



REBECCA OTTO  
STATE AUDITOR

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November 7, 2017

The Honorable Ardell Brede, Mayor  
The Honorable Randy Staver, Council President  
The Honorable Ed Hruska  
The Honorable Michael Wojcik  
The Honorable Nick Campion  
The Honorable Mark Bilderback  
The Honorable Mark Hickey  
The Honorable Annalissa Johnson  
Rochester City Hall  
201 - 4th Street South East  
Rochester, Minnesota 55904

Re: Council Restaurant Meetings

The Office of the State Auditor (OSA) received complaints from citizens of the City of Rochester (City) regarding meetings held by the Rochester Common Council (the formal name of Rochester's city council) at local restaurants. Specifically, citizens questioned whether using public funds to pay for the meals of Council members and City officials attending the meetings was appropriate, and whether Minnesota's Open Meeting law allowed for the meetings to be held in commercial restaurants. We requested and reviewed certain information from the City regarding the meetings, including the restaurant bills associated with them from 2014, 2015, and 2016.

Based on our review, we identified several concerns with these meetings, which we discuss in this letter.

## Background

The Rochester Common Council (Council) holds its regular Council meetings twice a month, on the first and third Mondays. The Council typically also holds Committee of the Whole meetings every Monday afternoon. During most of 2014, 2015, and 2016, the Council also held a separate meeting on the first Monday of the month at 5:00 p.m., between the 3:30 p.m. Committee of the Whole meeting and the 7:00 p.m. regular Council meeting. These 5:00 p.m. meetings were held at local restaurants chosen by the Mayor ("Restaurant Meetings"). According to the City, the purpose of the Restaurant Meetings was to "continue discussion with the Mayor and Council members on matters of public business" between the meeting of the Committee of the Whole and the time of the Council Meeting. The City Attorney, City Administrator, and Assistant City Administrator also attended the Restaurant Meetings.

An Equal Opportunity Employer

During the Restaurant Meetings, Council members and the other attending City officials sat at one table in the general restaurant area. Members of the public were not permitted at this table. Instead, citizens attempting to attend the Restaurant Meeting had to sit at whatever other tables were available. No microphone or other means was used to amplify the voices of the Council members or other City officials who were talking. As a result, members of the public sitting at other tables in the restaurant would have to try to hear the unamplified voices of the Council members and City officials, some facing away from them, over the noise of the operating restaurant.

Public funds were used to pay for the Council members' and other attending City officials' meals at the Restaurant Meetings. Based on information provided by the City, the Mayor paid for the meals using his City credit card, which either accessed or was charged to the Mayor's contingent fund. The City did not report the value of the meals to either the Internal Revenue Service (IRS) or the Minnesota Department of Revenue as income to the City Officials receiving the meals. According to the City, this was because the City viewed the dinners as "City business."

In the three-year period reviewed, the public funds expended for Restaurant Meeting meals each year were as follows:

2014	\$	3,265.96
2015		4,431.99
2016 (January through September)		<u>2,422.88</u>
Total	\$	<u>10,120.83</u>

The per meeting meal charges, including tip, ranged from \$1,017.49 (for 12 Council members and other City officials on January 5, 2015) to \$151.45 (for 11 Council members and other City officials on March 14, 2016). The list of all the Council meals from Restaurant Meetings during this period are set forth in Exhibit A.

In October 2016, the Restaurant Meetings were discontinued. As of the date of this letter, they have not resumed.

#### Use of Public Funds for Meals at Restaurant Meetings

The question of whether and under what circumstances public funds may be used to pay for city council meals has been previously addressed by the Minnesota Attorney General. In 1965, the St. Cloud City Attorney asked the Minnesota Attorney General for an Opinion regarding a long-time city meal reimbursement practice. The practice involved city officials who discussed city business at lunch and then presented the meal bill to the city for reimbursement. The St. Cloud City Attorney asked the Attorney General whether the city had the "legal authority" to pay the restaurant bills.

Like Rochester, St. Cloud had a charter with a broad grant of powers, as well as “all the implied powers necessary to carry” them out. Also, like the Restaurant Meetings in Rochester, the meals at issue in St. Cloud occurred over a meal hour during which city business was conducted.

In considering the St. Cloud question, the Minnesota Attorney General focused on whether there was statutory or charter authorization for the expenditures, as well as whether they were “necessary”:

What is the rationale which compels the meeting to be held at noon rather than some other time? What is the necessary benefit derived from eating while meeting, or meeting while eating, as distinguished from just meeting?

Op. Atty. Gen. 63a-2, May 6, 1965, p.5. Despite the broad grant of powers in the city charter and the rationale that city business was being conducted during the mealtime meetings, the Attorney General concluded that there was not a showing of necessity and no statutory or charter authorization that would justify the City of St. Cloud paying for the lunches. A copy of the Opinion is attached.

The facts provided to the OSA regarding the Restaurant Meetings are strikingly similar to those considered by the Attorney General in the St. Cloud Opinion, and they similarly suggest that public funds should not be used to pay for Council members’ and other City officials’ meals at the Restaurant Meetings. The City’s stated purpose for these meals is for Council members and City officials “to continue discussion” between the two official meetings. However, the city officials in St. Cloud also continued their discussions of city business over a meal hour, and, according to the Attorney General, that fact alone did not provide the “necessity” required to make these meals public expenses.

Regarding what meals might be payable with public funds, the Attorney General provided the following guidance:

This is not to say there may not be specific instances where officials could be compensated for necessary expenses incurred in attending dinners. Where the dinner is the product of an organization other than the municipality itself, its officers, agents and employees, where attendance is necessarily beneficial to the municipality and where such benefits cannot be derived other than from the dinner itself, then the propriety of such expenditures may become a factual determination vesting within the discretion of the city council in the exercise of its sound and honest judgment.

Op. Atty. Gen. 63a-2, May 6, 1965, p.5. None of these criteria, however, are present here.

Meals are generally a personal expense. In order for them to become a City expense payable from public funds, there must be both authority and a showing of necessity. Neither appears present in the case of the Restaurant Meetings.

#### Compliance With Open Meeting Law

Minnesota's Open Meeting Law requires city council meetings "be open to the public." Minn. Stat. Section 13D.01. The City correctly acknowledges that the Restaurant Meetings are subject to the Open Meeting Law. However, we question whether a Council meeting in a restaurant, occurring while the restaurant remains open for regular business, with the Council members sitting at a table apart from citizens and without any guarantee of citizens being seated within particular proximity to the table, fulfills the requirement that the meeting be "open to the public." In fact, citizens have reported to the OSA that they cannot hear Council members during the Restaurant Meetings as they converse with each other, some with their backs to the citizens. This is not surprising, given that the meetings are taking place in a setting in which regular restaurant dinner service is also taking place. If citizens are not able to hear and see easily the discussion of the Council, it is questionable as to whether the public actually has access to the meeting.

Further, we are concerned that citizens wishing to observe the Council in its deliberations are being asked to do so while occupying space at a restaurant table in a restaurant that is continuing to transact normal business. These circumstances could result in citizens who wish to attend the meeting feeling pressured to purchase food or drink, which could deter their attendance.

We urge the City to hold public meetings in a manner that allows the public to fully hear the Council's deliberations and to come and go freely, without any pressure to spend money to attend. Additional information or guidance about the Open Meeting Law can be sought from the Data Practices Office of the Minnesota Department of Administration, 200 Administrative Building, 50 Sherburne Avenue, Saint Paul, MN 55155 (651-201-2555).

#### Taxability of City Meals

The City is incorrect in its position that the meals paid by the City for the Council members and other City officials are not taxable to those officials. The IRS criteria as to the taxability of employee meals (for income tax purposes, "employee" generally includes elected and appointed officials) is not dependent on the employer's determination that such meals constitute "city business." Rather, non-taxability requires one of two factors: that the employee be in travel status, or that the meal is provided on the employer's premises for the employer's convenience. Here, the meals provided at local restaurants meet neither criterion.

The IRS's general rule regarding the taxability of fringe benefits states, "Any fringe benefit you provide is taxable and must be included in the recipient's pay unless the law specifically excludes it." 2017 IRS Publication 15-B, Employer's Tax Guide to Fringe Benefits, page 3. There are exceptions to this general rule: IRS Publication 5137, Fringe Benefit Guide, Office of Federal, State and Local Governments (Pub. 5137) indicates that meals provided to employees in travel status under an accountable plan are not taxable to an employee (see Pub. 5137 page 28), nor are meals provided on the employer's premises for the employer's convenience. See Pub. 5137 pages 43-47. Again, none of the exceptions apply to the Restaurant Meeting meals.

Besides meals provided when an employee is in travel status and those provided on the employer's premises, the IRS also provides an exemption from taxability for meals that are "de minimis." Pub. 5137 pages 14-16 discuss meals that are excludable from income, including de minimis meals, which are meals of such little value (considering how often they occur), that accounting for it would be unreasonable or administratively impracticable. Council meals from the Restaurant Meetings happened regularly, were not of little value, and were fully accounted for by the City, as shown by the records produced to us.

With no exception available, the general rule of taxability of fringe benefits would apply to the meals associated with the Restaurant Meetings. Therefore, the City should treat the payment for City official meals during the Restaurant Meetings as taxable fringe benefits provided to City officials.

#### Conclusion

The OSA recommends that the City not reinstitute the practice of holding the Restaurant Meetings. The use of public funds to pay for meals at the meetings appears to be without authority and likely cannot be shown to be "necessary." Moreover, the environment of the Restaurant Meetings is replete with apparent impediments to meeting the objectives of the Open Meeting Law.

We further recommend that the City review its current practice regarding meal reimbursement for all officers and employees. In general, meals not in travel status or provided on the employer's premises for the employer's convenience need to be handled as taxable income under IRS rules.

Very truly,

*/s/ David Kenney*

David Kenney  
Legal Counsel

cc: Stephen Rymer, City Administrator  
Terry Adkins, City Attorney

Date of meeting	Description	Location	Amount	Payment Method	Payment Date	Payment Number	Payee
1/8/2014	Jan Council Dinner	Red Lobster	260.75	CC	2/11/2014	2111430	Wells Fargo
2/3/2014	Feb Council Dinner	Thyme	266.06	CC	3/17/2014	3171430	Wells Fargo
3/3/2014	Mar Council Dinner	Michaels	328.75	CC	4/14/2014	4141430	Wells Fargo
4/7/2014	Apr Council Dinner	Salute	287.5	CC	5/12/2014	5121432	Wells Fargo
5/5/2014	May Council Dinner	Chester's	390.84	CC	6/13/2014	6131430	Wells Fargo
6/2/2014	June Council Dinner	Pappy's Place	184.38	CC	7/14/2014	7141432	Wells Fargo
7/7/2014	July Council Dinner	Bowlocity	133	CC	8/11/2014	8111432	Wells Fargo
8/4/2014	Aug Council Dinner	Cowboy Jack's	196.8	CC	9/15/2014	9151430	Wells Fargo
9/3/2014	Sept Council Dinner	Victoria's	273.5	CC	10/14/2014	10141431	Wells Fargo
10/6/2014	Oct Council Dinner	The Lost Cajun	257.89	CC	11/12/2014	11121430	Wells Fargo
11/3/2014	Nov Council Dinner	Twigs	287.03	CC	12/15/2014	12151430	Wells Fargo
12/1/2014	Dec Council Dinner	Michaels	399.46	CC	1/12/2015	1121530	Wells Fargo
1/5/2015	Jan Council Dinner	Pescara	1017.49	CC	2/13/2015	2131530	Wells Fargo
2/2/2015	Feb Council Dinner	Thyme	192.8	CC	3/16/2015	3161533	Wells Fargo
3/2/2015	Mar Council Dinner	Victoria's	339.6	CC	4/13/2015	4131530	Wells Fargo
4/6/2015	Apr Council Dinner	John Hardy's BBQ	154.81	CC	5/12/2015	5121531	Wells Fargo
5/4/2015	May Council Dinner	Olive Garden	263.29	CC	6/15/2015	6151530	Wells Fargo
6/15/2015	June Council Dinner	Courtyard by Marriot	260.6	CC	7/13/2015	7131531	Wells Fargo
7/6/2015	July Council Dinner	Terza	400	CC	8/11/2015	8111532	Wells Fargo
8/3/2015	Aug Council Dinner	Red Lobster	273.35	CC	9/14/2015	9141531	Wells Fargo
9/9/2015	Sept Council Dinner	Broadway Pizza	196.33	CC	10/13/2015	10131531	Wells Fargo
10/5/2015	Oct Council Dinner	Catering by Design	519	Check/ACH	11/25/2015	198989	Catering by Design
11/2/2015	Nov Council Dinner	Terza	439.15	CC	12/14/2015	12141531	Wells Fargo
12/7/2015	Dec Council Dinner	City Café	375.57	CC	1/11/2016	1111632	Wells Fargo
1/4/2016	Jan Council Dinner	Five West	341.39	CC	2/16/2016	2161632	Wells Fargo
2/1/2016	Feb Council Dinner	Hunnan	170.94	CC	3/14/2016	3141630	Wells Fargo
3/14/2016	Mar Council Dinner	Billoti's	151.45	CC	4/11/2016	4111630	Wells Fargo
4/4/2016	Apr Council Dinner	300 1st	329.4	CC	5/16/2016	5161633	Wells Fargo
5/2/2016	May Council Dinner	Half Barrel	219.95	CC	6/13/2016	6131632	Wells Fargo
6/6/2016	June Council Dinner	Hefe Rojo	230.97	CC	7/12/2016	7121630	Wells Fargo
7/6/2016	July Council Dinner	Roch Golf & Country Club	75	Check/ACH	8/11/2016	207430	Ardell Brede
7/6/2016	July Council Dinner	Roch Golf & Country Club	300.41	Check/ACH	8/18/2016	207826	Roch Golf & Country Club
8/1/2016	Aug Council Dinner	Victoria's	201.51	CC	9/12/2016	9121630	Wells Fargo
9/7/2016	Sept Council Dinner	Bleu Duck Kitchen	401.86	CC	10/14/2016		

CITY OFFICERS - EXPENSES - LUNCHES. Only necessary expenses may be reimbursed to city officials.

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May 6, 1965

Honorable Paul J. Doerner  
City Attorney  
St. Cloud, Minnesota

63a-2

Dear Mr. Doerner:

In your letter to Attorney General Robert W. Mattson, requesting an opinion of this office, you present the following

FACTS

"Pursuant to the Home Rule Charter of the City of St. Cloud, the State Public Examiner has recently completed his annual audit of the books and accounts of the City. The audit reveals a total expenditure during the year 1964 of \$971.48 for meals for various city officials, employees, and members of appointed boards. The city budget includes an item for each department entitled 'Travel-Conference-Schools' and the disbursements for the meals were charged against this item in the budget. According to the City Treasurer this has been a common practice for many years, but only in recent years has the total amount spent approached the amount for 1964. According to my best information, all of the expenditures were for meals during which official business of the city was being transacted. Although there is no suggestion that the practice has been abused or that any unusually large amounts have been spent by or for any particular individual or group or occasion, the invoices do not show the purpose of the meetings nor the names of those attending who received a meal at city expense.

"The Public Examiner questions the legal authority of the city to make such expenditures despite the long standing practice. The Charter is silent on the matter of expenses except for Section 2.20 which provides 'members of the Council shall receive reimbursement for all expenses incurred in the performance of their official duties,' and Section 8.10 which provides that the Council shall provide for the disbursement of public moneys and 'shall in the exercise of sound discretion appropriate money by

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means of a budget for the governmental expenses.' The Charter also grants the city broad general powers including 'all the implied powers necessary to carry into execution all the powers granted.' Although the name 'Travel-Conferences-Schools' as used in the budget is somewhat ambiguous, there is no doubt that the expenditures in question were anticipated as well as expenditures for out of town travel, meals, conferences, and formal schools and conventions. It would seem inconsistent that the city can legally pay for meals of city officials when they are out of town on official business but cannot pay for such meals when official business is being conducted at a local luncheon or dinner."

#### QUESTION

"Whether the City of St. Cloud has the legal authority to pay for the meals of persons who are the official representatives of the city at meetings held in the city which are for the purpose of conducting city business, and which are held during the usual meal time hours."

#### OPINION

The facts as provided relative to the submission of expenses, do not appear on their face to comply with the strict provisions of M.S. 471.38. The terms of this statute by case law and former opinions of our office have generally required strict compliance, and demanded detailed itemization and explanation prior to the presentation of any claim. Sec. 8.70 of the charter of the city of St. Cloud confirms the requirements of § 471.38 and details the procedures necessary for the payment of any claim.

Even assuming, however, that the requirements of M.S. 471.38 and § 8.70 of the charter are complied with, the question remains as to whether or not the expenditure of public funds for meals for various officials is authorized.

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Tousley v. Leach, 180 Minn. 293, 230 N.W. 788 has expressed the general principle of law applicable to this type of case:

"If the purpose is a public one for which tax money may be used, and there is authority to make the expenditure, and the use is genuine as distinguished from a subterfuge or something farcical, there is nothing for the court. Whether there shall be such use is then one of policy for the legislature. \* \* \*"

The above cited principle has subsequently been affirmed in Lindquist v. Abbett, 196 Minn. 233, 265 N.W. 54.

The question as presented involves, to some extent, ultimate determinations based upon factual situations which removes the question, in part, beyond the function of the attorney general's office.

Although the general trend of the courts is to apply more and more liberal interpretations to the legislative authority conferred upon cities as seen in State v. Dirnberger, 152 Minn. 444, 187 N.W. 972, and succeeding cases, all requirements for expenditures and all criteria for determining proper expenses have not, by any means, been eliminated.

Statutory authority for this type of expenditure is at best ambiguous, and at worst non-existent. The clearest authorization for a specific expense is found in M.S. 471.96 wherein various municipalities are authorized to appropriate "necessary funds to provide for memberships" in various state and national associations and "to appropriate necessary funds to defray the actual and necessary expenses" of

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"duly designated representatives" in the meetings and activities of such associations. Although quite obviously this section has no direct application to the facts at hand, it is not without merit as a guideline indicative of legislative intent.

M.S. 426.055 provides for a one mill levy for advertising agricultural, industrial, business and other general resources of the community. To determine that this statute is relevant would be to tax the bounds of a most imaginative application to the facts in question.

Tousley v. Leach, supra, refers to the commercial usage in business and states that:

"\* \* \* Private corporations for profit send their men to meetings and conventions where information of value may be had. \* \* \*"

To incorporate by reference the present customs and regulations of the private commercial system of expense accounts brings us face to face with the old "brown paper bag" theory providing for on-the-road expenses but requiring self-payment for lunch when at home.

Emphasized in M.S. ~~471.96~~ and (incorporated in the usages of commercial business is the fundamental prerequisite that expenses by definition are necessary expenses. Entertainment expenses are not properly payable (see Law v. People, 87 Ill. 365) and to the same degree, officials holding luncheon meetings among themselves are not compensable since neither are necessary expenditures.)

Honorable Paul J. Doerner - 5.

May 6, 1965

What is the rationale which compels the meeting to be held at noon rather than some other time? What is the necessary benefit derived from eating while meeting, or meeting while eating, as distinguished from just meeting? See Ops. Atty. Gen. 63a-2, May 17, 1954 and May 7, 1954, copies of which are enclosed.

Without having available detailed facts of specific expenditures, considering the lack of statutory authorization, the lack of charter reference, the lack of council approval, and the absence of any evidence of "necessary" expenditures, it is our opinion that the city of St. Cloud may not properly pay for the meals of its officials. This is not to say there may not be specific instances where officials could be compensated for necessary expenses incurred in attending dinners. Where the dinner is the product of an organization other than the municipality itself, its officers, agents or employees, where attendance is necessarily beneficial to the municipality and where such benefits cannot be derived other than at the dinner itself, then the propriety of such expenditures may become a factual determination vesting within the discretion of the city council in the exercise of its sound and honest judgment.

Very truly yours

ROBERT W. MATTSON  
Attorney General

KENNETH J. FITZPATRICK  
Special Assistant  
Attorney General

KJF: jc  
Enc.

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May 6, 1965

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ROBERT W. MATTSO  
Attorney General

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KJF:jc  
Enc.