

**OPEN RECORDS AND MEETINGS OPINION  
2012-O-02**

DATE ISSUED: February 6, 2012

ISSUED TO: Linton School Board

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Leah Burke, Editor of the Emmons County Record asking whether the Linton School Board (Board) violated N.D.C.C. §§ 44-04-19 and 44-04-20 by meeting without providing public notice.

**FACTS PRESENTED**

In August 2011, Emmons County State's Attorney Donald Becker contacted Linton Superintendent of Schools Alan Bjornson to request certain documents. The documents related to an investigation concerning a Board contract to resurface the Linton School playground and parking lots. The superintendent subsequently contacted the Board president and told him about the investigation. The Board president instructed the superintendent to cooperate with the state's attorney and provide him with any records he requested. The Board president then contacted the other Board members by telephone and told the members about the investigation and the instructions he gave the superintendent.

State's Attorney Becker subsequently wrote a letter to the Board expressing his opinion that the Board's resurfacing contract failed to comply with North Dakota bidding laws. State's Attorney Becker further stated that although he thought the law was violated, he did not intend to pursue criminal charges. State's Attorney Becker also asked to appear at the next regular meeting of the Board to discuss the matter in person.

State's Attorney Becker appeared and spoke to the Board about North Dakota's bidding laws at the October 24, 2011, regular meeting. During the meeting, the state's attorney asked the Board if any of the members had read his letter dated September 30, 2011. The Board president, on behalf of the Board, explained that he did not provide the members with a copy of the letter because he had discussed the letter and the bidding problems with each Board member.

## ISSUE

Whether the Board violated N.D.C.C. § 44-04-19 when the Board president made a series of telephone calls to a quorum of the Board members regarding public business without providing public notice in substantial compliance with N.D.C.C. § 44-04-20.

## ANALYSIS

All “meetings” of the governing body of a public entity are required to be open to the public unless otherwise specifically provided by law and must be preceded by sufficient public notice.<sup>1</sup> The definition of “meeting” is not limited to face-to-face gatherings of a quorum of the members of a governing body, thus, a “meeting” could occur via telephone conversations.<sup>2</sup>

The open meetings law may also be violated if a governing body holds one or more meetings attended by less than a quorum of members to discuss public business with the intent of avoiding the open meetings requirements.<sup>3</sup> For a series of conversations to fall under this definition, it is not necessary that the Board intended to violate the law.<sup>4</sup> A 1998 opinion regarding the State Board of Higher Education clarifies the intent requirement by stating:

However, intent to violate the law is not required; what is required is that the Board intentionally met in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding items of public business that would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.<sup>5</sup>

Here, the Board president admits that he called each Board member separately to discuss the state’s attorney’s investigation. The Board president also told each member that he had instructed the superintendent to turn all relevant records over to the state’s attorney.

The Board’s president explained that he did not consider the series of telephone calls to constitute a “meeting” because he believed he was only providing information to the entire Board. As I explained in the recent opinion to the Minto City Council, information gathering is a step in the decision making process comparable to discussion,

---

<sup>1</sup> N.D.C.C. § 44-04-19; N.D.C.C. § 44-04-20.

<sup>2</sup> N.D.A.G. 2011-O-17; N.D.A.G. 2000-O-08.

<sup>3</sup> N.D.C.C. § 44-04-17.1(9)(a)(2).

<sup>4</sup> N.D.A.G. 2011-O-17; See also N.D.A.G. 98-O-05.

<sup>5</sup> N.D.A.G. 98-O-05.

formulating or narrowing of options, or action regarding public business.<sup>6</sup> Thus, a meeting can take place even if there is no intent to build a consensus or take a vote.<sup>7</sup> Information gathering, like consensus building or voting, is considered public business, regardless of how brief.<sup>8</sup> The “information” provided by the Board president to the Board members was more than ministerial in nature because the Board president discussed his instructions to the school administration regarding an investigation.<sup>9</sup> The public has a right to know what steps the Board president took and that the steps were endorsed by the Board. If the discussions take place outside of an open meeting, the governing body is, essentially, operating without the public’s knowledge.<sup>10</sup>

If a quorum of the Board had gathered to receive the information, rather than receiving the information through a series of separate telephone calls from the Board president, the gathering would have had to occur in an open meeting.<sup>11</sup> The Board could have held a short meeting by a properly noticed conference call and discussed the investigation in a manner consistent with the law. Thus, it is my opinion that the multiple conversations constituted a “meeting” of the Board. It is my further opinion that because this “meeting” took place without public notice, the Board violated N.D.C.C. §§ 44-04-19 and 44-04-20.

#### CONCLUSION

The Board violated N.D.C.C. § 44-04-19 when it held a meeting through a series of telephone calls to a quorum of the Board without providing notice in substantial compliance with N.D.C.C. § 44-04-20.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board must post a notice to inform the public that a special meeting took place when the Board president contacted the other Board members about the state’s attorney’s investigation. Minutes must be created and a copy of both the notice and the minutes must be furnished to Ms. Burke and any other citizen who requests them, without charge.

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

---

<sup>6</sup> N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05. See also N.D.A.G. 2008-O-11; N.D.A.G. 98-O-16; N.D.A.G.; 98-O-08.

<sup>7</sup> N.D.A.G. 2011-O-17.

<sup>8</sup> Id.

<sup>9</sup> See generally N.D.A.G. 2007-O-08 (determining agenda items is ministerial).

<sup>10</sup> N.D.A.G. 2011-O-17.

<sup>11</sup> Id.; See also N.D.A.G. 98-O-05.

OPEN RECORDS AND MEETINGS OPINION 2012-O-02

February 6, 2012

Page 4

reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.<sup>12</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>13</sup>

Wayne Stenehjem  
Attorney General

mkk/vkk

---

<sup>12</sup> N.D.C.C. § 44-04-21.1(2).

<sup>13</sup> Id.