

**OPEN RECORDS AND MEETINGS OPINION
2007-O-14**

DATE ISSUED: December 5, 2007

ISSUED TO: Mandan City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Susan Beehler asking whether the Mandan City Commission violated N.D.C.C. § 44-04-19 by holding a meeting by e-mail.

FACTS PRESENTED

The Mandan City Commission is made up of five members: Mayor Ken LaMont and Commissioners Dan Ulmer, Sandra Tibke, Tim Helbling, and Jerome Gangl. On June 27, 2007, at 4:03 p.m. Jim Neubauer, the Mandan City Administrator, e-mailed Susan Beehler in response to a voice-mail she had left Mr. Neubauer asking about a building permit regarding the home of Bob Thorberg.¹ The e-mail was copied to Mayor LaMont and the other commission members. At 4:06 p.m. Commissioner Helbling responded to Mr. Neubauer and forwarded to all other commission members the following e-mail:

I don't know if we should be dealing with Susan and giving her any information when it comes to Mr. Thorberg's home and what can and can't be done. I think we at least need Mr. Thorberg to sign off on us giving out information concerning his home and if he wants to deal though [sic] her.

At 4:14 p.m. Commissioner Ulmer e-mailed a response to all the commission members stating that he agreed with Commissioner Helbling. At 4:35 p.m. Commissioner Tibke responded by e-mail to the other commission members stating: "I think since this is his home we will deal with him. All he has to do is come in with the information but dealing with everyone else would be difficult. To [sic] many cooks in the kitchen." After receiving Commissioner Tibke's comment, Jim Neubauer e-mailed Commissioner Tibke

¹ The city of Mandan was considering the demolition of Mr. Thorberg's home in the Spring of 2007.

saying “remember when you hit reply all it also went to Susan. . .” The next morning at 8:27 a.m., Mayor Ken LaMont responded to Commissioner Helbling and Jim Neubauer, and sent copies to the other commission members, stating:

Tim is correct in his assumption of this situation. Have Mr.. [sic] Thorberg provide a Release of Information or some form or [sic] written assurance that he will have representatives acting on his behalf. I also believe Jim’s list of requirements provide a workable and livable median for Mr.. [sic] Thornburg [sic] and the city.

All of the e-mails described above were also sent to Susan Beehler, who alleges that the Commission met by e-mail in violation of the open meetings law.

ISSUE

Whether an exchange of e-mails among a quorum of the Mandan City Commission was a “meeting” as defined in N.D.C.C. § 44-04-17.1(8).

ANALYSIS

In response to questions of this office, Mayor LaMont wrote:

It is customary for the city administrator to send emails to all commissioners updating them with the same information at the same time relating to issues that have become very public in nature. This has become an efficient method of sharing information with the commission in order to best answer questions that we field from the public. In the Thorberg matter, Mr. Neubauer simply informed the Commission of information he provided to Ms. Beehler. He did not request our opinion or ask for our input.

. . . .

It is customary for Mr. Neubauer to communicate to the commissioner [sic] via e-mail. Mr. Neubauer does this in a manner which enables him to keep commissioners informed on developments pertinent to city business. This is simply a method of disseminating information to the commissioners, not unlike picking up the phone and calling each one, or meeting individually with each commissioner.

There are occasions where commissioners will offer their opinion back to Mr. Neubauer via email.

Generally, all meetings of a public entity must be open to the public and notice must be provided.² A “meeting” is defined in the open meetings law as follows:

“Meeting” means a formal or informal gathering, whether in person or through electronic means such as telephone or video conference, of:

- (1) A quorum of the members of the governing body of a public entity regarding public business; or
- (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.³

In a past opinion, e-mail messages were likened to written letters, thereby distinguishing them from “gatherings.”⁴ The definition of “meeting,” however, was amended by the 2005 Legislative Assembly.⁵ Previously, the definition provided that “‘Meeting’ means a formal or informal gathering, whether in person or through other means such as telephone or video conference. . .” The 2005 Legislature replaced the term “other” with “electronic,” so the section now says “‘Meeting’ means a formal or informal gathering whether in person or through electronic means such as telephone or video conference. . .” This amendment was the suggestion of an open records and meetings taskforce created by this office in 2004. The purposeful replacement of the term “other” with “electronic” was intended to address the possibility of a governing body using emerging technology such as e-mail to evade the open meetings law. “The taskforce wanted the word ‘electronic’ used so that public entities are on notice that using new technology is not a way to circumvent the open meetings law.”⁶

Therefore, the analysis of whether a meeting took place by e-mail is no different than that of other meetings. As long as an exchange contains the four elements of a “meeting,” a meeting occurred. Here, the four elements of a meeting are present: (1) a public entity: city of Mandan; (2) a governing body: city commission; (3) public business:

² N.D.C.C. §§ 44-04-19 and 44-04-20.

³ N.D.C.C. § 44-04-17.1(8)(a) (emphasis added).

⁴ “Unlike telephone conversations, e-mail messages or letters between Board members are records subject to the open records and records retention laws, but are not a ‘gathering’ of Board members.” N.D.A.G. 98-O-05, n. 8.

⁵ 2005 N.D. Sess. Law ch. 377, § 3.

⁶ Hearing on H.B. 1286 Before the House Comm. on the Judiciary, 2005 N.D. Leg. (Jan. 24) (Testimony of Assistant Attorney General Mary Kae Kelsch).

a request by a citizen for information regarding a matter pending before the Commission; and (4) a gathering: an exchange of e-mails among a quorum of the governing body. Therefore it is my opinion that the discussion, although brief, was a meeting as defined in N.D.C.C. § 44-04-17.1(8) and a violation of the law because the meeting was held without providing public notice.

This is not to say that every e-mail will be a “meeting” under the open meetings law. Although previous Attorney General opinions have stated that a quorum of a governing body may not meet to receive information regarding public business without proper notice,⁷ it is my opinion that a city administrator may provide information to city commission members by e-mail as long as a copy of the e-mail is kept for a reasonable period of time so that the public may have access to it.⁸ Mayor LaMont explains that it is “customary for Mr. Neubauer to communicate to the commissioner [sic] via e-mail. Mr. Neubauer does this in a manner which enables him to keep commissioners informed on developments pertinent to city business.”⁹ Such a ministerial use of e-mail, is comparable to sending information by mail, and is appropriate.

Mayor Lamont states that using e-mail is “not unlike picking up the phone and calling each one, or meeting individually with each commissioner.”¹⁰ Such interactive use of e-mail is not comparable to sending information by mail and may not be appropriate. There is a threshold at which multiple conversations (whether in person, over the telephone, or by e-mail) on a particular subject, each involving a commissioner, collectively involve enough commissioners (a quorum) that the conversations have the effect of forming a consensus or furthering the decision-making process on that subject.¹¹

When using e-mail as a means to provide information to a governing body in lieu of the mail, safeguards should be in place to protect against the communication triggering the open meetings law. For example, when in receipt of information by e-mail, it would be a good practice for members of a governing body, if they respond at all, to reply to the sender of the information without copying the response to the other governing body members by using the “reply all” function.

⁷ See N.D.A.G. 98-O-08 and N.D.A.G. 98-O-05.

⁸ See N.D.A.G. 2001-O-14, n. 2; Op. Att’y Gen. Fla. 01-20 (2001).

⁹ August 15, 2007 letter from Ken LaMont.

¹⁰ Id.

¹¹ See N.D.A.G. 98-O-05; N.D.A.G. 44-04-17.1(8)(2)(“Meeting” includes “[l]ess than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.”)

CONCLUSION

It is my opinion that the Mandan City Commission violated the open meetings law when it held a brief discussion by e-mail that met the four elements of a "meeting" under the open meetings law.

STEPS NEEDED TO REMEDY VIOLATION

Copies of the e-mail exchanges that took place from 4:03 p.m. on June 27 through 8:27 a.m. on June 28 must be provided free of charge to anyone requesting it. Ms. Beehler already has copies.

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. § 44-04-21.2.¹² It may also result in personal liability for the person or persons responsible for the noncompliance.¹³

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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¹² N.D.C.C. §44-04-21.1(2).

¹³ Id.