

**OPEN RECORDS AND MEETINGS OPINION
2006-O-02**

DATE ISSUED: February 2, 2006

ISSUED TO: Red River Valley Fair Association

CITIZEN'S REQUEST FOR OPINION

On December 15, 2005, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matthew Von Pinnon, of The Forum asking whether the Red River Valley Fair Association violated N.D.C.C. § 44-04-19 by holding meetings that were not open to the public. On January 5, 2006, The Forum supplemented its request asking if the Fair Association violated the open meetings law on January 4, 2006.

FACTS PRESENTED

The president, vice president, and secretary/treasurer (officers) of the Red River Valley Fair nine member board met five times during November and December of 2005 and once on January 4, 2006. In addition to being the officers of the nine member board, these three officers, along with the immediate past president, make up the "Executive Board."¹ The Executive Board is created in the by-laws of the Red River Valley Fair Association (Fair Association) and has the duty to "be on call between regular board meetings to plan matters to be considered at the next regular Board meeting."² No other duties have been delegated to the Executive Board by the nine member board.

The attorney for the Fair Association, Jonathon Garaas, was present when the officers met in November, December, and January.³ The meetings generally related to the

¹ The 2004-2005 Executive Board was Kyle Anderson (president), Donald Rudnick (vice president), Carol Nelson (secretary-treasurer) and Gerald Melvin (immediate past president). As of November 2005, the 2005-2006 Executive Board was Kyle Anderson (president), Fred Anderson (vice president), Carol Nelson (secretary-treasurer), and Gerald Melvin (immediate past president).

² Amended & Restated Articles of Incorporation of Red River Valley Fair Association, Art. IV(2) (2001).

³ The three officers met with legal counsel on Wednesday, Nov. 16, 2005 at the Kelly Inn, Fargo; December 1, 2005, at the Old Broadway Restaurant, Fargo; the morning of

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“Board of Directors and Executive Management Performance Report” that was compiled by Great Plains Benefit Group, Inc. (Great Plains) at the request of the nine member board. According to Mr. Garaas, the duty of the Executive Board was to create the agenda for the nine member board meetings, a duty typically done in the past few years by the fair manager, rather than the Executive Board. When Mr. Garaas met with the officers on the six occasions at issue here, he did not believe the discussions were within the scope of the Executive Board duties as described in the by-laws. This belief, coupled with the fact that the officers did not constitute a quorum of the nine member board, led the officers and Mr. Garaas to believe that the meetings were not subject to the open meetings law.

ISSUE

Whether Red River Valley Fair Association violated the open meetings law when the officers of the nine member board met six times in November and December of 2005 and January of 2006.

ANALYSIS

The fact that the Fair Association is a non-profit corporation does not prevent it from being subject to the open meetings law if it is supported by public funds, expending public funds, or recognized by state law to exercise public authority or perform a governmental function.⁴

The Legislature has set out, in N.D.C.C. ch. 4-02, the authority for a fair association to manage and control premises within the county for the holding of fairs and expositions that exhibit products and resources of the state of North Dakota.⁵ The Fair Association manages the Red River Valley Fair, which is the county fair in Cass County. It is a public entity under N.D.C.C. § 44-04-17.1(12)(b) because it is recognized by state law to exercise public authority or perform a governmental function.⁶

In a previous opinion this office found the Pembina County Fair Board to be a public entity because it received an unrestricted 1.5 mills from Pembina County and also

Dec. 5, 2005, at the fair office and at 1:00 p.m. Dec. 5 at the fair office; and the afternoon of January 4, 2006, at the fair office.

⁴ See N.D.C.C. § 44-04-17.1(12); N.D.A.G. 2003-O-08; N.D.A.G. 2003-O-02; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.

⁵ N.D.C.C. §§ 4-02-01, 4-02-10, and 4-02-26.

⁶ See N.D.A.G. 2003-O-08 (Dakota Center for Independent Living is recognized to perform a governmental function set out in N.D.C.C. § 50-06.5); N.D.A.G. 98-O-21 (North Dakota Soil Conservation District manages public lands for purposes set out in N.D.C.C. § 4-22-51).

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because it was organized under N.D.C.C. ch. 4-02 as the county fair association.⁷ Although Cass County does not levy a tax to support the county fair association, as allowed in chapter 4-02, it does provide annually unrestricted money to the fair.⁸ Therefore, the Fair Association is also a public entity because it is supported by public funds.⁹

All meetings of a public entity must be open to the public unless otherwise specifically provided by law.¹⁰ The definition of “meeting” covers all stages of the decision-making process, including information gathering.¹¹ A “meeting” is defined as “a formal or informal gathering . . . of . . . [a] quorum of the members of the governing body of a public entity regarding public business.¹² “Governing body” means both the multimember body responsible for making a collective decision on behalf of a public entity and any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.¹³ “Public business” means all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity’s governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power.”¹⁴ Public notice must be given in advance of all meetings of a public entity.¹⁵

The president, vice president, and secretary/treasure (officers) of the nine member board constitute a quorum of the “Executive Board” as created by the by-laws of the Fair Association. In order for a gathering of the officials to be a meeting of the Executive Board, not only must there be a quorum, but the purpose of the meeting must be within the duties and authority of the board. The by-laws provide the Executive Board with the authority to “be on call between regular board meetings to plan matters to be considered at the next regular Board meeting.”

The attorney for the Fair Association has provided this office with detailed descriptions of each gathering, so each will be evaluated to determine whether at any of the gatherings, the officers were acting within the authority of the Executive Board. I will examine each meeting in turn.

⁷ See N.D.A.G. 2004-O-17.

⁸ See N.D.C.C. § 4-02-26. According to the Cass County Auditor, in 2005 and 2006, Cass County gave the Fair Association \$104,000 of unrestricted funds.

⁹ See N.D.C.C. § 44-04-17.1(12)(c).

¹⁰ N.D.C.C. § 44-04-19.

¹¹ See N.D.A.G. 2004-O-15; N.D.A.G. 98-F-16; N.D.A.G. 98-O-08.

¹² N.D.C.C. § 44-04-17.1(8)(a).

¹³ N.D.C.C. § 44-04-17.1(6).

¹⁴ N.D.C.C. § 44-04-17.1(11)(a).

¹⁵ N.D.C.C. § 44-04-20.

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November 16, 2005

The officers and Mr. Garaas met with Roger Krueger, president of Great Plains. At the meeting, Mr. Krueger informed the officers of the nature of the report's outcome. He then had the officers review the report for typographical errors and give input on the format of the report. The gathering did not relate to planning matters for the next meeting of the nine member board therefore, the meeting on this date was not subject to the open meetings law.

November 22, 2005

Roger Krueger of Great Plains suggested that he, President Kyle Anderson, and Mr. Garaas meet with fair manager, Bruce Olson, to allow Mr. Olson a chance to read the contents of the report submitted by Great Plains. There was no quorum of the Executive Board, so the gathering was not a meeting subject to the open meetings law.

December 1, 2005

The officers met with Mr. Garaas "for purposes of ascertaining the time and agenda for the December, 2005, meeting, and the proper method to take the issue 'off the table.'"¹⁶ A quorum of the Executive Board was present and determined how to handle the issue of the Great Plains report at the next meeting of the nine member board. Mr. Garaas argues that the duty of the Executive Board in the by-laws is limited to literally drafting an agenda. However, the actual language of the by-laws and the articles of incorporation sets forth a broader duty "to plan matters to be considered at the next regular Board meeting."¹⁷ It is my opinion that the purpose of the December 1, 2005, meeting fell within the authority of the Executive Board and therefore the meeting was subject to the open meetings law.

December 5, 2005

Morning: The officers and Mr. Garaas met at the fair offices and discussed the Great Plains report. The officers instructed Mr. Garaas to inform Mr. Olson that "the Executive Board, if asked, would recommend that he [Mr. Olson] not be employed in such capacity," i.e., as the fair manager.¹⁸

¹⁶ Letter from Jonathan Garaas, January 4, 2006.

¹⁷ By-Laws of Red River Valley Fair Association, Art. IV(2) (2000), and Amended & Restated Articles of Incorporation of Red River Valley Fair Association, Art. IV(2) (2001).

¹⁸ Letter from Jonathan Garaas, January 4, 2006.

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Afternoon: Again the officers and Mr. Garaas met at the fair offices to wait for Mr. Olson. When he arrived, Mr. Garaas “informed Mr. Olson that the Executive Board would recommend [to the nine member board] that he not be employed as Executive Vice President [Fair Manager] when the subject was again placed on the agenda” of the nine member board.¹⁹

The purpose of the December 5 gatherings related to the matter of how Mr. Olson’s employment would be addressed at the next meeting of the nine member board. The officers planned to give a recommendation to the nine member board at its next meeting. It is my opinion that the subject matter of the meetings on December 5, 2005, fell within the authority of the Executive Board and therefore, these meetings were subject to the open meetings law.

January 4, 2006

The entire Executive Board met with Mr. Garaas the day before the scheduled January 5 meeting of the nine member board at the fair offices. The purpose, according to Mr. Garaas, was “to make sure that the business of the non-profit corporation would be properly presented to the 9 Person Board of Directors.”²⁰ Specifically, the accounting firm performing an audit was contacted to confirm that a representative of the firm would be present at the next day’s meeting, Roger Kruger asked to be placed on the agenda in order to make a presentation to the nine member board and Mr. Garaas was asked to inform the nine member board that an attorney was identified by the insurance company to represent the Fair Association and Kyle Anderson in pending litigation. It is my opinion that the purpose of the meeting on January 4, 2006, fell within the authority of the Executive Board and therefore, the meeting was subject to the open meetings law.

The open meetings law applied to each meeting discussed above where the Executive Board dealt with matters related to its authority in the by-laws. Because the meetings were not preceded by public notice and not open to the public, it is my opinion that the Executive Board of the Fair Association violated the open meetings law on December 1 and 5, 2005, and on January 4, 2006.

STEPS NEEDED TO REMEDY VIOLATION

The Executive Board must draft a notice stating that it held meetings on December 1 and 5, 2005, and on January 4, 2006. The notice must contain the dates and locations of each meeting and who attended. Notice must be posted at the fair offices for two weeks and filed with the Cass County Auditor. The Executive Board must create

¹⁹ Id.

²⁰ Letter from Jonathan Garaas, January 26, 2006.

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detailed summaries of each meeting and provide copies of the summaries to The Forum at no cost. The summaries must be kept at the fair offices and provided to the public, upon request, at no cost. Copies of the summaries must also be provided to the Cass County Auditor.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.²¹ It may also result in personal liability for the person or persons responsible for the noncompliance.²²

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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²¹ N.D.C.C. §44-04-21.1(2).

²² Id.