

**OPEN RECORDS AND MEETINGS OPINION
2010-O-13**

DATE ISSUED: October 27, 2010

ISSUED TO: Grand Forks City Council
Grand Forks Events Center Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether the Grand Forks Events Center Commission, also known as the Alerus Center Commission (Commission) violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding an unauthorized executive session and holding a meeting without providing public notice.

FACTS PRESENTED

The Commission is a committee of the Grand Forks City Council and has seven members and one ex officio non-voting member. The members are nominated by the Grand Forks Mayor and ratified by the Grand Forks City Council.

At the June 23, 2010, regular meeting of the Commission the chair person announced that Commission was going into executive session to confer with a representative of the accounting firm of Brady Martz to discuss the 2009 Audit Report. The secretary of the Commission made a general statement that the executive session was being convened under North Dakota law but failed to provide a specific citation. A motion was made and passed to go into executive session, which lasted for fifteen minutes.

When the Grand Forks city attorney, who was not at the meeting, learned that the Commission held an executive session, he listened to the recording of the executive session and concluded that the Commission had not complied with the procedural requirements for holding an executive session and that there was no legal authorization to discuss the subject matter in executive session. He advised the Commission to make the recording available to the public both at the Alerus Center and Grand Forks City Hall, he provided educational materials about the open records and meetings law to the Commission members, and appeared at a Commission meeting to advise the Commission about the unauthorized executive session.

The requester also alleges that the Commission has been negotiating with a management company and discussing contract terms during meetings that were not publicly noticed.

ISSUES

1. Whether the Commission followed the procedures required under 44-04-19.2 prior to holding an executive session on June 23, 2010, and whether the executive session was authorized by law.
2. Whether the Commission met to negotiate a contract with a management company without providing public notice.

ANALYSIS

Issue one

Generally, all meetings of a public entity must be open to the public.¹ A meeting is a formal or informal gathering of a quorum of the members of a governing body of a public entity that is discussing public business.² A “governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.³ The definition of a governing body includes a committee delegated authority to perform any function on behalf of a governing body.⁴ As a committee of the Grand Forks City Council, the Commission is a governing body and subject to the open meetings law.⁵

A governing body may hold an executive session to consider or discuss closed or confidential records or to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts.⁶ An executive session that is authorized by law may be held if the governing body first convenes in an open session, announces in open session the topics to be discussed during the executive session and the legal authority to hold the

¹ N.D.C.C. § 44-04-19.

² N.D.C.C. § 44-04-17.1(8)(a)(1).

³ N.D.C.C. § 44-04-17.1(6).

⁴ See N.D.C.C. § 44-04-17.1(6) (definition of governing body). See also N.D.A.G. 2009-O-05; N.D.A.G. 2008-O-21; N.D.A.G. 2007-O-13.

⁵ See N.D.A.G. 2008-O-21; N.D.A.G. 2007-O-13; N.D.A.G. 2004-O-15; N.D.A.G. 2003-O-13. .

⁶ N.D.C.C. § 44-04-19.2(1) and N.D.C.C. § 44-04-19.1(9).

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executive session.⁷ If an executive session is anticipated at the time the notice is drafted, the agenda must include the general subject matter of the executive session.⁸

Here, the agenda for the June 23, 2010, meeting did not indicate that an executive session was anticipated. In fact, the Commission now admits that it ignored all the procedural requirements for holding an executive session and that it had no legal authority to hold an executive session. After a review of the recording it appears the rationale for excluding the public was an unfavorable audit report. In several past opinions violations occurred when governing bodies closed meetings or held secret meetings to discuss either personnel matters or potentially unpopular and controversial topics.⁹ Regardless of how uncomfortable it might be to receive unfavorable information during an open meeting, the public had a right to hear the report as it was given to the Commission.

Therefore, notwithstanding that the city attorney promptly attempted to rectify the violation as soon as he learned of it, it is my opinion that the Commission violated the open meetings law when it held an unauthorized executive session.

Issue two

The second question involves a factual determination as to whether a quorum of the Commission met in secret with a management company in order to negotiate a contract and then met to discuss the terms of the contract.¹⁰ My opinion must be based upon the facts of the situation in question as presented by the public entity.¹¹

In response to an inquiry by this office, the city attorney explained that the contract negotiations regarding a contract between the management company and the City of Grand Forks were conducted by his office rather than members of the Commission.¹² He also explained that a quorum of the Commission did not meet without providing

⁷ N.D.C.C. § 44-04-19.2(2).

⁸ N.D.C.C. § 44-04-20(2) and N.D.A.G. 2009-O-09.

⁹ See generally, N.D.A.G. 2007-O-15; N.D.A.G. 2005-O-02; N.D.A.G. 2004-O-21; N.D.A.G. 2004-O-19; N.D.A.G. 98-F-11.

¹⁰ An allegation that a meeting occurred without public notice must be made within ninety days of the alleged violation. N.D.C.C. § 44-04-21.1(1). Thus, this office could only look back to April 16, 2010, based on the date the opinion request was received by this office.

¹¹ N.D.C.C. § 44-04-21.1(1).

¹² Letter from City Attorney Howard Swanson to Assistant Attorney General Mary Kae Kelsch, August 17, 2010.

public notice in order to discuss the contract terms or the negotiations.¹³ Thus, it is my opinion that no violation occurred because a quorum of the Commission did not negotiate or discuss a contract with a management company at meetings held without public notice.

CONCLUSIONS

1. It is my opinion that the Commission failed to follow the procedures required under N.D.C.C. § 44-04-19.2 prior to holding an executive session on June 23, 2010, and that the executive session was not authorized by law.
2. It is my opinion that the Commission did not violate N.D.C.C. §§ 44-04-19 and 44-04-20 by having a quorum negotiate or discuss a contract with a management company at meetings held without public notice

STEPS NEEDED TO REMEDY VIOLATION

Although the Commission's attorney took appropriate corrective measures, the recording is of poor quality so, as a further remedy, the Commission must make a transcript of the recording, to the best of its ability, and should attach the transcript to the minutes of the meeting. The transcript must also be provided to the requester.

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. § 44-04-21.2.¹⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁵

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Attorney General

mkk/vkk

¹³ Id. The city attorney presented the contract terms to the Commission at a special meeting held July 7, 2010.

¹⁴ N.D.C.C. §44-04-21.1(2).

¹⁵ Id.