

**OPEN RECORDS AND MEETINGS OPINION  
2005-O-15**

DATE ISSUED: September 19, 2005

ISSUED TO: Bismarck City Commission

**CITIZEN'S REQUEST FOR OPINION**

On July 25, 2005, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dave Kolpack asking whether the City of Bismarck (Bismarck) violated N.D.C.C. § 44-04-19 by holding two meetings that were not open to the public. It is my opinion that Bismarck did not violate N.D.C.C. § 44-04-19 because the meetings held were not meetings of the Bismarck City Commission or a committee of the Commission and, therefore, were not subject to the open meetings law.

**FACTS PRESENTED**

Bismarck received a Small Community Air Service Development Pilot Program grant from the United States Department of Transportation. The grant was used to study the feasibility of starting an on-demand air service to improve regional travel. The grant has three phases. Phase I and II are complete. Phase III has not been awarded. After a competitive bidding process, John Boehle, owner of Expanded Air Service Enterprise, LLC (EASE) was awarded both phase I and II of the grant. Pursuant to the grant agreement, phase II was completed on February 22, 2005, when the Bismarck City Commission received the phase II business model and accompanying report. Bismarck issued a request for proposals for phase III but no award has been made or contract signed. Mr. Boehle is the only bidder for phase III.

In phase III, Bismarck would establish an on demand, point-to-point air service. Owners of private air charter services in the state expressed concern that the Point2Point Airways proposed by Mr. Boehle in his bid would create unfair competition. The Commission informed Mr. Boehle that before it would consider his bid for phase III, he would somehow have to address the concerns expressed by the air charter operators. To address the concerns, Mr. Boehle decided to schedule two meetings for July 5 and July 7, 2005, in Grand Forks, and invited people from the aviation and air charter industry to attend. Bismarck City Administrator Bill Wocken attended the July 5 meeting. At the time of the meetings, Mr. Boehle was not under contract with Bismarck. The requestor tried to attend the July 5 meeting but was not permitted to do so.

The requestor alleges that the meetings held on July 5 and July 7 by Mr. Boehle should have been open to the public. He alleges that Bismarck told Mr. Boehle to hold the meetings and that he did so as a consultant for the city. As further proof of Bismarck's involvement, the requestor points out that the city administrator, Bill Wocken, attended the July 5 meeting.

#### ISSUE

Whether the two meetings Mr. Boehle held with air charter operators to discuss how they would be affected by Point2Point Airways were subject to the open meetings law and required to be open.

#### ANALYSIS

A meeting must be open to the public if there is gathering of a quorum of a public entity's governing body regarding public business. N.D.C.C. § 44-04-17.1(8)(a). A gathering of less than a quorum may be an open meeting if those meeting are held pursuant to authority delegated to them by a governing body. N.D.C.C. § 44-04-17.1(6); N.D.A.G. 2004-O-12. For the open meetings law to apply, a delegation from a governing body must be made to a "group of persons" rather than just one person. Id.

Mr. Boehle scheduled, funded, and sponsored the meetings where matters regarding the Bismarck grant were discussed. He was a consultant for the Commission during phase I and II of the grant, but at the time of the meeting, he was not under contract with the city. Even if he had been, the presence of a consultant for a public entity, alone, does not implicate the open meetings law because there is no gathering of a governing body.

A governing body may delegate its authority. The Commission did not delegate its authority, however, when it requested Mr. Boehle to address concerns expressed by the air charter operators. Rather, the commission was merely stating a prerequisite for further consideration of his proposal. Even if the request had been a delegation to Mr. Boehle, a delegation must be to a "group of persons" in order for that group's meeting to be subject to the open meetings law. N.D.A.G. 2004-O-12. Here, only Mr. Boehle was told to address the concerns of the air charter operators.

Mr. Wocken, the Bismarck city administrator, and Mr. Boehle could only constitute a "group of persons" acting together on behalf of a governing body at the July 5 meeting if the Commission had delegated authority to them. According to the attorney for the Commission, there was no delegation to Mr. Wocken and Mr. Boehle to hold the meeting together. Mr. Wocken attended the July 5 meeting on his own volition and not

at the direction of the Commission. His presence is of no consequence because the presence of one city employee at a meeting does not violate the open meetings law.

Although the topic of the meetings on July 5 and July 7 were related to public business, no quorum of a governing body of a public entity attended either meeting. Therefore, it is my opinion that the meetings were not required to be open.

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Attorney General

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