

**OPEN RECORDS AND MEETINGS OPINION
2010-O-09**

DATE ISSUED: July 1, 2010

ISSUED TO: Cooperstown 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 Jon Flatland asking whether the Cooperstown City Council violated N.D.C.C. § 44-04-19 by holding meetings by e-mail without public notice.

FACTS PRESENTED

The members of the Cooperstown City Council (Council) are Paul Paintner, Joanne White, Blair Cussons, Carl Sad and Donna Campbell.¹ The mayor is Connie Swenson. On January 14, 2010, Council member Carl Sad e-mailed the mayor and the other four Council members. He informed them of a conversation he had with a local resident by listing three observations the resident had about the city's landfill.

The mayor responded that same day to Council member Sad and copied the e-mail to the four other Council members. She gave her opinion regarding the constituent's comments and suggested that the issue be put on the February meeting agenda for discussion. According to the mayor, two days after her e-mail, another Council member e-mailed an opinion on the landfill to all of the Council members and a few days later another e-mail was sent to all members regarding the same issue.²

ISSUE

Whether the Cooperstown City Council held a meeting by e-mail that was not properly noticed.

¹ The Council usually has six members plus the mayor but at the time of this event there was one vacancy.

² The council no longer has these e-mails in its possession.

ANALYSIS

Generally, all meetings of a public entity must be open to the public and notice must be provided.³ A “meeting” is defined in the open meetings law in relevant part as “a formal or informal gathering, . . . whether in person or through electronic means such as telephone or videoconference, of . . . a quorum of the members of the governing body of a public entity regarding public business.”⁴

As I explained in a 2007 opinion to the City of Mandan, the analysis of whether a meeting took place by e-mail is no different than that of other meetings.⁵ As long as an exchange contains the four elements of a “meeting,” a meeting occurs.⁶ I will review each element in turn: (1) a public entity: the city of Cooperstown; (2) a governing body: the City Council; (3) public business: rules relating to the city’s landfill; and (4) a gathering: an exchange of e-mails among a quorum of the governing body.

Here, the first e-mail from Council member Sad only passed the constituent’s concerns on to the other Council members and the mayor without including his own opinion about the landfill. As I explained in my 2007 opinion, it is appropriate to use e-mail in lieu of the mail as a means to provide information to a governing body as long as there are safeguards to protect against communication that may trigger the open meetings law.⁷ In other words, members of a governing body should be careful not to use the “reply all” function when responding to the information they receive by e-mail.⁸

In her e-mail response to Council member Sad, the mayor appropriately suggested that the matter be put on the agenda for the next meeting. However, when she went on to express her own opinion about the landfill to the other council members she triggered the open meetings law. Mayor Swenson believed her e-mail was acceptable as long as the council members only stated opinions and took no action on the issue.⁹ As explained in numerous opinions, action does not have to be taken during a gathering of a quorum in order for a meeting to take place. The definition of “meeting” covers all stages of the decision-making process, including information gathering.¹⁰ Expressing

³ N.D.C.C. §§ 44-04-19 and 44-04-20.

⁴ N.D.C.C. § 44-04-17.1(8)(a)(1).

⁵ See N.D.A.G. 2007-O-14.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Letter from Mayor Connie Swenson to Assistant Attorney General Mary Kae Kelsch (Mar. 31, 2010).

¹⁰ N.D.A.G. 2009-O-05; N.D.A.G. 2008-O-28; N.D.A.G. 2008-O-13.

opinions about how to handle public business is the equivalent to having a discussion because it contributes to the consensus building process.

It is my opinion that the Council held a meeting as defined in N.D.C.C. § 44-04-17.1(8) when a quorum shared opinions regarding public business by e-mail without providing public notice.

CONCLUSION

Cooperstown City Council violated the open meetings law when it discussed public business by e-mail.

STEPS NEEDED TO REMEDY VIOLATION

The Council members must recreate the conversations from the deleted e-mails to the best of their ability. The recreated statements and the e-mail that was saved should be provided at no cost to Mr. Flatland and anyone else requesting them. At the next regular meeting, the Council should explain the conversations that took place so that there is a record of the meeting in the Council's minutes.

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. § 44-04-21.2.¹¹ It may also result in personal liability for the person or persons responsible for the noncompliance.¹²

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¹¹ N.D.C.C. §44-04-21.1(2).

¹² Id.