

**OPEN RECORDS AND MEETINGS OPINION
2009-O-04**

DATE ISSUED: March 6, 2009

ISSUED TO: Rugby City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Deidre Godycki asking whether the Rugby City Council's Public Safety Committee violated the open meetings law by failing to provide her with notice of the November 13, 2008, special meeting and whether the notice and agenda for the special meeting violated the open meetings law.

FACTS PRESENTED

Deidre Godycki mailed a request to the Rugby city auditor on November 12, 2008, requesting notification of "meetings of the Rugby City public entities." The letter did not specify whether the notice should be by mail, e-mail, telephone, or facsimile. The auditor received the letter on the morning of November 13.

The Rugby City Council's Public Safety Committee (Committee) planned to have a special meeting on November 13 at 3:30 p.m. Notice of the meeting was posted on November 12 in the glass case in the city office building where notices are customarily posted and filed with the city auditor. The notice was not provided to the official newspaper because the newspaper specifically requested the city not give it notice of committee meetings.¹ After receiving Ms. Godycki's request for meeting notices, the auditor mailed her a copy of the Committee's special meeting notice for the meeting scheduled that day. Ms. Godycki received the notice the day after the meeting.

The special meeting notice for the Committee's November 13 meeting consists of two pages. The first page is entitled "Meeting Notice" and is a reproduction of the "Sample Meeting Notice" found on the Attorney General's website with the blanks filled in. Although the agenda topics for the meeting are not included on the first page, the "Meeting Notice" states "see attached agenda." The "Agenda" is the second page of the notice and provides as follows:

¹ A governing body has an obligation by law to provide notice to the official newspaper of the county even if the newspaper does not want the notice. The city has resumed providing notices to the newspaper.

Agenda
Public Safety Committee Meeting
Thursday, November 13, 2008
3:30pm
Council Chambers

1. Call to Order
2. Approved Minutes of the following meetings: Oct. 2, Oct. 3, Oct. 30 (2 meetings)
3. Update on Department- Chief Coca
4. Other Business
5. New Business
6. Adjournment

ISSUES

1. Whether the Rugby Public Safety Committee complied with N.D.C.C. § 44-04-20 when it notified Ms. Godycki of its November 13, 2008, special meeting.
2. Whether the Rugby Public Safety Committee's notice and agenda for its November 13, 2008, special meeting, violated N.D.C.C. § 44-04-20.

ANALYSIS

Issue One

A public entity violates the open meetings law if the entity's notice does not substantially comply with the notice requirements for a meeting.² Like a regular meeting, notice of a special meeting must be posted at the principal office of the governing body, at the location of the meeting on the day of the meeting, filed with the city auditor for city-level bodies, and provided to anyone requesting personal notice.³ Additionally, for special meetings, the governing body's official newspaper must be given notice.⁴ Notice for any

² N.D.C.C. § 44-04-20(9).

³ N.D.C.C. § 44-04-20(4) and (5).

⁴ N.D.C.C. § 44-04-20(6).

OPEN RECORDS AND MEETINGS OPINION 2009-O-04

March 6, 2009

Page 3

meeting must be provided to the public and made available to anyone requesting such information “at the same time as such governing body’s members are notified”⁵

Ms. Godycki asks if the Committee violated the law by failing to notify her of the Committee’s special meeting scheduled for November 13, the same day as her request for notice was received. Since Ms. Godycki’s request arrived the same day as a meeting was scheduled, calling her would have been a practical way to contact her prior to the meeting.⁶ The city auditor, who provides the notices for city meetings, did not call Ms. Godycki because she was under the impression that notice was legally required to be provided by mail.

The law does not specify how notice must be made available to those requesting it, only that it be made available.⁷ Past opinions indicate that public entities provide notice to a person requesting personal notice in whatever way is agreed upon by the person and the public entity or whatever way is practical.⁸ The law also fails to address a circumstance like this, where a request for notice arrives on the same day as a meeting, after the meeting was already noticed. The only timing requirement in N.D.C.C. § 44-04-20 is that the notice be provided both generally and to persons requesting specific notice at the same time as the members of the governing body receive notice.⁹ Here, Ms. Godycki’s letter had not arrived when the notice of the November 13 meeting was given to the members of the Committee and posted publicly.

In past opinions, this office has found a violation when a public entity failed to notify an individual of a meeting, by mail, after having been requested to do so.¹⁰ It was also a violation when individual notice was not provided to a requester at the same time the members of a governing body received notice.¹¹ Finally, this office found a violation when the mayor of Nome failed to send individual notice of a meeting to a requester after the meeting was held even though the mayor made an effort to find the phone number of a requester, but did not contact the requester due to an unlisted phone number.¹² In the Nome opinion, this office explained that even though the mailed notice

⁵ N.D.C.C. § 44-04-20(5).

⁶ Because special meetings may be scheduled upon very short notice, mailing individual notice to someone requesting it is not always practical. Thus, public entities should make a reasonable attempt to contact the person by telephone or e-mail, if possible, in order to give people who requested notice an opportunity to attend. If it is not possible to contact the person by telephone or e-mail, the notice should be sent even if it would be received after the meeting.

⁷ N.D.C.C. § 44-04-20(5).

⁸ See; N.D.A.G. 2007-O-02; N.D.A.G. 2006-O-10.

⁹ N.D.C.C. § 44-04-20(5).

¹⁰ N.D.A.G. 2007-O-10.

¹¹ N.D.A.G. 2004-O-09; N.D.A.G. 2003-O-13.

¹² N.D.A.G. 2007-O-02.

would have arrived after the meeting, it is still beneficial because it would have advised the requester that a meeting occurred and the topics discussed so that he could ask for a copy of the minutes and follow-up if desired.¹³ Thus, if it is not reasonably possible to provide advance notice of an emergency meeting, providing notice immediately following the meeting constitutes substantial compliance.¹⁴

In the past opinions addressing when and how a person who has requested personal notice should receive the meeting notice, the public entity has received the request prior to posting the notice of the meeting. Here, at the point the auditor received Ms. Godycki's letter, the public notice of the meeting had already been posted consistent with the time requirements of the law.¹⁵ Thus, the Committee was not under the usual timing requirements of N.D.C.C. § 44-04-20(5) and Ms. Godycki had other opportunities to find out about the meeting. The auditor certainly could have attempted to call Ms. Godycki, but based upon the timing of the request and its proximity to the meeting, it is my opinion that it was reasonable to mail the notice to the requester. By doing so, the auditor satisfied the requirement by law to make the notice available to her.¹⁶ It is my further opinion that notice was provided in substantial compliance with N.D.C.C. § 44-04-20.

Issue Two

Ms. Godycki asserts the notice for the November 13 meeting violated the open meetings law because it indicated an executive session may take place but did not include a topic or legal authority, and that the agenda violated the law because it included the non-specific agenda items "Other Business" and "New Business."

As explained in the "FACTS" portion of this opinion, the Committee uses the "Sample Meeting Notice" from the website of this office. The sample notice states "[w]here noted, the discussion of some . . . topics may be held in executive session rather than during the portion of the meeting which is open to the public."¹⁷ Thus, if the Committee planned on holding an executive session at the meeting, it would have had to note it in the agenda. The agenda attached to the "Meeting Notice" did not indicate an executive session and an executive session did not occur. Thus, it is my opinion that the notice does not violate the open meetings law.

¹³ Id.

¹⁴ N.D.A.G. 2007-O-02. See also N.D.A.G. 2005-O-20; N.D.A.G. 98-O-13.

¹⁵ See N.D.C.C. § 44-04-20(5) (notice must be given at the same time as such governing body's members are notified of a meeting).

¹⁶ N.D.C.C. § 44-04-20(5).

¹⁷ North Dakota Attorney General Sample Meeting Notice, <http://www.ag.nd.gov/OpenRecords/SAMPLEMEETINGNOTICE.pdf> (emphasis added).

The attached agenda listed as meeting topics "New Business" and "Other Business." As explained in a recent opinion to Rugby,¹⁸ such vague phrases cannot be listed in an agenda for a special meeting because a governing body must list the specific items it intends on discussing at a special meeting in the notice and then may only consider those listed topics at the meeting.¹⁹

In past opinions such vague phrases have led to violations when the agenda items were coupled with discussion during the meeting of items not specifically listed on the agenda. Here, Rugby states that the Committee did not consider any topics under "Other Business" or "New Business."²⁰ In an open meetings opinion, the Attorney General is required to base the opinion on the facts given by the public entity.²¹ Based on the foregoing, it is my opinion that the Committee did not violate the open meetings law because it discussed only the topics specified in the meeting agenda.

CONCLUSIONS

1. The Rugby Public Safety Committee's notice to Ms. Godycki of its November 13, 2008, special meeting was in substantial compliance with N.D.C.C. § 44-04-20.
2. The Rugby Public Safety Committee's November 13, 2008, notice and agenda did not violate the open meetings law.

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Attorney General

mjm/vkk

¹⁸ N.D.A.G. 2009-O-03.

¹⁹ N.D.C.C. § 44-04-20(2) and (6).

²⁰ This office has reviewed the minutes from the meeting and, other than the auditor reminding the Committee to only discuss what was on the agenda, the Committee only discussed the police department.

²¹ N.D.C.C. § 44-04-21.1(1).