

**OPEN RECORDS AND MEETINGS OPINION
2008-O-28**

DATE ISSUED: December 12, 2008

ISSUED TO: Fargo 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 Jerimiah Moerke, News Director for KVLV/KXJB-TV, and Jim Shaw, News Director for KVRR-TV, asking whether the Fargo City Commission violated N.D.C.C. § 44-04-19 by participating in a bus tour that was closed to the public.

FACTS PRESENTED

On July 10, 2008, the City of Fargo engineering department (Fargo) conducted a bus tour for the Fargo City Commission (Commission) to view an area for a possible flood control project. Four of the five Commission members took the bus tour. The bus used by Fargo was equipped with video displays that showed the Commissioners and other passengers video renderings of the project features. The Commissioners were able to compare the existing conditions with the computer generated models of what the conditions would be after completion of the project. In addition to the four Commissioners, five city employees, nine employees of contractors, three members of the Southeast Water Resources District, the county engineer, and a reporter from The Forum were on the bus.

Fargo issued a media advisory stating that the Commission would be taking the tour on Thursday, July 10, from 1:30 p.m. to 4:30 p.m. The advisory stated that the City engineering staff would lead the tour, show the Commission specific features of the project, and answer any questions. The bottom of the advisory stated:

Members of the media who wish to follow the tour and participate should meet at 200 3rd St. N. by 1:30 p.m. Due to limited space on the bus, the tour is not open to the public.

According to Fargo, at the time of departure three reporters and three cameramen wanted to board the bus, but there were only two seats available. The reporters initially decided that they would follow the tour and leave the camera people on the bus. However, they were told that there was not enough room for the camera people and the city engineer asked them all to leave so the tour could commence.¹ The three TV camera crews were told to figure out for themselves how they would obtain footage of the meeting and Fargo rejected the idea of having one "pool camera" on the bus.² The media's solution was to take turns on the bus throughout the tour.³

A reporter from The Forum was on the bus and attended the entire tour. DVD disks with the digital renderings of the proposed project were distributed to the media.

ISSUE

Whether the Fargo City Commission violated the open meetings law when its staff excluded the public, including the media, from a July 10, 2008, bus tour that was arranged by Fargo's engineering department.

ANALYSIS

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public."⁴ A "meeting" is defined as any gathering of a quorum of the members of a governing body regarding the public business of the entity.⁵ The definition of "meeting" covers all stages of the decision-making process, including the gathering of information by the governing body.⁶ The governing body's presiding officer has the responsibility of assuring that sufficient notice is provided under N.D.C.C. § 44-04-20.⁷

¹ Letter from Erik R. Johnson, Fargo City Attorney, to Assistant Attorney General Matthew Sagsveen (July 31, 2008).

² Id.

³ Id. at page 4.

⁴ N.D.C.C. § 44-04-19.

⁵ N.D.C.C. § 44-04-17.1(8)(a)(1).

⁶ N.D.A.G. 98-F-16.

⁷ N.D.A.G. 98-O-13 (although providing notice may be delegated to the county auditor, the Commission and its chairman remain ultimately responsible). See N.D.C.C. § 44-04-20(5). See also N.D.A.G. 2004-O-09.

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The definition of “meeting” is not limited to gatherings held in a governing body’s usual meeting room.⁸ This office has previously determined that an on-site inspection by a quorum of the board of a water resource district of an area that was the subject of a complaint was a meeting.⁹ Attendance of a quorum of city council members at a meeting of another public entity to hear presentations by sanitation companies was also considered to be a meeting.¹⁰

The bus tour held July 10, 2008, had all the elements of a “meeting” and therefore, by law, was open to the public.¹¹ The fact that Fargo did not anticipate attendance by any members of the public is irrelevant. There is no legal authority to close a meeting based on a public entity’s assumption that there is a lack of public interest.

According to Fargo, its assumption was reasonable because no members of the public attended the meeting.¹² This argument is unpersuasive because Fargo, in its notice, told the public not to come to the meeting. It is also incorrect, as six members of the media did attempt to attend the meeting.

The open meetings law does not make a distinction between “the public” and “the media.” Both are one and the same and have equal rights to attend meetings required to be open. However, Fargo did make a distinction between the two by stating that “the public” could not attend the bus tour, but “the media” could follow along and participate. This distinction is legally irrelevant. Although Fargo treated the media as an annoyance, they had a legal right to attend a public meeting.

Fargo denies that its treatment of the public violated the open meetings law by pointing to N.D.C.C. § 44-04-19(1) which states as follows:

This section is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access.

This subsection is one of four subsections included in N.D.C.C. § 44-04-19. The four subsections address the balance between the public’s right to attend and the governing

⁸ Id.

⁹ N.D.A.G. 98-F-16. See also N.D.A.G. 2004-O-15.

¹⁰ N.D.A.G. 2004-O-15. See also N.D.A.G. 2008-O-10 and N.D.A.G. 2008-O-11.

¹¹ See N.D.C.C. § 44-04-17.1(8)(definition of “meeting”).

¹² Letter from Erik R. Johnson, Fargo City Attorney, to Assistant Attorney General Matthew Sagsveen (July 31, 2008).

body's ability to hold a productive meeting.¹³ Subsection two of N.D.C.C. § 44-04-19 provides in part that "the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting."¹⁴

Subsections (1) and (2) of N.D.C.C. § 44-04-19 must be read together. Thus, a governing body may not deny access based upon space limitations unless it has first attempted to make reasonable accommodations. Here, Fargo's attempt to accommodate the public was a decision to exclude them altogether. This is not reasonable. The right of the public to attend public meetings cannot be so easily dismissed due to inconvenience. To condone Fargo's effort to exclude the public could provide an incentive to governing bodies to hold meetings in the smallest space available in order to deny access to the public.

When meetings are held outside the regular meeting room, the possible participation of the public must be considered. There may not be a perfect solution to meetings that take place in unconventional settings, but even a little effort and creativity would have resulted in better access to this meeting. Thus it is my opinion that the Commission violated N.D.C.C. § 44-04-19 by participating in a meeting that was not open and accessible to the public.

CONCLUSION

There is no legal authority to exclude the public, which includes the media, from a bus tour of flood projects attended by a quorum of the Fargo City Commission. Before a governing body excludes the public from a meeting based on lack of physical space, it must first attempt to make reasonable public accommodations.

STEPS NEEDED TO REMEDY VIOLATION

The records reviewed by the Commission, including the DVD, during the bus tour must be provided to any person upon request free of charge. If minutes were created from the meeting, copies must be provided free of charge. If minutes were not created, a detailed summary of what was discussed by the Commission during the bus tour must be created and provided free of charge.

¹³ See N.D.C.C. § 44-04-19(1),(2), (3),(4).

¹⁴ N.D.C.C. § 44-04-19(2).

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. It may also result in personal liability for the person or persons responsible for the noncompliance.

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Attorney General

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