

**OPEN RECORDS AND MEETINGS OPINION  
2009-O-05**

DATE ISSUED: March 12, 2009

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 the open meetings law by holding a meeting that was not open to the public.

**FACTS PRESENTED**

On November 13, 2008, Mayor Tim Helbling,<sup>1</sup> Commissioner Thomas Jackson, City Attorney Malcolm Brown, City Administrator Jim Neubauer, Business Development Director Ellen Huber, and City Assessor/Chief Building Inspector Richard Barta met at Mandan City Hall to discuss the electronic door ordinance that was passed in Mandan on November 4, 2008. Director Huber asked for the meeting because her office had been receiving numerous questions about the ordinance and its impact on the local economic development programs. At the meeting, Attorney Brown was directed to prepare a document of talking points and possible amendments to the initiated ordinance for the Mandan City Commission ("Commission") to consider at its next meeting on November 18, 2008. The group also decided to send Commissioner Jackson to meet with Susan Beehler, one of the sponsors of the initiated measure, to discuss the talking points and potential amendments to the ordinance that may be suggested to the Commission. No notice of the meeting was posted.

**ISSUE**

Whether the Mandan City Commission violated N.D.C.C. § 44-04-20 by failing to give notice of a November 13, 2008, meeting that included two city commissioners.

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<sup>1</sup> Mandan operates under the commission system of government and the head of the commission is the president of the board of city commissioners. N.D.C.C. § 40-09-01. Mayor Helbling has chosen to be identified as "mayor" rather than "president".

## ANALYSIS

The Commission is a governing body of a public entity.<sup>2</sup> All meetings of a public entity must be open to the public unless otherwise specifically provided by law.<sup>3</sup> The definition of “meeting” covers all stages of the decision-making process, including information gathering.<sup>4</sup> 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.”<sup>5</sup> “Governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.<sup>6</sup> A meeting of less than a quorum of a governing body may still be subject to the open meetings law if the smaller group has been delegated authority by the governing body.<sup>7</sup> “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.”<sup>8</sup> “Public business” includes all stages of the decision-making process from information gathering to final action.<sup>9</sup> Public notice must be given in advance of all meetings of a public entity.<sup>10</sup>

The Commission did not give notice of the November 13, 2008, meeting because the city believed there was not a quorum of the Commission and Mayor Helbling and Commissioner Jackson had not been delegated any authority to act on behalf of the Commission.<sup>11</sup> The Commission, however, had appointed Mayor Helbling and Commissioner Jackson to hold the Business Development Portfolio.<sup>12</sup> According to the response from the Commission, a portfolio holder has a specific role as an advocate for one or more departments and is expected to be the most knowledgeable regarding current issues in those respective areas.<sup>13</sup> The portfolio holder will occasionally meet

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<sup>2</sup> N.D.C.C. § 44-04-17.1(12)(b).

<sup>3</sup> N.D.C.C. § 44-04-19.

<sup>4</sup> See N.D.A.G. 2006-O-02; N.D.A.G. 2004-O-15; N.D.A.G. 98-F-16; N.D.A.G. 98-O-08.

<sup>5</sup> N.D.D.D. § 44-04-17.1(8)(a).

<sup>6</sup> N.D.C.C. § 44-04-17.1(6).

<sup>7</sup> N.D.C.C. § 44-04-17.1(6); N.D.A.G. 2005-L-14; N.D.A.G. 2004-O-12; N.D.A.G. 2003-O-15.

<sup>8</sup> N.D.C.C. § 44-04-17.1(11)(a).

<sup>9</sup> N.D.A.G. 2005-O-02; N.D.A.G. 98-O-08.

<sup>10</sup> N.D.C.C. § 44-04-20(1).

<sup>11</sup> E-mail from Jim Neubauer, City Administrator, to Assistant Attorney General Mary Kae Kelsch (Nov. 17, 2008, 4:00 p.m.).

<sup>12</sup> Minutes, Mandan City Commission (July 1, 2008).

<sup>13</sup> E-mail from Jim Neubauer, City Administrator, to Assistant Attorney General Lori Mickelson (Feb. 2, 2009, 4:03 p.m.).

OPEN RECORDS AND MEETINGS OPINION 2009-O-05

March 12, 2009

Page 3

with a department head to discuss issues relative to the department and will occasionally lead discussions regarding those department issues at Commission meetings.<sup>14</sup>

Numerous past opinions have explained that the definition of governing body includes a committee delegated authority to perform any function on behalf of a governing body.<sup>15</sup> In 2007, the Grand Forks School Board directed its president and vice president to look for an interim superintendent.<sup>16</sup> The president and vice president did not consider themselves a committee, but rather only performing executive duties of the board.<sup>17</sup> Likewise here, Mayor Helbling and Commissioner Jackson considered themselves managing the business development portfolio rather than acting as a committee.

When Mayor Helbling and Commissioner Jackson met on November 13, it was pursuant to the authority delegated to them by the full Commission. Regardless of the label given to a group of persons, as long as there is a delegation of authority from the governing body, it is a committee.<sup>18</sup> Thus, any meeting attended by the both of the portfolio members is subject to the state's open meetings law.<sup>19</sup> Mayor Helbling and Commissioner Jackson attended this meeting because the Commission assigned them to the Business Development Portfolio. The topic of the meeting was directly related to the business of the Business Development Portfolio and included the head of that department, Director Huber. When a quorum or a committee of a governing body meets to discuss public business, it is a meeting as defined by the open meetings law and must be noticed accordingly.<sup>20</sup> Therefore, it is my opinion that Mandan City Commission violated the open meetings law by failing to give notice of the November 13, 2008, meeting.

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<sup>14</sup> Id.

<sup>15</sup> See N.D.C.C. § 44-04-17.1(6) (definition of governing body). See also N.D.A.G. 2008-O-21; N.D.A.G. 2007-O-13; N.D.A.G. 2005-O-02; N.D.A.G. 2003-O-15; N.D.A.G. 2003-O-13; N.D.A.G. 2001-O-04;

<sup>16</sup> N.D.A.G. 2007-O-13.

<sup>17</sup> Id.

<sup>18</sup> See N.D.C.C. § 44-04-17.1(6) (definition of governing body). But see N.D.A.G. 2008-O-24; N.D.A.G. 2005-O-15; N.D.A.G. 2005-L-14; N.D.A.G. 2004-O-12 (assignment of a portfolio or the delegation of authority to one person does not trigger the open meetings law).

<sup>19</sup> N.D.A.G. 2008-O-21.

<sup>20</sup> See N.D.C.C. § 44-04-17.1(8) (definition of "meeting").

## CONCLUSION

The Mandan City Commission violated N.D.C.C. § 44-04-20 by failing to provide notice of a November 13, 2008, meeting attended by two city commissioners who were delegated authority by the Commission.

## STEPS NEEDED TO REMEDY VIOLATION

To remedy for the lack of notice for the November 13, 2008, meeting, a notice listing the time, date, location and topics which were considered at that meeting should be posted at the Commission's principal office, filed in the city auditor's office, and given to the official newspaper of the city of Mandan and any other person who has requested to receive notices of Commission meetings. Minutes must also be created regarding the public business and discussions conducted at the November 13, 2008, meeting and must be provided at no cost to the requester and any other person who requests 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.<sup>21</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>22</sup>

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<sup>21</sup> N.D.C.C. § 44-04-21.1(2).

<sup>22</sup> Id.