

Walking a Fine Line:

An Investigation of the Monticello Mayor and City Council



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Ombudsman's Role

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent and impartial agency in the legislative branch of Iowa state government which investigates complaints against most Iowa state and local government agencies. Its powers and duties are defined in Iowa Code chapter 2C.

The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. The Ombudsman may make recommendations to the agency and other appropriate officials to correct a problem or to improve government policies, practices, or procedures. If the Ombudsman determines a public official has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman may refer the matter to the appropriate authorities.

If the Ombudsman decides to publish a report of the investigative findings, conclusions, and recommendations, and the report is critical of the agency, the agency is given the opportunity to reply to the report, and the unedited reply is attached to the report.

Complaint

We received a complaint on February 22, 2010, concerning the manner in which the mayor and several city council members for the City of Monticello (City) attempted to remove the city administrator from his position. It was alleged that the mayor and at least one council member went to the homes of other council members and sought their signatures on a letter of offer requesting the city administrator to resign or face a vote to terminate his employment. We were asked to investigate whether this action complied with Iowa's Open Meetings Law.

Investigation

On March 30, 2010, we issued a notice of investigation to Mayor Don Miyagawa and City Council Members Dave Goedken, Russ Hodge, Gregg Merfeld, Gerald Muller, John Sauser, and Tom Yeoman.¹

We interviewed the mayor and six council members, City Administrator Doug Herman, and Cory Roberts, who served as the mayor's campaign manager. We also reviewed documents from the City, including the city administrator's *Employment Agreement*, the letter of offer, the agenda, minutes and videotape of the February 6, 2010, City Council meeting, and related newspaper stories. In addition, we researched Iowa statutes, court cases, Iowa Attorney General's Opinions, and other resources relevant to the issue raised in the complaint.

¹ As of the date of this report, Miyagawa and Hodge no longer serve as mayor and council member, respectively. Mayor Miyagawa resigned his position effective February 22, 2011. Council Member Hodge moved out of the ward he was elected to serve and resigned on April 30, 2010.

Summary of the Facts

The City of Monticello hired City Administrator Herman to serve in that position from June 5, 2009, through June 30, 2013; the terms and conditions of employment are set out in a written *Employment Agreement* between the City and Herman.

Former Mayor Miyagawa said that, during his campaign and after his re-election as mayor in November 2009, he heard from citizens who were dissatisfied with Herman's job performance. On or about February 4, 2010, the mayor asked Cory Roberts, who served as his campaign manager, to write a letter on his behalf. The letter was an offer requesting Herman to resign or face a vote for his termination at the next City Council meeting.² The letter stated in part the following:

With the consent of the undersigned members of the City Council of Monticello, I extend to Doug Herman the following offer, to be fully completed and signed and agreed to upon review by legal council [sic] of the city's choosing.

Doug Herman will resign immediately as City Administrator of the City of Monticello with a severance package of six (6) [months] salary and benefits. The additional salary package based on the recent seating of the city council will not be paid. Doug Herman will sign a full release of future liability of the City of Monticello.

Upon receipt of this letter, employee Doug Herman is given 48 hours to respond in writing or by personal contact to the mayor advising of his decision to accept or reject this offer with the written offer being completed by city legal council [sic] immediately following the acceptance.

If the employee Doug Herman chooses to reject this offer, I will be forced to move forward with a motion to terminate employee for cause. This motion will be placed on the agenda of the next scheduled meeting and a vote will be called for.

I will seek to remove Doug Herman as an employee based on "misconduct" and "violation or disregard of the standards of behavior expected by the City" and "moral turpitude".

...

Upon receipt of this letter Doug Herman is to be placed on paid administrative leave until this matter is fully complete.

...

All recipients and signators [sic] of this letter are notified and strictly held under confidentiality of the contents of this letter and are not to share it publicly or privately with any person including but not limited to employees of the city. City

² See entire letter of offer in Appendix A.

council members are not to discuss this matter with employee Doug Herman without a quorum.

The following signatures indicate an agreement with me and clearly state that they intend to vote with the will of the people and with myself in the removal of Doug Herman as City Administrator. With the consent of the council I will be retaining the services of legal representation to assist with this matter.

Miyagawa told us he wanted to get “support” of the council members so he could bring up the matter of the city administrator’s termination at the City Council meeting on Thursday, February 11, 2010. Miyagawa showed the letter to Council Members Hodge and Merfeld and discussed it with them, after which they individually signed it. Hodge informed us his understanding was that the mayor wanted support from the council members to place Herman on administrative leave, then for the City Council to hold a closed session and a final vote to terminate him. Merfeld also understood the letter to be support for the mayor “to bring this to a vote on Thursday and ask [Herman] to resign if he wants.” He thought the mayor had authority to “suspend” Herman until the City Council could vote on it.

In order to get signatures from the other council members, Mayor Miyagawa and Merfeld tried to meet with the other council members individually at their homes on Saturday, February 6, 2010. At their request, Hodge also joined in the meetings with Sauser and Muller.

According to several council members, they came to the homes without any advanced warning or any notice of the reason for their visits. Each gathering consisted of Miyagawa, Merfeld, and one or two other council members. Miyagawa acknowledged to us he was aware that it would be wrong to have four council members meet at the same time. He stated, “I didn’t want to break the law.”

Merfeld told us they tried to obtain signatures from Goedken and Sauser first because they knew Muller and Yeoman would not sign and were concerned that Yeoman might inform Herman.

Miyagawa, Merfeld, and Hodge convinced Sauser to sign the letter. Sauser told us that “they came in and sat down and presented all their arguments . . . to terminate our City Administrator.” He said they discussed Herman’s job performance before he “went along” and signed the letter; he regretted signing the letter right after they left his house. Sauser added that he did not believe his signature was a vote because “there was never a quorum, so there was never a legal vote.”

Goedken said that he “knew what they were doing was not right when they came to [his] house.” Nevertheless, he had a lengthy conversation with Miyagawa and Merfeld that included discussion about Herman’s job performance. He said he felt “like they were trying to twist my arm to sign.” Goedken recalled they used the word “vote” when he was asked to sign the letter.

I believe that I was being presented with the fact that we were actually taking a vote, and if they would have got four people to sign it that Doug would be voted to be released, that he would go ahead and resign . . . They were conducting a vote because they were looking for four council members . . . They knew [Muller and Yeoman] would not likely [sign the letter].

Goedken claimed he chose not to sign the letter because he thought the matter should “go to a vote at the public meeting.” However, both Miyagawa and Merfeld said they were left with the impression that Goedken was supportive of the letter but did not want to be one of the first council members to sign it. Merfeld said, “We had verbal support but we didn’t have written support.”

Muller informed us the reason why he refused to sign the letter was because he had “no reason to relieve [Herman] from his position.” He claimed Miyagawa, Merfeld, and Hodge were telling him “all the reasons and the causes” for the letter and “demanding” his support.

Yeoman was not home, so Miyagawa and Merfeld left a copy of the letter at his home.

Miyagawa also signed the letter. He told us that he thought his signature could serve as the “fourth one” needed to proceed as planned. His understanding was that he could “break the tie” if there was a 3-to-3 tie. Hodge said he believed at that time Herman answered to both the mayor and council members. That Saturday evening, Miyagawa, Merfeld, and Sauser presented to Herman a letter with the same wording, but without the page containing the signatures.³

Herman recalled, “[T]he Mayor told me I could quit and receive severance pay, or, in the alternative, he would fire me for cause.” Herman believed from Miyagawa’s comments “the decision to terminate had been made.” He added, “I understood that I would be on administrative leave until Thursday at which time there would be a closed session to be followed by my termination.”

Herman declined to resign and was told he was being placed on paid administrative leave. On the next day, Miyagawa had the locks changed to Herman’s office.

When Yeoman returned home, he found a copy of the letter. On Sunday, he met with Muller and Sauser at his office; after that meeting, he called Goedken on the telephone. Yeoman did not think the mayor had the authority to put Herman on administrative leave. According to Yeoman, all of them were in agreement that Herman should report to work on Monday. Yeoman then called Herman and informed him that he should go to work on Monday.

Miyagawa learned that Herman would be reporting to work and went to the city hall and delivered the keys to unlock Herman’s office on Monday. Miyagawa then called for a special meeting to be held on Tuesday. The agenda⁴ for that meeting included the following items:

1. Mayor requests permission to “hire alternate legal counsel, not Anne Loomis.”
2. Mayor requests Discussion and possible action Re: Preparation of Performance Evaluation of Doug Herman.

The minutes of the February 9, 2010, special meeting⁵ indicate that several community members spoke in support of Herman and demanded to know the reasons the mayor and council members

³ See the letter presented to Herman in Appendix B. It was written on City stationery and dated February 6, 2010; the language is identical to the letter shown to the council members minus the signature portion.

⁴ See agenda in Appendix C.

⁵ See the complete minutes of the February 9, 2010, meeting in Appendix D.

were not happy with his performance. The mayor and council members provided some detail about what occurred over the weekend. According to the minutes, Goedken said the following:

Goedken stated the [sic] Miyagawa stated at his house that “either Doug goes or I go”; Goedken would like him to stick to his word. Goedken questioned Hodge, you talked about open communication and you signed the letter and they demanded a house to house vote.”

The minutes later indicate that Hodge expressed regret and apologized for his action:

Hodge stated that Goedken was right. Hodge stated he did it wrong and apologized to the public. He stated he doesn’t agree how it was done and he was wrong on how he did it. It should have been done the way we are doing it tonight.

Toward the end of the meeting, the minutes said the City Council voted “to establish an evaluation team to setup [sic] an objective evaluation system process for Herman’s evaluation which would not be tied to the budget process.”

Following that meeting, no further action was taken by the City Council to remove Herman as the city administrator, and he remains in that position to this date.

Iowa Open Meetings Law (Iowa Code chapter 21)

Iowa Code § 21.1 states the legislative intent and purpose for the Open Meetings Law:

This chapter seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this chapter should be resolved in favor of openness.

Not every gathering or discussion involving members of a government body is subject to the law. Iowa Code § 21.2(2) defines what type of gatherings are subject to its requirements:

“Meeting” means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body’s policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

Meetings of governmental bodies must be “preceded by public notice . . . and shall be held in open session unless closed sessions are expressly permitted by law.” Iowa Code § 21.3.

A government body may enter into a closed session to evaluate an employee’s job performance or to consider an employee’s discharge when both of the following conditions exist:

- The individual requests it; and
 - When it is necessary to prevent needless and irreparable injury to that individual's reputation.
- Iowa Code § 21.5(1)(i).

In addition, the following procedural requirements in Iowa Code § 21.5 must be met:

- Two-thirds of the members or all members present vote in the affirmative to go into closed session;
- The vote of each member and the specific exemption for holding the closed session is announced in the open session;
- Detailed minutes and a recording of the discussion in the closed session are kept; and
- Final action on a matter shall be taken in open session, unless otherwise allowed by law.

Relevant Court Cases

Critical to our analysis is how the Iowa courts have interpreted the elements in the definition of “meeting” in Iowa Code § 21.2(2) for the purpose of determining whether the requirements of the Open Meetings Law apply. Several Iowa court cases have examined whether a particular gathering involving members of a governmental body was a “meeting” under the law.

1. Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981)

In *Wedergren*, three members of a school board had several contacts with each other about possibly discharging the school superintendent prior to a board meeting on this issue. All the contacts involved only two members, except for one instance when a third member also joined in a telephone call. The Iowa Supreme Court said “the legislature has expressly limited the law to apply only to gatherings of a majority of the members of a governmental body.”⁶ It concluded any gathering of two members of the five-member board was not a “meeting” under the Open Meetings Law. Even though the three-way telephone conversation was a possible violation, the court decided not to void the vote taken at the public board meeting to consider termination.

2. Hettinga v. Dallas County Board of Adjustment, 375 N.W.2d 293 (Iowa Ct. App. 1985)

In *Hettinga*, the Iowa Court of Appeals decided a “meeting” did not occur when, prior to an open meeting, a majority of the members of the board of adjustment met privately with the county attorney in an adjacent room to discuss the law pertaining to a county zoning ordinance. In reaching that decision, the court considered if they engaged in any “deliberation or action upon any matter within the scope of the governmental body’s policy-making duties.”⁷ The court noted an Attorney General Opinion had interpreted that statutory language to embrace situations where there is “discussion and evaluative processes in arriving at a decision or policy.”⁸

⁶ *Wedergren*, 307 N.W.2d at 18.

⁷ *Hettinga*, 375 N.W.2d at 295.

⁸ 1979 Iowa Op. Att’y Gen. 164 (# 79-5-14).

It also pointed out how this contrasts with the “ministerial or social purposes” exception in Iowa Code § 21.2(2), as explained in another Attorney General Opinion:

[A] gathering for ‘purely ministerial’ purposes may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body's policy-making duties. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either “deliberation” or “action” [as defined earlier in the opinion] occurs. A meeting may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they exercise judgment or discretion.⁹

The court concluded that the Open Meetings Law did not apply because there was no deliberation or action regarding board policy-making during the gathering, and the discussion was solely to clarify a point of law with the county attorney. It also found none of the members intended to violate the law.

3. *Gavin v. City of Cascade*, 500 N.W.2d 729 (Iowa Ct. App. 1993)

In *Gavin*, the Iowa Court of Appeals reviewed two transactions to determine if the Open Meetings Law was violated and concluded that no “meeting” occurred in either situation.

The first transaction occurred after a city-contracted excavation unexpectedly encountered some rock which would cost additional money to dig through. The mayor and one council member met at the site, and the mayor contacted two other council members individually and based on these conversations, told the contractor to proceed with removal of the rock. Payment for the work was later discussed at an open meeting and approved at a subsequent open meeting. The court, relying on *Wedergren*, held no “meeting” under the Open Meetings Law occurred because only two members of the five-member council met at any one time.

The second transaction took place after the city superintendent requested an opinion on his authority to pay for some rock which was \$10 under his pre-approved limit. The mayor went with two council members to look at the rock together and then called a third council member for her opinion. The mayor subsequently told the superintendent to purchase the rock. Payment for this purchase was later voted on at a regular open meeting of the council. The court focused on whether any policy-making deliberation or action occurred when they met about the rock and found no such evidence; it noted the mayor and a council member testified they did not discuss purchase of the rock then, but later individually expressed their opinions to the superintendent. The court also did not find any intent to avoid the requirements of the Open Meetings Law.

4. *Dooley v. Johnson County Bd. of Supervisors*, No.08-0195, 2008 WL 5234382 (Iowa Ct. App. Dec. 17, 2008)

In *Dooley*, a county board of supervisors was accused of violating the Open Meetings Law when its members had private discussions about a road project with the contractor. These discussions

⁹ 1981 Iowa Op. Att’y Gen.162 (# 81-7-4(L)).

with the contractor’s representatives occurred in quick succession—first with just two members of the board, then with two other board members, then with the remaining board member.

The Court of Appeals identified the issues as whether “a majority” of the members gathered, whether the discussions that transpired amounted to “deliberation,” and whether the board had intended to avoid the purposes of the law. However, the court did not specifically address whether the serial discussions (or “walking quorum,” as referenced by the plaintiffs) amounted to being a gathering of a “majority” of the members. Rather, it proceeded on the assumption that a majority was present and focused its analysis on the other two issues.

The court agreed with the district court’s ruling there was no violation because there was no evidence that members engaged in deliberation or policy-making during those meetings. It found the board members merely asked questions and attempted to obtain clarification about the recommendations in a draft report and did not debate or discuss the recommendations. However, the court pointed out that, since the project was to be voted on at a public meeting, a gathering to provide input on the draft report appeared dangerously close to “deliberation.”

It added that the “record is conflicting as to whether the serial gathering was arranged to avoid the purpose of the open meetings law requirements or carefully structured to avoid a violation of the law.”¹⁰ In the end, the court said it did not need to decide whether a majority was present.¹¹

5. *Fleener v. City of Oskaloosa*, No. 09-0230, 2009 WL 4116568 (Iowa Ct. App. Nov. 25, 2009)

The *Fleener* case involved a letter that was signed serially by a majority of the members of a city council and of a county board of supervisors. The letter was written by an employee of a private company, to be sent to officials of another city in the area, to indicate interest in further dialog about the location of the site for a new airport to serve the region. The mayor and four of seven city council members signed the letter; two of the three county board members also signed it.

The issue in the case was whether the events leading to their signatures on the letter was a “meeting” under the Open Meetings Law. The court found the company employee contacted the signatories and either invited them individually to her company’s office or offered to bring the letter to their individual place of business or home to sign the letter. It found “no evidence of an in-person gathering, as the signatures were each obtained by Musco at a separate time, and there is no evidence of a prior gathering of any of the various board or council members to discuss the letter amongst themselves.”¹² The court also found that the employee’s telephone and email communications with the various council or board members did not involve any “deliberation” and were for the purpose of informing them about the letter and arranging for them to sign it.

The court acknowledged that it “could be gleaned from the . . . record . . . that as the various members signed the January 3, 2008 letter, the later ones to sign were informed of any who had already signed, and were also able to see those signatures.”¹³ But, that did not suffice to show

¹⁰ *Dooley*, 08-0195, 2008 WL 523482, at *4.

¹¹ In its conclusion, the court said, “Given that there was no deliberation during the gathering, we need not decide whether a majority was present.” *Id.* at *5.

¹² *Fleener*, 09-0230, 2009 WL 4116568, at *2.

¹³ *Id.* at *5.

any discussion occurred among a majority of the council members or the board members. The court stated, “The January 3, 2008 letter was signed by . . . [the] members individually, based on the information each had individually received from Musco, not from a majority of their members meeting and deliberating with intent to circumvent the open meetings law.”¹⁴

Analysis and Conclusions

The issue of whether a gathering by a government body constitutes a “meeting” under Iowa’s Open Meetings Law (Iowa Code chapter 21) depends on the specific factual circumstances. For the requirements of the law to apply, several elements must be met under Iowa Code § 21.2(2). They include:

- There is a gathering of a majority of the members in person or by electronic means
- The gathering concerns a matter within the governmental body’s policy-making duties
- Deliberation or action occurs on the subject matter
- The gathering is not purely for ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of the law.

The City of Monticello is a government body under Iowa Code chapter 21,¹⁵ and its meetings are subject to the requirements of that chapter. We analyzed the events surrounding the attempts on February 6, 2010, to obtain the signatures of the council members on a letter to be presented to the City Administrator to determine if a “meeting” occurred.

Issue 1: Was the subject matter of the letter within the City Council’s policy-making duties?

The City of Monticello has a mayor-council form of government, with six council members and a mayor.¹⁶ There are four ways a council can exercise power: a motion, a resolution, an amendment, or an ordinance.¹⁷ In order to act on an ordinance, resolution, or amendment, the council must do so with a majority of all members (at least four of six members). A majority of all council members is a quorum.¹⁸ For a motion to pass, they only need a majority of a quorum (at least three members).¹⁹

The mayor functions as the chief executive officer of the city and presides at the council meetings.²⁰ The mayor is not a member of the council and is not able to vote on measures before the council, with one exception: In cities where there is an even number of council members (i.e., six members), the mayor may break a tie vote, but only “on motions not involving ordinances, resolutions, or appointments made by the council alone.”²¹ (Emphasis added.)

¹⁴ *Id.*

¹⁵ Iowa Code § 21.2(1).

¹⁶ Iowa Code § 372.4.

¹⁷ Iowa Code § 364.3.

¹⁸ Iowa Code § 372.13(1).

¹⁹ Iowa Code § 380.4(1).

²⁰ Iowa Code § 372.14(1).

²¹ Iowa Code § 372.4 and City of Monticello Ordinance 15.05.

By ordinance, the City Council created the office of city administrator, who is appointed by a majority vote of the Council and serves “at the discretion of the Council.”²² The Council, as the appointing body, has the authority to remove the city administrator.²³ However, any removal must be “by written order” which is filed with the city clerk and a copy sent to the person removed, after which the person may request “a public hearing before the council on all issues connected with the removal.”²⁴

City Administrator Herman was appointed by the Council after it passed a resolution approving the terms of an *Employment Agreement*, effective June 5, 2009, through June 30, 2013. Section 13 of the agreement provides for Herman to receive an annual performance evaluation based on goals and performance objectives set by him and the Council.

The agreement outlines in Section 10 the terms and conditions for termination; it specifically states that termination shall occur when:

1. The majority of the governing body votes to terminate the Employee at a duly authorized public meeting.
- ...
3. If the Employee resigns following an offer to accept resignation, whether formal or informal, by the Employer as representative of the majority of the governing body that the Employee resign, then the Employee is entitled to the severance package.

Clearly, Iowa law and City ordinance grants the Council the authority and responsibility for the appointment, job performance evaluation, and termination of the city administrator. The mayor has no power to act on these matters, even if there is a 3-to-3 tie vote or decision by the Council.

We find that, although the letter was initiated by the mayor, it was presented to and discussed with members of the Council. The letter expressed dissatisfaction with Herman’s job performance and offered him the opportunity to resign immediately or face a vote for his removal at a Council meeting. Since the city administrator’s job performance and continued employment are under the Council’s purview, we conclude consideration of these matters by the council members was within their policy-making duties under Iowa Code § 21.2(2).

Issue 2: Was there deliberation by council members regarding the subject matter in the letter?

The Open Meetings Law does not define what is meant by the terms “deliberation” or “ministerial or social purposes.” Several court cases and Attorney General Opinions have examined what is “deliberation” for purposes of the law.

The *Hettinga* case, quoting one Attorney General Opinion, said deliberation includes “discussion and evaluative processes in arriving at a decision or policy.”²⁵ Another Attorney General

²² City of Monticello Ordinance 21.01.

²³ Iowa Code § 372.15.

²⁴ *Id.*

²⁵ *Hettinga*, 375 N.W.2d at 295.

Opinion, citing *Arrow Express Forwarding Co. v. Iowa State Commerce Commission*, 130 N.W.2d 451, 453 (1964), defined a ministerial act as:

one which a person or board performs upon a given stated of facts in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.²⁶

“The difference between a ministerial gathering and one that involves deliberation appears to be whether members are gathering information or are discussing opinion.”²⁷ However, a ministerial gathering can evolve into a meeting under Iowa Code § 21.2(2) if there is “any discussion that focuses at all concretely on matters over which they exercise judgment or discretion.”²⁸

As evident from the court cases referenced earlier, whether or not deliberation occurred at a gathering depends on the factual circumstances involved. Determining if there was deliberation requires looking “not only to whether there was communication, but also the intent behind any such communications.”²⁹

Based on the evidence we collected, we find that the communications at the various gatherings involving the mayor and different council members were not for the purely ministerial purpose of sharing or receiving information about Herman’s work or job performance. The purpose of the gatherings was to obtain the signatures of the council members on a letter to indicate their “agreement” with what was stated in the letter, including their intention “to vote . . . in the removal of Doug Herman as City Administrator” if Herman did not voluntarily resign. However, unlike the *Fleener* case, the communications involved more than merely informing the council members about the letter and arranging for them to sign it. The discussions involved the sharing of opinions about Herman’s job performance. Moreover, in the gatherings with Council Members Sauser, Goedken, and Muller, there were efforts to persuade them that Herman’s job performance was not satisfactory and warranted his termination.

It does not matter that these gatherings took place in informal settings, such as their homes. We note that the *Employment Agreement* provides that the offer itself may be formal or informal; however, that does not mean the discussion leading to a decision to make such an offer may be done in an informal setting so as to avoid the requirements of the Open Meetings Law. As pointed out in an Iowa Attorney General Opinion, § 21.2(2) specifically provides that an “informal,” as well as a formal gathering of the members, may constitute a “meeting” for purposes of the law.

It would be a strange law indeed which was intended to assure the public a right to observe their government’s business being conducted, but which permitted governmental body members to avoid the requirements of the law by simply conducting important public affairs during informal settings. The intent of the Legislature in including the term “informal” is clearly to prevent this.

. . . Such “informal” gatherings of the members constitute a “meeting” under the law if the members engage in discussion or conduct public business involving

²⁶ 1990 Iowa Op. Att’y Gen. 65 (#79-5-4).

²⁷ *Dooley*, 08-0195, 2008 WL 523482, at *4.

²⁸ *Hettinga*, 375 N.W.2d at 295.

²⁹ *Fleener*, 09-0230, 2009 WL 4116568, at *4.

“deliberation or action” upon any matter within the scope of the governmental body’s policy-making duties.”³⁰

Because the communications at these gatherings involving council members entailed evaluating Herman’s job performance to decide whether or not to pursue his termination, we conclude that their discussions constituted deliberation on a matter within the City Council’s policy-making duties, as defined under Iowa Code § 21.2(2). Although the Council did not follow through to remove Herman after he refused to resign, this does not negate that deliberation did occur.

Issue 3: Was there a gathering of a “majority of the members” of the City Council?

This issue of whether there was a gathering of a majority of the council members is the most difficult one to address under the factual circumstances. A majority of the six-person Council means at least four members. However, during each of the exchanges involving the mayor and various council members, at most there were only three council members present.³¹

The evidence shows the following series of communications: Miyagawa first met with and obtained the individual signatures of Council Members Hodge and Merfeld. They then went from house to house in the course of one day to present and talk about the letter with the remaining council members—first Miyagawa and Merfeld met with Goedken, then all three went together to meet with Sauser, then Muller. They did not communicate with Yeoman because he was not home at the time, but they left a copy of the letter at his house.

The Open Meetings Law does not specifically state whether such serial communications, each involving less than a majority of the members, constitute a “meeting” for purposes of the law. Nor has any Iowa court case squarely addressed the issue. As discussed earlier in this report, although there were multiple contacts involving two to three school board members in the *Wedergren* case, the court interpreted the law to apply only to gatherings of a majority of the members of a governmental body. Three later cases, *Gavin*, *Dooley*, and *Fleener*, also involved serial contacts with members, but they were disposed of based on findings that no “deliberation” occurred.

Relying on the holding in *Wedergren*, the court in *Gavin* determined sequential communications by a mayor with various council members did not result in a “meeting” under the law, where only two members of a five-member city council were present at one time.

The plaintiff in *Dooley* argued that serial exchanges by groups of two county board members were contemplated to be covered by the law, pointing to court decisions in other states and an Attorney General Opinion which expressed “doubts that the [law] could be avoided through any bifurcation mechanism employed by a majority of the members to conduct the public’s business.”³² The court instead continued its analysis “[a]ssuming a majority was present” and determined the members did not engage in deliberation or policy-making.

³⁰ 1979 Iowa Op. Att’y Gen. 164 (# 79-5-14).

³¹ We note that three council members met at Yeoman’s office on Sunday, after which Yeoman also spoke with Goedken by telephone. We find their intent was to undo a procedural error when the city administrator was placed on administrative leave without the requisite authority, rather than to decide as a body if he should be terminated.

³² *Dooley*, 08-0195, 2008 WL 5234382, at *3.

Interestingly, the *Fleener* case also concerned a letter signed by members of a government body. In that case, the letter was signed by a majority of the members of a city council and also a majority of members of a county board; they each signed the letter separately at different times. As a result, the court found no evidence “of an in-person gathering” nor “of a prior gathering of any of the various board or council members to discuss the letter amongst themselves.”

Given Iowa’s current statutory and case law, we do not believe there is sufficient legal basis for us to conclude that the series of gatherings and communications about the letter involving the Mayor and various council members resulted in a “meeting” under the Open Meetings Law.

This conclusion is based on our finding that:

- No more than three council members were present at any one gathering.
- There were no prior communications amongst the council members to do the letter. The letter was prepared at the request of the mayor and then presented to the council members individually for their signature. Although some discussion and deliberation occurred at that point, as already noted, a majority of the members was never present.
- There was no concerted effort or intent by a majority or more of the council members to hold these serial gatherings in order to circumvent the Open Meetings Law. The City Council as a body did not arrange in advance or plan for these gatherings to occur. Mayor Miyagawa did acknowledge he knew in advance that having more than four council members present would violate the law; even assuming that Council Members Merfeld and Hodge were aware of this also, the other council members they visited had no prior notice they would be coming to their homes to talk with them about the letter.

However, we need to point out that we do not reach this conclusion easily or with the sense that what happened is the right way for a government body to conduct its business. We are especially troubled by the actions of Mayor Miyagawa and Council Members Merfeld and Hodge when they decided to jointly pursue obtaining the other council members’ signatures, but we are also concerned that other council members acquiesced and engaged in deliberation about what to do with City Administrator Herman, even after they became aware of the serial communications.

Although we are unable to conclude that they violated the Open Meetings Law, under its current definition of “meetings” and as it has been interpreted by the Iowa courts, we believe they violated the “spirit” of the law as enunciated in the purpose statement of the law under Iowa Code § 21.1. The purpose of the law is to require meetings of government bodies to be open so the public can attend and know the “basis and rationale of government decisions.” Members of government bodies contravene that purpose when they use serial gatherings to arrive at a predetermined result so as to make the final decision at a meeting a mere formality. Any closed sessions must be expressly permitted and in compliance with procedural requirements.

What should have happened? The issue of whether or not to terminate the city administrator based on his job performance, as provided in the *Employment Agreement*, should have been placed on the agenda of either a special or regular meeting of the Council. In the event the city administrator requests a closed session, the Council could hold a closed session if 1) it

determined that a closed session was necessary to prevent needless and irreparable injury to the city administrator's reputation, and 2) at least two-thirds or a majority of all present voted for it. The Council would need to take detailed minutes and record the discussion in the closed session. The Council would also need to take final action in open session. If the city administrator prefers an open session, then any deliberation and action would occur in the open session.

Summary of Conclusions

The Monticello City Council has authority and responsibility to appoint, evaluate, and terminate City Administrator Herman based on his competency. The subject matter of the letter, to pursue termination of City Administrator Herman due to concern with his job performance, was a matter within the City Council's policy-making duties. The council members engaged in deliberation under Iowa's Open Meetings Law when the letter was presented to and discussed with each council member sequentially, in an effort to obtain their signed agreement with the letter. However, we are unable to conclude, based on the evidence and current Iowa statutory and case law, that these serial communications resulted in a "meeting" under Iowa Code § 21.2(2) of the Open Meetings Law for the following reasons:

1. No more than three council members were present at any one of the gatherings.
2. There was no prior discussion amongst the council members to do the letter before it was presented to them for their signature.
3. There was no concerted effort or intent by a majority or more of the council members to hold serial gatherings in order to circumvent the Open Meetings Law.

Nevertheless, we have serious concerns about the conduct of the mayor and council members who either chose to or allowed this conduct to occur. We believe they violated the "spirit" of the law as stated in the purpose statement under Iowa Code § 21.1. Deliberating a matter within their policy-making duties through the use of serial communications, in order to evaluate and determine in advance the action to be taken at a meeting, is contrary to the intent of the law to allow the public access to the "basis and rationale of government decisions." For a matter to be deliberated in a closed session, it must be permitted by and done in accordance with the law.

Recommendations

Due to our concerns with what transpired, the Ombudsman recommends that the Monticello City Council take the following actions to help ensure compliance with the Iowa's Open Meetings Law and to avoid attempts to circumvent the purpose and intent of the law in the future:

- Study and become familiar with the Iowa Open Meetings Law and review relevant case law and other resources such as the Iowa Attorney General's Opinions and Sunshine Advisories related to specific issues that arise. Also, refer to the "Iowa Open Meetings, Open Records Handbook" published by the Iowa Freedom of Information Council.

- Arrange for a training for the Council within the next six months to be taught by someone knowledgeable on the requirements of the Open Meetings Law and also the Open Records Law.
- Consult with the city attorney or seek other appropriate legal advice if there are questions or uncertainty about whether a particular action might violate the law.

Ombudsman's Note

We want to point out what happened in Monticello is not the first time that the issue of serial gatherings (or “walking quorums”) has come to our attention. We have seen news stories that seemed to suggest that some governmental bodies were using serial communications to circumvent the Open Meetings Law. Because of those concerns, we proposed legislation in 2005 to amend the definition of “meeting” under Iowa Code § 21.2(2) to specifically include serial gatherings involving deliberation on a matter within the government body’s policy-making duties. A bill was introduced but it was not enacted. An amendment we recommended during the legislative session would have added the following underlined language to the definition:³³

“Meeting” means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body’s policy-making duties. A meeting includes a prearranged series of gatherings of members who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where the members knowingly participate in the series of gatherings to deliberate or act upon the same matter within the scope of the governmental body’s policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

In 2009, another bill was introduced to address the issue, but that was also unsuccessful.³⁴

We hope the Iowa General Assembly will reexamine the issue regarding the serial gatherings or serial communications by governmental bodies and consider legislation to provide clarity when they constitute a “meeting” for purposes of the Open Meetings Law.

³³ After we submitted the legislative proposal, House File 372 was introduced by the House Committee on State Government. Our amendment was recommended as an alternative to Amendment H-1185, which had been filed on the bill. The bill did not make it out of the Committee for further consideration by the Iowa General Assembly.

³⁴ Senate File 282, with a provision similar to what was in House File 372 in 2005, was introduced by the Senate Committee on State Government. Although the bill made it out of the Committee, this provision was removed when Senate File 282 was attached to House File 777, a similar bill being considered by the House of Representatives.

APPENDIX A: Signed Letter of Offer

In November 2009 I was elected as Mayor of Monticello for a second term. During my campaign I spoke with hundreds of citizens of this city, both those who supported me and some who did not. Overwhelmingly, I was confronted with a single issue. That issue being the employment of Doug Herman as our City Administrator.

I was bombarded with citizens who are not happy with his performance as City Administrator and stated very clearly that they wished for his removal.

Since the elections, I have been approached by multiple members of the city staff and the public who have continued to state emphatically that they are displeased with Doug Herman's performance as well as his disregard for direction from the council.

As the Mayor of Monticello, I feel it is my duty and my responsibility to listen to the concerns of the people and work to meet the needs of the people for the good of the community. I have listened and have heard loudly and clearly that Doug Herman must be removed.

As I understand the contract between the City of Monticello and Employee Doug Herman, there are three options:

Option 1. Per section 10 of the employment contract, a majority of the governing body, in this case the city council, may terminate the employee and the city would be required to pay a severance package as defined in Section 11 of the contract. This severance is equal to six (6) months salary at the current rate of pay to be paid in a lump sum. Based on the timing of this letter also included would be an additional salary and benefits for any portion of the six (6) months not worked following the seating of new members of the council..

Option 2. Voluntary resignation. In the case of voluntary resignation, the employee is not entitled to the above severance package but would be paid for accrued leave and vacation time.

Option 3. "In the event the Employee is terminated for misconduct, violation or disregard of the standards of behavior expected by the city, either on or off duty, or for conviction of any illegal act involving personal gain to employee or moral turpitude, Employer shall pay no severance to the employee."

This is my intention; I intend to remove Doug Herman from the employment of the City of Monticello. As Mayor, I have been given a task from the people and will use

the remainder of my elected time to reach this goal and will use all of the power of my office to ensure that this goal is met.

With the consent of the undersigned members of the City Council of Monticello, I extend to Doug Herman the following offer, to be fully completed and signed and agreed to upon review by legal council of the city's choosing.

Doug Herman will resign immediately as City Administrator of the City of Monticello with a severance package of six (6) salary and benefits. The additional salary package based on the recent seating of city council will not be paid. Doug Herman will sign a full release of future liability to the City of Monticello.

Upon receipt of this letter, employee Doug Herman is given 48 hours to respond in writing or by personal contact to the mayor advising of his decision to accept or reject this offer with the written offer being completed by city legal council immediately following the acceptance.

If the employee Doug Herman chooses to reject this offer, I will be forced to move forward with a motion to terminate employee for cause. This motion will be placed on the agenda of the next scheduled meeting and a vote will be called for.

I will seek to remove Doug Herman as an employee based on "misconduct" and "violation or disregard of the standards of behavior expected by the City" and "moral turpitude".

I do not wish this matter to come to public hearing, and I do not want to allow this matter to interfere with city business moving forward. But I want to be clear that this decision is not made lightly, nor without the required public support, should that become necessary.

It is not my intent to embarrass Mr. Herman or to cause harm to the city, but I was elected to do this for the people and I will stand by the people and their wishes. I am tired of the public feeling that their voices are not being heard.

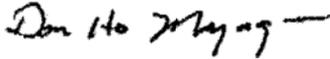
It is my intent to remove Doug Herman as City Administrator in order to allow the city to move forward with the consent of the people.

Upon receipt of this letter Doug Herman is to be placed on paid administrative leave until this matter is fully complete. Until such time, Doug Herman is not to perform any duties that would impact the city and to these ends is to be removed from the city premises and is not to be in or on city property unless accompanied by two or more members of the city council. Doug will be allowed to remove any personal property from city premises as needed, but must forfeit his city cell phone and any other electronic devices that are owned by the city.

All recipients and signatories of this letter are notified and strictly held under confidentiality of the contents of this letter and are not to share it publicly or privately with any person including but not limited to employees of the city. City council members are not to discuss this matter with employee Doug Herman without a quorum.

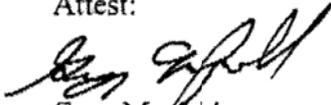
The following signatures indicate an agreement with me and clearly state that they intend to vote with the will of the people and with myself in the removal of Doug Herman as City Administrator. With the consent of the council I will be retaining the services of legal representation to assist with this matter.

Signed:

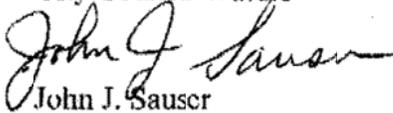


Don Ito Miyagawa
Mayor
City of Monticello

Attest:



Greg Merfeld
City Council Ward 1



John J. Sausser
City Council Ward 2



Russell Hodge
City Council Ward 3

Tom Ycoman
City Council Ward 4

David Goedken
City Council At Large

Gerald Muller
City Council At Large

APPENDIX B: Unsigned Letter of Offer



February 6, 2010

CITY OF MONTICELLO, IOWA

Monticello Community Building
200 East First Street • Monticello, Iowa 52310
Phone 319.465.6435 • Fax 319.465.3527
www.ci.monticello.ia.us

In November 2009 I was elected as Mayor of Monticello for a second term. During my campaign I spoke with hundreds of citizens of this city, both those who supported me and some who did not. Overwhelmingly, I was confronted with a single issue. That issue being the employment of Doug Herman as our City Administrator.

I was bombarded with citizens who are not happy with his performance as City Administrator and stated very clearly that they wished for his removal.

Since the elections, I have been approached by multiple members of the city staff and the public who have continued to state emphatically that they are displeased with Doug Herman's performance as well as his disregard for direction from the council.

As the Mayor of Monticello, I feel it is my duty and my responsibility to listen to the concerns of the people and work to meet the needs of the people for the good of the community. I have listened and have heard loudly and clearly that Doug Herman must be removed.

As I understand the contract between the City of Monticello and Employee Doug Herman, there are three options:

Option 1. Per section 10 of the employment contract, a majority of the governing body, in this case the city council, may terminate the employee and the city would be required to pay a severance package as defined in Section 11 of the contract. This severance is equal to six (6) months salary at the current rate of pay to be paid in a lump sum. Based on the timing of this letter also included would be an additional salary and benefits for any portion of the six (6) months not worked following the seating of new members of the council..

Option 2. Voluntary resignation. In the case of voluntary resignation, the employee is not entitled to the above severance package but would be paid for accrued leave and vacation time.

Option 3. "In the event the Employee is terminated for misconduct, violation or disregard of the standards of behavior expected by the city, either on or off duty, or for conviction of any illegal act involving personal gain to employee or moral turpitude, Employer shall pay no severance to the employee."

This is my intention; I intend to remove Doug Herman from the employment of the City of Monticello. As Mayor, I have been given a task from the people and will use the remainder of my elected time to reach this goal and will use all of the power of my office to ensure that this goal is met.

The City of Flags & Flowers



CITY OF MONTICELLO, IOWA

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Upon receipt of this letter, employee Doug Herman is given 48 hours to respond in writing or by personal contact to the mayor advising of his decision to accept or reject this offer with the written offer being completed by city legal council immediately following the acceptance.

If the employee Doug Herman chooses to reject this offer, I will be forced to move forward with a motion to terminate employee for cause. This motion will be placed on the agenda of the next scheduled meeting and a vote will be called for. I will seek to remove Doug Herman as an employee based on "misconduct" and "violation or disregard of the standards of behavior expected by the City" and "moral turpitude".

I do not wish this matter to come to public hearing, and I do not want to allow this matter to interfere with city business moving forward. But I want to be clear that this decision is not made lightly, nor without the required public support, should that become necessary.

It is not my intent to embarrass Mr. Herman or to cause harm to the city, but I was elected to do this for the people and I will stand by the people and their wishes. I am tired of the public feeling that their voices are not being heard. It is my intent to remove Doug Herman as City Administrator in order to allow the city to move forward with the consent of the people.

Upon receipt of this letter Doug Herman is to be placed on paid administrative leave until this matter is fully complete. Until such time, Doug Herman is not to perform any duties that would impact the city and to these ends is to be removed from the city premises and is not to be in or on city property unless accompanied by two or more members of the city council. Doug will be allowed to remove any personal property from city premises as needed, but must forfeit his city cell phone and any other electronic devices that are owned by the city.

All recipients and signators of this letter are notified and strictly held under confidentiality of the contents of this letter and are not to share it publicly or privately with any person including but not limited to employees of the city. City council members are not to discuss this matter with employee Doug Herman without a quorum.

The City of Flags & Flowers

APPENDIX C: February 9, 2010 City Council Agenda

City of Monticello, Iowa

www.ci.monticello.ia.us

Posted: February 8, 2010 @ 4:45 P.M.

Meeting:	Monticello City Council Meeting
Date/Time:	February 9, 2010 at 7:00 P.M.
Place:	Monticello Renaissance Center, 220 East First Street, Monticello, Iowa

Mayor:	Dor "Ho" Miyagawa
Council At Large:	David Goedken
Council At Large:	Gerald Muller
Council Ward #1:	Gregg Merfeld
Council Ward #2:	John Sauser
Council Ward #3:	Russell Hodge
Council Ward #4:	Tom Yeoman

City Administrator:	Doug Herman
City Clerk:	Sally Hinrichsen
Dir. Pub. Works:	Dana "Diz" Edwards
Police Chief:	Ryan Evans
City Engineer:	Darin Ligtenberg

-
- ❖ Call to Order - 7:00 PM
 - ❖ Pledge of Allegiance
 - ❖ Roll Call

Agenda Addition/Agenda Approval

Proposed Discussion - Action Items:

1. Mayor requests permission to "hire alternate legal counsel, not Anne Loomis".
2. Mayor requests Discussion and possible action Re: Preparation of Performance Evaluation of Doug Herman.

Pursuant to §21.4(2) of the Code of Iowa, the City has the right to amend this agenda up until 24 hours before the posted meeting time.

APPENDIX D: February 9, 2010 City Council Minutes

Special Council Meeting
February 9, 2010
Community Media Center
7:00 P.M.

Mayor Don Ho Miyagawa called the meeting to order. The Pledge of Allegiance was recited. City Clerk Sally Hinrichsen called Roll Call with the following members present: Mayor Don Ho Miyagawa and Council members: Dave Goedken, Gerald Muller, Gregg Merfeld, John Sauser, Russ Hodge and Tom Yeoman. Also present were City Administrator Doug Herman, City Clerk Sally Hinrichsen and Director of Public Works Dana Edwards.

Yeoman moved to approve the agenda adding an open forum to the agenda, Goedken seconded. Ayes: All present. Motion carried. City Attorney Anne Loomis arrived.

Yeoman reported that Saturday evening the Mayor and Merfeld visited the Council member's homes with an unsigned letter stating that he intended to remove Herman from office. Today he walked around town with a petition asking for Herman's dismissal.

Tom Bagge questioned what the just cause for Herman's dismissal was. It appears that an action like this there would have to be just cause. Goedken stated that he felt it was un-ethical if not illegal on what was done this weekend. Goedken stated Miyagawa and Merfeld told him that they hired an attorney and had proof that Herman needed to be let go. Goedken would like to see the proof as to why Herman should be let go. Darrell Reyner stated Goedken explained that Miyagawa and Merfeld came to see you and wanted to hear why and to find out what was so bad that Herman should be let go. Goedken stated that when Miyagawa and Merfeld came to his house they told him he knows what he needs to do (sign the letter to let Herman go) but didn't have the heart to do it. Miyagawa stated this item is not on the agenda. Reyner asked if the locks were changed on Herman's door? Miyagawa stated the reason he started this was because 2 years ago people told him that Herman needed to go. On Thursday, Herman sent an email to the department heads regarding the budget, which Miyagawa never got a copy and neither did the Council. When he took the job and ran for the Mayor position, people were asking a lot of questions and that was why he did it. Yeoman explained the email sent by Herman to the department heads was at the request of the Council to balance the budget and asked the department heads to cut their budgets. Kristy Black stated that she was elated that the Council helped to get Kirkwood facility up and running in Monticello. She has great respect for the Council and the City Administrator. Herman's job is a tough job and people will not like him because of decision he has to make. Herman is intelligent and professional at doing his job. He has commitments to the community, such as his business, family and volunteers in the community. Black hopes the Council does the right thing and felt Herman was good for the City and the Community. Merfeld stated the only thing on the agenda is job performances. Goedken stated when you were at my house; you said this meeting was to fire Herman. He asked to see the facts produced that they have. Goedken stated the Miyagawa stated at his house that "either Doug goes or I go"; Goedken would like him to stick to his word. Goedken questioned Hodge, you talked about open communication and you signed the letter and they demanded a house to house vote. Loomis stated there could be a violation of the law, depending what was done. There are case laws that found violation of open records laws. Merfeld questioned if what they did was the same as the case laws? Loomis stated she was giving criteria of violations of open records law. The method and timing of communications is what affects the issue and determines if a violation

of the open meetings law. Goedken asked if those facts are hard to be determined and felt there was no problem with getting the information. He questioned if Loomis could get a copy of the letter that they were asked to sign. Loomis stated it would also depend if the Council felt that by signing the letter it was a vote. Goedken stated that signing the letter was to allow the Mayor to hire an attorney and we have one. Merfeld stated they wanted to hire another attorney because of the other investigation. Miyagawa stated he will give this information when ready but not now. Goedken stated to had to do it right now but now you don't what changed? Merfeld stated what changed is the Council's response. He did vote on it being Herman is his wife's half boss. Connie Chronowski stated she felt this is a witch hunt and questioned what Herman did that was so he needs to go. What the public wants to know is what Herman did. Miyagawa stated no public comment needs to be made tonight and what we want to do is a job performance. He wants a different attorney because of conflict. Chronowski asked Miyagawa, did you or did you not try to fire Herman this weekend? Goedken asked why they waited to just before the budget was due to bring up the issue. Austin Merfeld stated you just stated said Herman is evaluated on a daily basis by the community and so many people don't like him. Goedken questioned if the Mayor had the power to fire the City Administrator. Loomis stated City Code 5.09, states he is removed by the body making the appointment, so the Council has the power to remove him. Nick Hein stated it was not Herman's job to give his boss the job performance. It is the Council's responsibility not Herman to do it. Hein stated that he has worked with Herman on several community projects and no council member has helped. Mark Spensley, Monticello Express owner, stated he contacted the Freedom of Information Council and what the Mayor did is a violation of Iowa Code. The Freedom of Information attorneys stated that when signatures were taken they violated the code. Goedken felt what happened this weekend was disgusting. Cindy Welter Bagge thanked Herman for what he was doing and for doing his job. Gary Exner stated he talked with Herman when he wanted to start his business in Monticello and he was very helpful. Exner finds it very disturbing what is going on here and stated that he voted for some of the Council members. Hodge stated that Goedken was right. Hodge stated he did it wrong and apologized to the public. He stated he doesn't agree how it was done and he was wrong on how he did it. It should have been done the way we are doing it tonight. He can't change what happened; maybe he went with his emotion and acted in haste. He stated the Council doesn't have to get along but they need to work together. Darrell Reyner stated Hodge did something, he made a mistake, apologized and now wants to move forward. Hodge stated he did what he thought was right. The Council doesn't know we are supposed to care unless the public let them know they are suppose to care. We all learned a lesson. Leroy Mootz stated he has been a transplant to Monticello since 1967, before you fire the Council needs to check with people on how much Herman has done. Are you going to Herman with someone who is going to do better? Jerry Retziaff felt there was a system breakdown and feels Herman is doing a great job. People can't get over something that went against them, but they can't win very battle. Herman will make people mad or he is not doing his job. He asked the Council to think twice before letting him go because he is doing a great job. Tami Bartram, Park & Recreation Director stated that she heard a rumor that all City employees dislike Herman, and stated that is not true. We don't always agree but we do get along. She stated she does not have a problem with Herman.

Merfeld moved to hire an alternate legal counsel for any proceedings to do with evaluations of Herman. Motion died due to lack of a second.

Yeoman moved to establish an evaluation team to setup an objective evaluation system process for Herman's evaluation which would not be tied to the budget adoption. Goedken seconded. Ayes : All present except Merfeld and Hcdge. Carried.

Jeannine Roberts, Officer Corey Robert's wife stated the Miyagawa came to her for a referral of an attorney. He stated that she got a copy of Herman's contract over a month ago. His contract states his job performance is to be done prior to the budget amendment.

Merfeld moved to adjourn at 8:10 PM, Sauser seconded. Ayes: All present. Carried.

Don Ho Miyagawa, Mayor

Sally Hinrichsen, City Clerk

Reply from Former Council Member Russ Hodge

Russell J. Hodge
402 W. 1st Street
Monticello, IA
52310

May 13, 2011

Dear Ms. Cooperrider,

I received your letter on May 11 regarding the investigation of actions by myself and other members of the Monticello City Council and whether those actions violated the Iowa open meeting laws. This letter is my response, required by you, to your conclusions and recommendations contained within your letter.

I accept all of you recommendations and my actions in response to them are as follows:

(As you noted I am no longer a member of the city council but,)

- Should I ever sit again on any school or council body I will be sure to be more familiar with city and state laws and rules regarding all aspects of the power and scope of the council and mayor. I will of course give special attention to the rules regarding open meetings law.
- Should I be needed to sit in as part of the training of the current city council as recommended in your second bullet point I would be agreeable to that if helpful.
- Again, should I ever sit in the future on any governing body I will be sure that if I am uncertain as to the legality of a course of action I will seek advice from the correct legal source.

As far as things I have done to correct the actions of that event. As you noted I apologized on the night of the special meeting. Also during that time period I apologized to the two council members whose home I went to, placed an article in the local newspaper and of course apologized to the City Administrator Doug Herman.

I thank you and your office for the fairness of the investigation and politeness of your staff. Please understand I learned a lot from the whole event, that is to say how I would not do things next time should there be one. I consider the violation of any law very serious and consider the violation of the "spirit" of the law as seriously because it amounts to the same thing. The fact that I did not do it deliberately or knowingly of course is no excuse as I should have studied the rules more closely or asked for guidance.

Sincerely,

Russell J. Hodge
Former Council Member, Monticello.

Reply from the Monticello City Council



CITY OF
MONTICELLO

200 E. First St.
Monticello, IA 52310
(319) 465-3577
Fax (319) 465-3527

Equal Opportunity Employer - Fair Housing City

June 15, 2011

Attn: Ruth Cooperrider
Citizen's Aide Ombudsman
Ola Babcock Miller Building
1112 East Grand Avenue
Des Moines, IA 50319

Re: Monticello Investigation

Dear Ms. Cooperrider:

The Monticello City Council has reviewed the report issued by your office on or about the 9th day of May 2011, same having been forwarded to the Council members, along with the past Mayor, Don Miyagawa, and past Councilperson, Russ Hodge, with a cover letter bearing that date.

As requested by your letter, the Council submits this letter, same having been approved by Resolution of the City Council at the Council's regular meeting of June 20, 2011, responding to your report and its' recommendations.

First of all, all of the current Council members have read and reviewed the report and understand its' contents. There is no disagreement with the findings and/or recommendations of a nature that requires clarification or objection. The Council recognizes that the procedures and/or steps taken in the early days of February, 2010 with regard to the potential termination of the City Administrator, while not illegal as noted by your report, were nonetheless in conflict with the spirit of the Iowa open meetings laws and it is clear that the process could have and should have been handled in a more business-like and open fashion.

With that said the Council has considered your recommendations and in light thereof intends to take the following action:

1. All Council Members will be provided with a copy of the "Iowa Open Meetings, Open Records Handbook" published by the Iowa Freedom of Information Council. (This has already occurred.)
2. In addition to reviewing the above, the Council has been provided, and will individually review the following Presentation Outlines obtained from the Iowa Attorney General's website:

- a. Outline of Presentation on Open Meetings Law, Iowa Code Chapter 21, presented by Dep. Atty. General Julie Pottorff on or about 10/5/2010 (Downloaded and printed from Iowa Atty. General web site.)
 - b. Outline of Presentation on Public Records Law, Iowa Code Chapter 22, presented by Dep. Atty. General Julie Pottorff on or about 10/5/2010 (Downloaded and printed from Iowa Atty. General web site)
3. The Council has also been provided a copy of the "Rules of Order and Procedure for Conduct of City Council Business", adopted by the City in December of 2001.
 4. The Council agrees to consult with the City Attorney if and when open meetings or open records issues arise.
 5. Our City Administrator, who is also an Attorney, will provide continuing education and updates on the open meetings laws over the course of the next six months during some of our Council meetings. This education will likely involve a review of an Attorney General Opinion or two at the end of one meeting a month with a discussion of said opinion to follow.

The documents identified in paragraphs numbered 1 to 3 above were provided to the City Council at the Regular City Council meeting of May 16, 2011. While all of the above documents are useful, and good educational tools, I think we would all agree that the procedures of last February, along with the discussions and education that followed, provided all of us with a much better understanding of not only the law, but of the procedures to be employed to deliberate, discuss, and take action on any and all city issues.

The Council wishes to thank you for your time and efforts on this issue, we appreciate your review, and accept your findings and recommendations.

Sincerely yours,



**John Sauser,
Mayor Pro Tem**

**CC: Tom Yeoman
Gregg Merfeld
Dave Goedken
Gerald Muller
Chris Lux**