub-

\begin{itemize}
\item \textsuperscript{108} Id. (Popovich, J., dissenting).
\item \textsuperscript{109} Id. (Popovich, J., dissenting).
\item \textsuperscript{110} Id. (Popovich, J., dissenting).
\item \textsuperscript{111} Id. (Popovich, J., dissenting).
\item \textsuperscript{112} Id. at 29. In addition, the majority stated that there is a benefit to the public in not having the report released. This benefit arises out of the fact that:
\begin{itemize}
\item The public has a strong interest in settlement of employee discipline matters because it permits governing bodies to discharge troublesome employees with a minimum of cost and aggravation. At the same time, it allows employees the opportunity to avoid adverse publicity. Release of confidential personnel data after such a settlement, but before a final disposition of the disciplinary matter, would remove much of the incentive for employees to settle. . . . Clearly, the public's interest is better served by encouraging settlements while, at the same time, expecting governing bodies to make responsible and intelligent decisions.
\end{itemize}
\end{itemize}

\textit{Id.} at 29 n.2.
division 1 for "‘any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings.’"113 The court concluded from this examination that the quasi-judicial exception does not apply to a city council or any other type of local government.114 The language in section 471.705, subdivision 1 creating a presumption of openness for governmental meetings specifically refers to governing bodies of school districts, unorganized territories, counties, cities, towns, or other public bodies while the quasi-judicial exception in the same section refers only "to any state agency, board, or commission."115 The court stated that the difference in language between these two parts of section 471.705, subdivision 1 "demonstrates that the legislature knew how to incorporate specific reference to cities and other local government bodies in the Open Meeting Law. It also demonstrates that, if the legislature had wanted to exempt city governments from the Open Meeting Law, it would have so indicated."116 Moreover, the court pointed out that the legislative history of subdivision 1 reveals that the legislature specifically excluded local governments from the quasi-judicial exception for disciplinary proceedings.117 Therefore, the supreme court held that the quasi-judicial exception could not have been used by the Annandale City Council as support for its decision to close the meeting in which the resolution to discharge Police Chief Ledwein was passed.118

Since the quasi-judicial exception did not provide support for the City Council’s decision to close the meeting, the supreme court next examined the question of what a public body should do when information classified as private under the Data Practices Act is discussed at a meeting which under the Open Meeting Law is required to be

113. Annandale Advocate, 435 N.W.2d at 29 (quoting MINN. STAT. § 471.705, subd. 1 (1986)).
114. Id. at 30. Ledwein contended that the exception should apply to city council meetings, asserting that "governing bodies other than state agencies, boards or commissions have traditionally closed meetings at which disciplinary actions were taken."
115. Id. at 29.
116. Id. at 30.
117. Id. The court stated that "[l]egislative proceedings reveal that the phrase ‘or other governing bodies’ and similar language was considered in order to include local governments within the exception to the Open Meeting Law contained in section 471.705, subdivision 1.’" Id. (quoting Hearings on House File No. 2037 Before Senate as Committee of the Whole, Minn. Legis., (May 2, 1973) (audiotape) (emphasis added)). The phrase "or other governing bodies" was not included in the bill as finally passed. Id. Hence, the court concluded that the absence of this phrase indicated the legislative intent was for the quasi-judicial function exception to apply only to state agencies, boards and commissions. Id.
118. The court concluded that the intent of the legislature was to have one rule for state agencies, boards and commissions and another for local governments. Annandale Advocate, 435 N.W.2d at 30.
open. The court stated that the Minnesota Court of Appeals previously answered this question in *Itasca County Board of Commissioners v. Olson* by requiring data classified as private to be reclassified as public when discussed at a meeting required to be open. Yet, the supreme court pointed out that the court of appeals in *Olson* did not take into consideration the exception in section 471.705, subdivision 1b for printed materials when answering this question.

Section 471.705, subdivision 1b requires that when members of a governing body have any printed materials available to them before or during a meeting required to be open to the public, "at least one copy of any printed materials relating to the agenda items of the meeting . . . shall be available in the meeting room for inspection by the public." Section 471.705, subdivision 1b also states, however, that materials classified as something other than public as defined in chapter 13 are not affected. The meaning of the Data Practices Act exception in section 471.705, subdivision 1b, is not clear and the supreme court stated there are two equally plausible interpretations. Section 471.705, subdivision 1b can be interpreted either as only prohibiting "the dissemination of written materials including private data and not the oral discussion of such data," or as creating "an exception to the Open Meeting Law anytime it is necessary for a governing body to discuss non-public or private data." The court chose the latter interpretation after examining the legislative history of subdivision 1b.

The court's examination of the legislative history of subdivision 1b focused on statements made by the author of the bill which eventually became section 471.705, subdivision 1b. Specifically, the court focused on a statement made by the author on the Senate floor in response to a question concerning whether the bill "sufficiently protect[ed] delicate and embarrassing personnel information of government employees" from being disclosed to the public at an open meeting. The author of the bill responded by stating:

119. *Id.*
120. 372 N.W.2d 804 (Minn. Ct. App. 1985).
122. *Annandale Advocate*, 435 N.W.2d at 31.
125. *Annandale Advocate*, 435 N.W.2d at 31.
126. *Id.*
127. *See infra* notes 132–38 and accompanying text.
128. The author of the bill was Senator Donna C. Peterson. *Annandale Advocate*, 435 N.W.2d at 31. The court first notes that the legislative history "provides little guidance" to interpreting this subdivision of the statute. *Id. But see infra* note 139.
129. *Annandale Advocate*, 435 N.W.2d at 31.
"[T]hat's exactly why this language is in here, so that currently any materials that are classified as not open to the public would remain that way, and even though that material may be discussed at the meeting, that material could not be made available to the public. And that's why that language is in here; it's to clarify that. So anything that is not open to the public now would remain that way."\(^\text{130}\)

The court in *Annandale Advocate* interpreted this statement as expressing "both the intent that private data be discussed at public meetings and that private data remain unavailable to the public."\(^\text{131}\) To put it differently, the court found the author's statement to be contradictory because if private data is discussed at a public meeting it will certainly be made available to the public. Therefore, the court concluded that the statement was inconclusive in revealing legislative intent.\(^\text{132}\) Nevertheless, the court stated that since the author of the bill asserted "no less than three times that information classified as private should remain private,"\(^\text{133}\) then the primary concern of the legislature must have been "to prevent data classified as private from being released to the public, which would support interpreting section 471.705, subdivision 1b as an exception to the Open Meeting Law . . . ."\(^\text{134}\)

In dissent, Chief Justice Popovich disagreed with the majority's interpretation of the legislative history of subdivision 1b. Relying on the same contradictory statement of the author of the bill as well as one other statement,\(^\text{135}\) Chief Justice Popovich stated:

>[T]he legislative history . . . of subdivision 1b clearly indicates it was not the legislature's intent to close a public meeting when private data was being discussed. The restrictions implemented by the legislature applied only to the *distribution* of the material, not

\(^{130}\) *Id.* (quoting *Hearings on Senate File No. 482*, Minn. Legis., (Apr. 27, 1983) (audiotape) (Statements of Sen. Donna C. Peterson during Special Orders of the Senate).

\(^{131}\) *Annandale Advocate*, 435 N.W.2d at 31.

\(^{132}\) *Id.* The court noted that the contradictory statement "appears to be ambiguous and inconclusive," and then went on to draw a conclusion from the statement. *Id.*

\(^{133}\) *Id.* at 31-32.

\(^{134}\) *Id.* at 32.

\(^{135}\) In addition to the statement of the bill's author referred to by the majority, Chief Justice Popovich's dissent refers to another of the bill author's statements. Senator Donna Peterson states that the idea of the bill is simply that whatever materials are printed which relate to agenda items of governing bodies and are distributed to all the members of the body, those materials should then be available at the public meeting. *Id.* at 34 (Popovich, J., dissenting) (quoting *Hearings on Senate File No. 482*, Minn. Legis., (Apr. 27, 1983) (audiotape) (Statements of Sen. Donna C. Peterson during Special Orders of the Senate).
the discussion of the material at an open public meeting."\textsuperscript{136}

In addition, he pointed out that "[t]he title of the 1983 statute enacting subdivision 1b . . . does not indicate the law provides authority for any governmental body to close a public meeting. Its application is limited to procedures relating only to the distribution of materials."\textsuperscript{137}

The majority in \textit{Annandale Advocate} stated that its conclusion that section 471.705, subdivision 1b creates an exception to the Open Meeting Law by allowing meetings to be closed when private data is discussed is supported by two important considerations.\textsuperscript{138} First, the conclusion is supported by the rule of statutory construction "that the legislature 'does not intend a result that is absurd, impossible of execution, or unreasonable.'"\textsuperscript{139} The court stated that "the protections given by the Data Practices Act become illusory" if section 471.705, subdivision 1b allows oral discussion of private data while at the same time prohibiting its dissemination in printed form.\textsuperscript{140} Second, the conclusion that section 471.705, subdivision 1b creates an exception to the Open Meeting Law is supported by the fact that, even though openness in government is an important public policy upon which both the Data Practices Act and the Open Meeting Law are founded, the provision of exceptions in each statute indicates "that, in certain situations, an equally important public policy is served by denying public access."\textsuperscript{141} In this case, therefore, the public policy of protecting private personnel data from disclosure outweighs the benefits of public access to that information.\textsuperscript{142}

\textsuperscript{136} \textit{Annandale Advocate,} 435 N.W.2d at 34 (Popovich, J., dissenting) (emphasis in original).


\textsuperscript{138} \textit{Annandale Advocate,} 435 N.W.2d at 32.

\textsuperscript{139} \textit{Id.} (quoting MINN. STAT. § 645.17, subd. 1 (1986)). Justice Popovich also employed this rule of statutory construction in his analysis.

\textsuperscript{140} \textit{Annandale Advocate,} 435 N.W.2d at 32.

\textsuperscript{141} \textit{Id.} The court cited as support for this proposition State by Johnson v. Colonna, 371 N.W.2d 629, 632 (Minn. Ct. App. 1985) holding that disclosure of private data could be compelled "because of strong public policy supporting both the limited and protected disclosure of private data under the Government Practices Act," which in turn cited Minnesota Medical Ass'n v. State, 274 N.W.2d 84, 87 (Minn. 1978) (purpose of the Minnesota Government Data Practices Act 'is to control the state's collection, security, and dissemination of information in order to protect the privacy of individuals while meeting the legitimate needs of government and society for information.') (quoting MINN. STAT. § 15.169, subd. 3(3) (1978) (repealed 1979)).

\textsuperscript{142} \textit{Annandale Advocate,} 435 N.W.2d at 33.
Thus, an examination of the two considerations discussed above supports the conclusion that section 471.705, subdivision 1b creates an exception to the Open Meeting Law when nonpublic or private data is discussed. The court stated, however, that this exception is a narrow one allowing public bodies to close "only those portions of . . . [a] meeting in which private data need be discussed."

In dissent, Chief Justice Popovich argued against the exception found by the majority stating that "[t]he potential for abuse is too great for this [the majority's] interpretation to be adopted." Chief Justice Popovich reasoned that the discussion of private material that is not distributed at an open meeting is not absurd because "[d]iscussion . . . need not reveal private information." For example, in this case, the Annandale City Council in their discussion of Ledwein's termination would not have to "refer to specific instances of misconduct contained in the report." While this approach for conducting a meeting involving the discussion of private data suggested by Chief Justice Popovich would appear to prevent the disclosure of the data, it is questionable how valuable the discussion would be in helping the decision makers to reach a rational and reasoned decision.

Chief Justice Popovich also argued that, in this case, the benefit of public access outweighed the benefit of protecting the private personnel data involved from public disclosure. He stated:

As the chief of police for the City of Annandale, Ledwein was the primary law enforcement officer for the city and entrusted with enormous power under the law. With this position comes the responsibility to uphold the public trust. . . . The allegations of misconduct in this case are serious ones, including possible acts of sexual misconduct against certain female persons. The public has a right to know on what basis the city council has made its decision to terminate and a right to witness the proceedings.

Consequently, because "misconduct may have occurred," Chief Justice Popovich reasoned that an open public meeting is required. However, if the meeting is conducted in the manner suggested above by Chief Justice Popovich, i.e., with the members of the Annandale City Council discussing Ledwein's termination without referring to specific instances of misconduct contained in the investigative report, the public will certainly be able to witness the proceedings to
terminate Ledwein; but, how will the public know on what basis the City Council made its decision when nothing specific is discussed?

The majority rejects Chief Justice Popovich’s argument that allowing public bodies to close portions of meetings when nonpublic data is discussed is impractical because there is much potential for public officials to abuse this right by also discussing public data.150 The majority points out that “[b]ecause the legislature has accorded private or non-public status to very few types of data, there is little danger of the doors of government being slammed shut.”151

V. ANALYSIS OF THE MINNESOTA SUPREME COURT’S DECISION

The conclusions reached by the Minnesota Supreme Court in Annandale Advocate appear to be fair and correct, though the court’s analysis is not completely convincing. Most of the analytical problems, however, are the result of some vague and ambiguous provisions contained in both the Data Practices Act and the Open Meeting Law.

A. Final Disposition of Disciplinary Action Under Section 13.43, Subdivision 2

The Annandale Advocate court’s holding that “the final disposition of any disciplinary action” under section 13.43, subdivision 2 of the Minnesota Statutes “refers to the last and final determination of the matter itself”152 is well supported. The United States Supreme Court has stated that a final disposition “of a suit is the end of litigation therein. . . . [T]his cannot be said to have arrived as long as an appeal is pending.”153 Similarly, other courts have stated that a final disposition of a matter “means either acquittal or ultimate disposition upon remand.”154 or “the final settling of the rights of the parties to the action beyond all appeal.”155 When these definitions of final disposition are applied to the fact situation in Annandale Advocate, the inevitable conclusion is that once Police Chief Ledwein exercised his right of appeal to the Veterans Preference Board, the resolution of the City Council to discharge him was not a final settling of his rights beyond all appeal. Furthermore, this conclusion is not limited to the specific fact situation; several state and federal laws give public employees the right to challenge and appeal adverse per-

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150. Annandale Advocate, 435 N.W.2d at 33.
151. Id. at 33.
152. Id. at 29.
sonnel decisions, including the Minnesota Human Rights Act, Title VII of the Civil Rights Act of 1964, and the Fourteenth Amendment of the United States Constitution.

Nonetheless, in this case, there had not been a final disposition of the dispute when Ledwein exercised his right of appeal. The Veterans Preference Act gives the Veterans Preference Board substantial power to modify disciplinary sanctions imposed on an honorably discharged veteran by a public employer. The Minnesota Supreme Court has previously stated that nothing in section 197.46 contemplates that the Veteran's Preference Hearing Board serve merely as a body that reviews findings and approves or disapproves recommendations, but that its function is also to decide for itself what penalty, if any, is justified. However, the Act does not give the hearing board total discretionary power to modify decisions made by public employers. The Act allows the hearing board to determine whether the employer acted reasonably and if so, whether extenuating circumstances justify a modification in the disciplinary sanction imposed by the employer.

Construing both the Data Practices Act and the Veterans Preference Act together, the necessary conclusion is that final disposition of the disciplinary action under section 13.43, subdivision 2 had not occurred when Ledwein exercised his right to appeal to the Veterans Preference Board. This conclusion is necessary given the substantial power of the Veterans Preference Board to alter the decision made by the City Council. Besides if the legislature had intended a final disposition under section 13.43, subdivision 2 to mean the final decision of a public body, it would, or should, have clearly indicated this unusual definition in the Data Practices Act. The legislature cre-

156. MINN. STAT. § 197.46 (1988). See, e.g., Mitlyng v. Wolff, 342 N.W.2d 120, 123 (Minn. 1984). "The Veterans Preference Act is just what its title indicates: a law giving preference to veterans. It says a veteran cannot be removed—i.e., discharged—from his or her public employment except for incompetency or misconduct 'after a hearing.' The hearing must come first, then the discharge." Id. See supra note 74 and accompanying text.


158. Id. at 802 ("The Veterans Preference Act, enacted to control the unfettered discretion of public employers toward veterans, did not intend to place total discretionary power in the veterans preference hearing board."). See supra note 74.

159. See supra note 74 and accompanying text.

160. Subsequent to the Minnesota Supreme Court's determination of Annandale Advocate on January 20, 1989, Representative Carruthers introduced a bill in the Minnesota House of Representatives to clarify the meaning of "final disposition" in section 13.43. See H.R. 1365, 76th Leg., 1989 Minn. Laws. The language proposed in this bill to clarify the meaning of final disposition stated the following: "For purposes of this subdivision, a final disposition occurs when the state agency, statewide system, or political subdivision makes its final decision about the disciplinary action, regard-
ated a presumption in section 13.43, subdivision 4 that personnel data on public employees is private unless specifically classified otherwise. This statutory presumption supports the inference that the legislature intended, as the supreme court points out in Annandale Advocate, to give substantial privacy protection to public employees—protection which extends until the final disposition of a disciplinary proceeding.

Chief Justice Popovich stated in his dissent in Annandale Advocate "that through his resignation Ledwein withdrew his request for a Veteran's Preference Hearing and [therefore,] the disciplinary proceedings became final" requiring the investigative report to be released to the public. While this proposition is logically correct, the analysis goes beyond the question appealed to the court. The question was limited to whether the lower courts had correctly held "that the meeting at which the city council voted to terminate Ledwein was a 'final disposition' of a disciplinary action under" section 13.43, subdivision 2 when Ledwein exercised his right to request a hearing under the Veteran's Preference Act. The fact that Ledwein later withdrew his request for a hearing is of little importance when answering this question. This is especially true since Ledwein's decision may have been largely prompted by the order of the district court to release the report. Once the district court made this ruling, Ledwein's only options were either to attempt some type of settlement with the City or to appeal the decision of the court.

But more importantly, under either option the Veterans Preference Board had no power to change the court's order to release the report. Consequently, it would be inequitable to punish Ledwein for deciding to settle with the City and not proceed with his hearing before the Veterans Preference Board, a hearing which could not change the court's order to release the report. Also, it would be especially unfair to punish Ledwein in this way when the Minnesota Supreme Court has previously stated that "[s]ettlement of disputes less of any later proceedings, including appeals to boards, commissions, courts, or other bodies, other legal actions, and arbitration and grievance proceedings." Id. The bill remained in the House Governmental Operations Committee when the 1989 legislative session ended, and the House had another chance to act on it when it reconvened in February 1990.

161. Annandale Advocate, 435 N.W.2d at 36 (Popovich, J., dissenting).
162. Id. at 26.
163. The district court ordered the report to be released after concluding that the City Council's resolution to discharge Ledwein constituted a final disposition of a disciplinary proceeding. Brief of Appellant at 2, Annandale Advocate v. City of Annandale, 435 N.W.2d 24 (Minn. 1989) (No. CX-87-1583). The district court ordered the release of the investigative report on July 30, 1987. Ledwein filed notice of appeal with the Minnesota Court of Appeals on August 11, 1987, but settled with the City of Annandale on November 2, 1987, prior to his hearing before the Veterans Preference Board. Id.
without litigation is highly favored . . . .”

Chief Justice Popovich counters in dissent that the encouragement of settlements is not a valid justification for the majority's interpretation of a final disposition in section 13.43, subdivision 2. He stated that the majority's reasoning clearly places the private interest of individuals (avoiding embarrassing information) above the public interest (the right to know what is going on about public officials and why). This contradicts the legislature's intent to favor the public interest as against any private interest. . . . While government bodies may want to avoid litigation or expense to cover up bad hiring decisions or inadequate management, that by itself does not overcome the presumption in favor of the public's right to be informed of the operation of its government. Not only do the citizens . . . suffer from this secrecy, but other individuals may be hurt as well.

While there is much validity in this forceful statement, Chief Justice Popovich fails to take into consideration the other factors involved in this type of situation. Other factors that need to be balanced against the interest of the public in an open government include the private interests of the persons involved, the possible chilling effect on the free give and take of ideas between officials which is necessary to reach well thought-out decisions, and the protections afforded the persons involved by other laws. When all of these factors are taken into consideration, the decision of the majority that no final disposition of the disciplinary proceeding involved in this situation had occurred is well supported.

B. Conflict Between Data Practices Act and Open Meeting Law—Discussion of Private Data at an Open Meeting

In *Annandale Advocate*, the Minnesota Supreme Court began its examination of the exceptions to the Open Meeting Law by first analyzing the quasi-judicial exception for disciplinary proceedings in section 471.705, subdivision 1. The court concluded from its analysis of this section that the quasi-judicial exception does not apply to local governments. This conclusion is well supported by both the specific language used in section 471.705, subdivision 1 and the legislative history of that provision. While the portion of the statute creating a presumption of openness in government meetings specifically refers to cities and other forms of local government, the portion

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165. *Annandale Advocate*, 435 N.W.2d at 37 (Popovich, J., dissenting) (citations omitted).

166. See supra notes 45–48 and accompanying text.

creating an exception for quasi-judicial disciplinary proceedings refers only to state agencies, boards, or commissions.\textsuperscript{168} The lack of reference to local government in the portion of the statute creating the exception, after specific referral to several forms of local government in the portion creating a presumption of openness, strongly indicates that the legislature intended the quasi-judicial exception for disciplinary proceedings to apply only to state government. Furthermore, the legislative history of the bill which became the quasi-judicial exception also reveals the same legislative intent. The legislative history of the bill discloses that language originally included in the bill to make the quasi-judicial exception apply to local governments was omitted "[i]n the final version of the bill as passed . . . ."\textsuperscript{169} The court's conclusion then, that the quasi-judicial exception for disciplinary proceedings in section 471.705, subdivision 1 of the Open Meeting Law does not apply to local government bodies, is well supported and beyond reproach.

The court's analysis of the data privacy exception in section 471.705, subdivision 1b of the Open Meeting Law, however, is not beyond reproach. The conclusion reached by the court in its analysis of subdivision 1b appears to be correct, but the analysis it followed to reach this conclusion is problematic. The court found an exception in subdivision 1b allowing public bodies to close meetings when discussing nonpublic or private data in a subdivision that is primarily concerned with the distribution of printed materials at public meetings. While subdivision 1b does contain an exception prohibiting the public from viewing printed materials classified as nonpublic by the Data Practices Act at an open meeting, it does not specifically state that meetings must be closed when nonpublic data is discussed, even though that would be a logical conclusion. As the court pointed out in \textit{Annandale Advocate}, the exact meaning of section 471.705, subdivision 1b is unclear, and it can plausibly be interpreted in two different ways.\textsuperscript{170}

Notwithstanding the contradictory legislative history of the bill which became section 471.705, subdivision 1b, the supreme court in \textit{Annandale Advocate} found support in subdivision 1b for a data privacy exception to the Open Meeting Law by relying on the contradictory statements of the bill's author.\textsuperscript{171} While there is precedent in Minnesota for giving "some weight" to statements made by the author of

\begin{itemize}
\item \textsuperscript{168} See Minn. Stat. § 471.705, subd. 1 (1988).
\item \textsuperscript{169} \textit{Annandale Advocate}, 435 N.W.2d at 30. See \textit{Hearings on House File No. 2037 Before Senate as Committee of the Whole}, Minn. Legis. (May 2, 1973) (audiotape).
\item \textsuperscript{170} \textit{Annandale Advocate}, 435 N.W.2d at 31. See supra note 126 and accompanying text.
\item \textsuperscript{171} See supra notes 127–133 and accompanying text.
\end{itemize}
a bill, it was incorrect for the court to do so here when the author's statements were clearly contradictory. The court's selective use of the portions of the Senator's statement which lend support to its conclusion, while ignoring the portions which refute it, results in an extremely unconvincing and confusing analysis. By selectively using statements, the court falls into a trap which it has previously warned others to avoid: The "[s]elective use of statements made in the give-and-take of the legislative process is . . . risky. 'It sometimes seems that citing legislative history is still . . . akin to 'looking over a crowd and picking out your friends.'" 173

Rather than rely solely on legislative history, the court in Annandale Advocate also argued that a presumptive rule of statutory construction supports the conclusion that the Data Practices Act creates an exception to the Open Meeting Law. Under this rule of statutory construction, there is a presumption that absurd results are not intended by the legislature.174 The court applied this rule of construction to the Open Meeting Law and concluded that "forbidding dissemination of written materials regarding private data, but allowing oral discussion of the same data would be unreasonable and perhaps absurd."175 Although this conclusion is quite reasonable, it is not entirely convincing when the first line of section 471.705, subdivision 1b is considered.

As indicated earlier, the first line of that subdivision requires that printed materials relating to the agenda of the meeting be available for inspection by the public.176 This clearly indicates that the purpose of the subdivision is to require that printed materials relating to the agenda items of open meetings be made available for inspection by

172. The Minnesota Supreme Court has previously stated:
   The legislature's intent, while deemed singular, arises from, although it is
   not necessarily the same as, the collective understandings of the individual
   members. Nor are member’s understandings always expressed, or, if ex-
   pressed, always made for the record. Consequently, statements made in
   committee discussion or floor debate are to be treated with caution. State-
   ments made, however, by the sponsor of a bill or an amendment on the purpose or effect
   of the legislation are generally entitled to some weight.

Handle With Care, Inc. v. Department of Human Servs., 406 N.W.2d 518, 522 (Minn. 1987) (footnote omitted) (emphasis added).

173. Id. at 522 n.8 (quoting Judge Patricia M. Wald, Some Observations on the
   Use of Legislative History in the 1981-82 Supreme Court Term 25 (July 27, 1982)
   (remarks delivered at 1983 Eighth Circuit Conference)).

174. Annandale Advocate, 435 N.W.2d at 32 (quoting MINN. STAT. § 645.17, subd. 1
   (1986)). See Tuma v. Commissioner of Economic Sec., 386 N.W.2d 702, 706-07
   (Minn. 1986) (construing MINN. STAT. § 268.03 (1984) so as to preserve the "general
   intent of the underlying law"). See generally Wichelman v. Messner, 250 Minn. 88, 83
   N.W.2d 800 (1957) (construing several Minnesota statutes regarding encumbrances
   on titles).

175. Annandale Advocate, 435 N.W.2d at 32.

176. MINN. STAT. § 471.705, subd. 1b (1988).
the public. Although, subdivision 1b also provides that "[t]his subdivision does not apply to materials classified by law as other than public as defined in chapter 13, or to materials relating to the agenda items of a closed meeting," this exception must be read in relation to the first line which requires printed materials to be made available for inspection by the public at open meetings. When read as a whole, subdivision 1b appears only to require that printed materials classified as nonpublic by the Data Practices Act not be made available for inspection by the public—not that discussion of nonpublic data requires a meeting to be closed.

Nevertheless, even though the legislative history and statutory construction in *Annandale Advocate* does not convincingly support its conclusion that section 471.705, subdivision 1b creates a data privacy exception to the Open Meeting Law, the conclusion remains correct. The court points out, while "in both the Open Meeting Law and the Data Practices Act, the legislature has indicated that openness in government is an important public policy . . . , by providing exceptions to each statute, [the legislature] has [also] indicated that, in certain situations, an equally important public policy is served by denying public access." One of the situations in which a public policy other then openness in government is better served by denying public access exists for personnel data on public employees. As the court stated, the Data Practices Act indicates a legislative "intent to give the personnel data of public employees substantial privacy protections." Therefore, it is reasonable to interpret section 471.705, subdivision 1b as creating an exception to the Open Meeting Law when private personnel data is discussed, even though the section only specifically refers to the inspection and not the discussion of nonpublic data. Commentators have pointed out that "one of the most widely recognized exceptions" to open meeting laws is for "personnel matters such as the hiring and firing of public officials." The justifications for personnel decisions being ex-

177. Id.
178. *Annandale Advocate*, 435 N.W.2d at 32.
179. Id. See MINN. STAT. § 13.43, subd. 4 (1988).
180. See Comment, supra note 40, at 267 ("[C]ourts have had little difficulty in accepting the validity of [a personnel] exception since it may prevent unjustified harm to an individual's reputation. Furthermore, this exception is necessary if persons of high caliber are to apply for governmental positions.") (footnote omitted); see also Tacha, supra note 45, at 195 (A "subject matter often listed as appropriate for discussion in . . . [closed meetings] is the hiring, firing, compensation, and discipline of public employees. . . . The fact that an employee is paid by tax monies should not subject that employee to the possibility that his or her job performance will be evaluated in public.") (footnote omitted); Wickham, supra note 46, at 485 ("Perhaps the most common exception pattern is the exclusion of proceedings related to personnel management. . . . [T]he main motivation behind these exclusions appears to be a feeling that government will operate far more efficiently if it is permitted to organize
cepted from the scope of open meeting laws are as follows:

Public business is of concern to the entire electorate, but where the proceedings at a public meeting focus on an individual, his personal privacy should be preserved. Even though a public employee is supported by the taxpayers, he, like a non-public employee, should not have to fear that his personal shortcomings might be discussed in a public meeting. Discussions at public meetings are nonjudicial in nature; therefore, the weapons of cross-examination and confrontation for combating the possibility of irreparable harm are not available. . . . Discussions of personnel matters in closed meetings also benefit public bodies themselves. It is believed that the governmental processes will function much more smoothly if staffing and organizing can be done in private. In addition, it is likely that more qualified individuals will be desirous of participating in government service if their privacy is assured. With respect to those already on the public payroll, the assurance of privacy is necessary in order to maintain high morale among government employees.\footnote{181}

While not all courts have accepted the discussion of personnel matters as a valid exception to open meeting laws,\footnote{182} several states have enacted this exception into their statutes.\footnote{183} Accordingly, the Minnesota Supreme Court’s conclusion in \textit{Annandale Advocate} that there is

\begin{footnotes}
\footnote{182. \textit{E.g.}, Times Publishing Co. v. Williams, 222 So. 2d 470, 474 (Fla. Dist. Ct. App. 1969). “The public has chosen to deny any privilege or discretion in . . . governmental bodies to conduct closed meetings.” \textit{Id.} Therefore, there is no exception for the discussion of personnel matters.
\footnote{183. \textit{See, e.g.,} CAL. GOV’T CODE \S 11126(a) (West Supp. 1990) (“Nothing in this article shall be construed to prevent a state body from holding closed sessions . . . to consider the appointment, employment, or dismissal of a public employee . . . unless the employee requests a public hearing.”); HAW. REV. STAT. \S 92-5(a)(2) (1985) (“[A] board may hold a meeting closed to the public . . . [t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved . . . .”); 3 KY. REV. STAT. ANN. \S 61.810 (Michie/Bobbs-Merrill 1986) (There is an exception to open meetings for “[d]iscussions or hearings which might lead to the appointment, discipline or dismissal of an individual employe, [sic] . . . provided that

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a personnel data exception to the Open Meeting Law is not unique or far-fetched. Rather, it is consistent with the majority of other state courts and statutes, and also with the arguments of the majority of legal commentators.

The supreme court's interpretation of section 471.705, subdivision 1b as creating an exception to the Open Meeting Law when private personnel data is discussed is also reasonable because the oral discussion of that type of data in printed form at an open meeting makes the data just as available to the public as when open to visual inspection. It would be absurd to interpret subdivision 1b as making a distinction between the protections given nonpublic data based on whether the data is visually or orally made available to the public. Since both the visual inspection and oral discussion of private personnel data make it equally available to the public, it is logical to interpret subdivision 1b as containing a data privacy exception to the Open Meeting Law. This data privacy exception allows meetings to be closed when nonpublic data is discussed for the same reason it prohibits printed materials containing nonpublic data from being inspected by the public at meetings—the legislature has declared that certain types of data are not public.

This interpretation of section 471.705, subdivision 1b is further supported by concepts of balancing under both the Open Meeting Law and the Data Practices Act previously enunciated by the courts in Minnesota. In Moberg v. Independent School District No. 281,184 the Minnesota Supreme Court stated that under the Open Meeting Law "the public's right to be informed must be balanced against the public's right to the effective and efficient administration of public bodies."185 Likewise, with respect to the Data Practices Act, the Minnesota Court of Appeals has stated that "the public's right to know [must be balanced] with an individual's right to privacy."186

this exception is designed to protect the reputation of individual persons and shall not be interpreted to permit discussion of general personnel matters in secret.

184. 336 N.W.2d 510 (Minn. 1983).
185. Id. at 517. See also Northwest Publications, Inc. v. City of St. Paul, 435 N.W.2d 64, 68 (Minn. Ct. App. 1989) ("[A] showing by the governing body that the need for confidentiality outweighs the public's right of access is a reasonable protection of the public interest."). See generally Note, supra note 48, at 410 ("[A]ny exception, whatever safeguards are provided, must be balanced with the public's need for information and the benefits to be derived from public input into governmental decisionmaking. Without a sufficient reason for an exception, none should be permitted to upset the open meeting principle.").
186. Freir v. Independent School Dist. No. 197, 356 N.W.2d 724, 730 (Minn. Ct. App. 1984). See also Gemberling & Weissman, supra note 21, at 598 ("[A] matter of public policy, the protection of personal data privacy must compete with other legitimate social objectives, particularly public access to data that describes governmental operations. The balance struck will, of necessity, be delicate and ephemeral."); cf. In re Agerter, 353 N.W.2d 908, 913 (Minn. 1984) ("[A] protectable right of informa-
When considered together, these two appellate court statements indicate that the benefits of both the Open Meeting Law and the Data Practices Act must be balanced against other equally important considerations, such as the right of privacy. Moreover, these statements indicate that even though both the Open Meeting Law and the Data Practices Act create a presumption of openness in government, this presumption is not absolute and can be overcome when other public policies are considered to be more important.

Although there is support for the supreme court's conclusion in *Annandale Advocate* that section 471.705, subdivision 1b creates a data privacy exception to the Open Meeting Law, the court does not adequately address the problem of potential abuse of this exception. The dissent, however, points out this lapse. The data privacy exception to the Open Meeting Law could be abused by public officials using nonpublic data as a mere pretext to close a meeting. The supreme court does point out justifiably, "[b]ecause the legislature has accorded private or nonpublic status to very few types of data, there is little danger of the doors of government being slammed shut." While this may be true, it does not completely rule out the possibility of public officials engaging in "pretextual discussions involving non-public data mainly as a pretext to close [a] meeting." Likewise, not all people would agree with the court's assertion that "the legislature has accorded private or non-public status to very few types of data." As one commentator has stated:

The Court's observation about the limited number of confidentiality provisions in the Data Practices Act is arguable. While the Court regarded the Act as "not any more difficult to apply than other statutes," observers are less sanguine. The Act sets forth a panoply of classifications ranging from A to Z, arrest data to zoological garden data, with plenty of other categories sandwiched in-between. The statute has been viewed as an "imperfect mechanism to deal with an extremely complex issue." Its bewildering classifications have prompted another commentator to describe the Act as a "crazy-quilt structure (that) . . . is simply too hard for most people to

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187. See supra note 45 and accompanying text.
188. See supra notes 145-47 and accompanying text.
189. *Annandale Advocate*, 435 N.W.2d at 33.
190. Respondent's Brief at 20, *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989) (No. CX-87-1583). See also Note, supra note 48, at 409 ("[D]espite statutorily prescribed limitations on the use of closed sessions, . . . officials may be tempted to discuss matters beyond the legitimate scope of the private session.").
191. *Annandale Advocate*, 435 N.W.2d at 33.
The Data Practices Act is confusing and has been so recognized by others. As of the date of publication, there is a bill in the Minnesota Senate Judiciary Committee which proposes to repeal the Act and replace it with a completely new Uniform Information Practices Code. Whether this or a similar bill will be enacted in the near future is doubtful. But, the fact that a bill to repeal the Data Practices Act has been proposed indicates there is current dissatisfaction with the complexities of the Act.

The potential for abuse of the data privacy exception to the Open Meeting Law enunciated by the supreme court in *Annandale Advocate* requires both the courts and the legislature to continue to analyze this exception. The potential for abuse, however, does not in and of itself mean that the exception should not be allowed. The same potential for abuse exists for the attorney-client exception to the Open Meeting Law when a governmental entity discusses litigation strategy with its attorney. Yet both the courts and the legislature have continued to allow this exception to exist, and it has not resulted in "the doors of government being slammed shut." Rather, the potential for abuse calls to mind the reality that an open meeting law "accomplishes its purpose only as well as it . . . defin[es] the exceptions to the general policy in favor of openness as well as mandating the general policy." Consequently, it is necessary to better define the data privacy exception to the Open Meeting Law in order to limit its potential for abuse to the greatest extent possible, keeping in mind that some abuse is inherent in any exception.

One possible way of better defining the data privacy exception is to indicate the specific procedure by which it may be invoked, either through judicial, or preferably through legislative action. At the time of this writing, a bill in the Minnesota House of Representatives Government Operations Committee takes this approach. The bill, which has already received two readings in the House, states that

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193. S.F. 178, 76th Minn. Leg. 1989 (introduced by Senator Randolph W. Peterson). The title of the proposed bill is as follows: "A bill for an act relating to collection and dissemination of data; enacting the uniform information practice code; repealing the government data practices act; prescribing penalties; proposing coding for new law as Minnesota Statutes, chapter 13B; repealing Minnesota Statutes 1988, sections 13.01 to 13.90." *Id.* An examination of this bill is beyond the scope of this Comment, but it certainly deserves further consideration.
194. See *supra* notes 49–52 and accompanying text.
196. H.R. 1365, 76th Minn. Leg. (1989). The Governmental Operations Committee had the opportunity to act on the bill again when the House of Representatives reconvened in February 1990.
197. The bill was read for a second time on April 17, 1989, after the House Judiciary Committee amended and adopted it. H.R. 1365, 76th Minn. Leg. (1989).
“[b]efore closing a meeting, a public body shall provide the reason that the meeting is to be closed and describe the subject to be discussed.”198

While requiring public officials to state both the reason for and subject matter of a closed meeting in a prior open session would go far to limit potential abuse, it may not go far enough. A good example of a state statute which goes further and requires additional procedural steps to be followed in order to close a meeting is the Virginia Freedom of Information Act.199 The Virginia Act requires that the subject matter of closed meetings be carefully restricted,200 and that the members of the public body must in open session, immediately following the conclusion of a closed session, certify that only matters “lawfully exempted from open meeting requirements” were discussed.201 The added procedural precautions contained in the Virginia Freedom of Information Act appear likely to prevent all but the worst abuses of the private data exception to the Minnesota Open Meeting Law. These added procedures deserve further consideration.

Besides additional procedures such as those contained in the Virginia Freedom of Information Act, there are other possible precautions to consider as prerequisites to public bodies holding closed

198. See id. at 3.
200. VA. CODE ANN. § 2.1-344.1 (Supp. 1989). In addition to the procedures proposed in the bill currently in the Minnesota House of Representatives Governmental Operations Committee, the Virginia Freedom of Information Act requires:
C. The public body holding . . . [a] closed meeting shall restrict its consideration of matters during the closed portions only to those purposes specifically exempted from the provisions of this chapter.
D. At the conclusion of any . . . closed meeting . . ., the public body holding such meeting shall reconvene in open session immediately thereafter and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of the member’s knowledge (i) only public business matters lawfully exempted from open meeting requirements . . ., and (ii) only such public business matters as were identified in the motion by which the . . . closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of subdivisions (i) and (ii) above, shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.
E. Failure to the certification required by subsection D, above, to receive the affirmative vote of a majority of the members of the public body present during a closed . . . session shall not affect the validity or confidentiality of such meeting with respect to matters considered therein in compliance with the provisions of this chapter. The recorded vote and any statement made in connection therewith, shall upon proper authentication, constitute evidence in any proceeding brought to enforce this chapter.

VA. CODE ANN. § 2.1-344.1.
201. Id.
meetings. Other precautions to consider include, requiring closed meetings to be tape-recorded, or relying on the electoral process for citizens to express their approval or disapproval of how public officials are using the data privacy exception to close meetings. Neither of these two possible precautionary procedures, however, appear to be as effective as the other procedural precautions discussed above.

CONCLUSION

*Annandale Advocate* is a reasonable attempt by the Minnesota Supreme Court to interpret ambiguous sections of both the Data Practices Act and the Open Meeting Law. The court's determination that the "final disposition of any disciplinary action" under section 13.43, subdivision 2 occurs when a public employee has exhausted all of his or her appeal rights is reasonable despite the fact that the court forgets to acknowledge that section 13.43, subdivision 4 of the Data Practices Act allows private personnel data on individuals to "be released pursuant to a court order." Still, this oversight by the court is not fatal to its analysis and conclusion. The court was addressing the issue of whether the lower courts had correctly interpreted the meaning of "final disposition" in section 13.43, subdivision 2 and not whether the courts had power to order the release of private data.

The determination of the court that section 471.705, subdivision 1b creates a data privacy exception to the Open Meeting Law for the

202. The requirement that a public meeting be tape-recorded as a prerequisite to closing it is not a new or novel concept to the Minnesota Open Meeting Law. For example, the governing body of a public employer may close a meeting to discuss labor negotiation strategies, but only if the meeting is tape-recorded and the tape is preserved for two years after a contract is signed. *Minn. Stat.* § 471.705 (1)(a) (1988). A more recent example relates to public hospitals. Under recently enacted legislation, a public hospital or related organization "may hold a closed meeting to discuss specific marketing activity and contract . . . where the hospital or organization is in competition with health care providers that offer similar goods or services, and where disclosure of information pertaining to those matters would cause harm to . . . [its] competitive position . . . ," provided that the closed session is tape-recorded and the tape is preserved for two years. *Minn. Stat.* § 144.581 (5) (Supp. 1989).

203. See Comment, *supra* note 56, at 274. The commentator points out that: the individuals who are subject to the . . . constraints [of the Open Meeting Law] are either publicly-elected officials or are directly accountable to such officials. Consequently, they are subject, either directly or indirectly, to the electoral process. If the public does not have confidence in an official, it can use the electoral process to remove him.

204. *Minn. Stat.* § 13.43, subd. 4 (1988). Chief Justice Popovich points out this error in his dissent. See *Annandale Advocate*, 435 N.W.2d at 37 ("[R]elease pursuant to a court order is an exception to the Data Practices Act, and the majority does not discuss the import of this provision.") (Popovich, J., dissenting).
portions of governmental meetings in which data classified as non-public by the Data Practices Act is discussed is also reasonable. The court acknowledges, however, that there are two possible interpretations of section 471.705, subdivision 1b. Thus, the supreme court wisely calls on the legislature to clarify the statute if the legislature disagrees with the interpretation chosen by the court.205

205. The legislature has already responded to the supreme court's interpretation of § 471.705, subd. 1b in Annandale Advocate by attempting to amend the statute. The legislature was unable to pass any legislation in response to Annandale Advocate during either the 1989 regular or special sessions. However, there were bills in both House and Senate committees which had the opportunity to be acted upon when the legislature reconvened again in February 1990.

There is a bill in the House Governmental Operations Committee attempting to modify § 13.43, subd. 2 of the Data Practices Act by making the following addition:

(b) For purposes of this subdivision, a final disposition occurs when the state agency, statewide system, or political subdivision makes its final decision about the disciplinary action, regardless of any later proceedings, including appeals to boards, commissions, courts, or other bodies, other legal actions, and arbitration and grievance proceedings.


There is also another provision in the bill to modify § 471.705, the Open Meeting Law, by adding the following provisions:

Before closing a meeting, a public body shall provide the reason that the meeting is to be closed and describe the subject to be discussed.

Subd. 1d. [CLOSING MEETING FOR PRELIMINARY CONSIDERATION OF DISCIPLINARY MATTER.] A public body subject to this section may close a meeting for preliminary consideration of specific allegations, complaints, charges, or grounds for discipline, termination, or discharge concerning an employee, volunteer, independent contractor, or student who is subject to the authority of the public body. If the members conclude that termination, discharge, or discipline of any nature may be warranted, all further meetings or hearings must be open, including any formal action on whether discipline, termination, or discharge will be imposed, except as otherwise expressly provided by law. A motion or resolution proposing discipline, termination, or discharge may contain a recitation of specific complaints or charges warranting the action. If at a meeting the public body imposes discipline, termination, or discharge, the public body shall specify the factual basis in a motion or resolution. The motion or resolution must be public regardless of form. A meeting that could be closed under this subdivision must be open to the public if the employee who is the subject of the meeting requests it, unless the public body determines that third parties could be harmed in cases of alleged sexual misconduct. In the case of a minor student, the request for an open meeting must be made by the student’s parent or guardian.

Subd. 1e. [CLOSING MEETING FOR EVALUATION OF EMPLOYEES.] A public body subject to this section may close a meeting for the purpose of conducting a formal evaluation of an employee who is subject to the authority of the public body. At the next open meeting of the public body following the closed meeting at which an evaluation is conducted, the public body shall report on the conclusions of the evaluation. A meeting that could be closed under this subdivision must be open to the public if the employee who is the subject of the evaluation requests it. A public body
Hopefully, if the legislature amends either section 13.43 of the Data Practices Act or section 471.705 of the Open Meeting Law, it will do so in furtherance of the ends discussed by the Minnesota Supreme Court in *Annandale Advocate*. The holding in *Annandale Advocate* results from the necessary balancing of both the presumption that openness in government leads to better government, and the public policies of providing "substantial privacy protection to [the] personnel data"\(^{206}\) of public employees and providing for "the effective and efficient administration of public bodies."\(^{207}\) The public policies of privacy and efficiency are just as important as the public policy of openness in government. All of these policies need to be continually balanced and weighed against one another.

*Richard C. Thrasher*

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may not close a meeting for the purposes of conducting an evaluation more than twice in any one year with respect to the same employee.

*Id.* at 3–4 (emphasis added) (underscoring removed).

A bill considered by the Senate Judiciary Committee would modify § 13.43, subd. 2 by adding the following:

(b) For purposes of this subdivision, there is final disposition of disciplinary action if no further action is pending before the body taking the action and no appeal to that body is possible or the time for filing an appeal to that body has passed. Final disposition of disciplinary action includes a settlement concerning a complaint or charge that is agreed to by the subject of the data.

S.F. 1086, 76th Minn. Leg., at 2 (1989) (underscoring removed).

This bill in the Senate also would modify § 471.705. But, the modifications contained in the Senate version are substantially different from the ones contained in the House version. (The current Senate version is similar to a former House version.) The bill would modify § 471.705 by adding the following:

(c) Materials that contain not public data may be discussed or printed copies distributed at a meeting required by section 13.43, subdivision 2, to be open to the public if the portions discussed or distributed are substantially related to an issue at a meeting required by subdivision 1 to be open to the public. Sections 13.08 and 13.09 do not apply to the dissemination of not public data in compliance with this subdivision.

*Id.* at 2–3.

Unlike in the House, the status of the bill in the Senate is uncertain because the sponsor of the Senate bill, Glen Taylor, is resigning.

206. *Annandale Advocate*, 435 N.W.2d at 29.