

**OPEN RECORDS AND MEETINGS OPINION  
2013-O-05**

DATE ISSUED: April 16, 2013

ISSUED TO: State Parole Board

**CITIZEN'S REQUEST FOR OPINION**

This office received requests for an opinion under N.D.C.C. § 44-04-21.1 from Michelle Tweed and Rodger and Patti French, asking whether the March, April, and May 2012 meetings of the North Dakota Parole Board ("Board") met the notice requirements of N.D.C.C. § 44-04-20 and whether the May 2012 meeting of the Board also violated other provisions of the open meetings law.

**FACTS PRESENTED**

The Board is a six member commission. The members are appointed by the Governor for individual terms of three years.<sup>1</sup> The Board's chairman designates three Board members to attend each meeting of the Board.<sup>2</sup> The Board holds regularly scheduled monthly meetings at which it carries out reviews of applications for parole pursuant to N.D.C.C. § 12-59-05. The meetings are scheduled for two days. The Board usually reviews the parole applications by reviewing the file and does not interview the inmate. However, a small number of inmates are interviewed by the Board in person.

The Board held a meeting on May 6 and 7, 2012. Prior to the meeting, the family members of one of the inmates up for parole notified officials at the North Dakota State Penitentiary (NDSP) that 14 people would attend. Only five family members were allowed in the same room with the inmate and the Board. The remaining family members and other people viewed the Board's meeting from another room via video conference.

**ISSUES**

1. Whether the Board noticed its March, April, and May 2012 meetings in substantial compliance with N.D.C.C. § 44-04-20.

---

<sup>1</sup> N.D.C.C. § 12-59-01.

<sup>2</sup> N.D.C.C. § 12-59-02.

## OPEN RECORDS AND MEETINGS OPINION 2013-O-05

April 16, 2013

Page 2

2. Whether the Board kept minutes of its May 2012 meeting in compliance with N.D.C.C. § 44-04-21(2).
3. Whether the Board violated N.D.C.C. § 44-04-19 at its May 2012 meeting because some of the members of the public had to view the Board meeting from another room by video conference.
4. Whether it was a violation of N.D.C.C. § 44-04-19 to limit the participation by the public during the Board's May 7, 2012, meeting.
5. Whether the Board's announcement of the topics to be considered and legal authority for the executive sessions held during its May 2012 meeting was sufficient under N.D.C.C. § 44-04-19.2.
6. Whether it was a violation of the open meetings law to exclude an inmate from a portion of a meeting conducted for the purpose of the inmate's parole hearing.

### ANALYSIS

#### Issue one

The Board is created by statute so it is a "public entity" subject to the open record and meeting laws.<sup>3</sup> "Unless otherwise provided by law, public notice must be given in advance" of every meeting of a governing body of a public entity.<sup>4</sup> Notice of meetings must be provided in substantial compliance with N.D.C.C § 44-04-20.

The notice required in this section must be posted at the principal office of the governing body holding the meeting, if there is one, and at the location of the meeting on the day of the meeting.<sup>5</sup> In addition, unless all the information contained in the notice was previously filed with the appropriate office under N.D.C.C. § 44-04-20(3), the notice must be filed in the office of the Secretary of State for state-level bodies . . . or posted on the public entity's website.<sup>6</sup>

According to the Board, prior to September 13, 2011, it provided the Secretary of State's office a "Notice of Parole Board Meetings Calendar Year 2012." This document contained the date, time, location and general subject matter of the Board's meetings for March, April, and May 2012. The Board also posted a yearly calendar on the Department of Correction's (DOCR) website prior to January 1, 2012.

---

<sup>3</sup> N.D.C.C. § 44-04-17.1(13)(a); See N.D.A.G. 2006-O-06.

<sup>4</sup> N.D.C.C. § 44-04-20(1)(4).

<sup>5</sup> N.D.C.C. § 44-04-20(4).

<sup>6</sup> Id.

OPEN RECORDS AND MEETINGS OPINION 2013-O-05

April 16, 2013

Page 3

Generally, the Friday before the monthly meeting, an agenda is finalized. The Board posts the agenda for each meeting on the doors of the meeting rooms and makes it available to members of the public attending the meeting. It does not file a copy of the notice and agenda with the Secretary of State's office or post it on the DOCR's website.

According to the Board, it does not file the meeting notice and agenda of each Board meeting with the Secretary of State's office because it files a yearly schedule of its meetings for the entire calendar year in accordance with N.D.C.C. § 44-04-20(3).<sup>7</sup> The schedule does not contain specific agenda items for each meeting. The Board argues that it has no statutory obligation to supplement the schedule for each meeting and cites to the section in the North Dakota Century Code that states:

However, the lack of agenda in the notice, or departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat.<sup>8</sup>

The purpose of this language is to provide flexibility for topics that may be considered at regular meetings.<sup>9</sup> It does not, however, relieve a governing body from the legal obligation to provide notice of what topics it expects it will consider at the time it drafts a meeting notice.<sup>10</sup> Additionally, the obligation to file a yearly notice does not relieve a governing body from its obligation to post notice of each meeting as required by statute.<sup>11</sup>

In addition to the topics the governing body expects to discuss at the meeting, the notice must contain the date, time, and location of the meeting.<sup>12</sup> The notices for the March, April, and May 2012 meetings do not contain the location of the meetings. I have explained in past opinions that the location of a meeting is a material requirement for meeting notices.<sup>13</sup>

The notice must also contain the general subject matter of any executive session expected to be held during the meeting.<sup>14</sup> The March meeting notice does not

---

<sup>7</sup> See N.D.C.C. § 44-04-20(3) (the purpose of filing the schedule of regular meetings with the Secretary of State's office is to provide a means for a governing body that does not have its schedule set in statute to classify its meetings as "regular").

<sup>8</sup> N.D.C.C. § 44-04-20(2).

<sup>9</sup> See N.D.A.G. 2008-O-23.

<sup>10</sup> N.D.C.C. § 44-04-20(2); N.D.A.G. 2006-O-07; N.D.A.G. 2006-O-05; N.D.A.G. 2003-O-12.

<sup>11</sup> See N.D.C.C. § 44-04-20(4). As of 2011, the law provides that notice may be filed with the Secretary of State's office or the public entity's website.

<sup>12</sup> N.D.C.C. § 44-04-20(2).

<sup>13</sup> N.D.A.G. 2006-O-06; N.D.A.G. 2005-O-04.

<sup>14</sup> N.D.C.C. § 44-04-20(2).

## OPEN RECORDS AND MEETINGS OPINION 2013-O-05

April 16, 2013

Page 4

reference any executive sessions although the minutes indicate that the Board held 33 executive sessions. The April notice references one executive session although the minutes indicate that the Board held 38 executive sessions. Finally, the May meeting notice makes reference to one executive session although the minutes reveal that 24 executive sessions were held during the meeting. The Board explains that it commonly holds executive sessions during its meetings because in order to evaluate the inmates requesting parole, it must review victim statements, drug, alcohol, medical, psychological and other treatment records that are confidential by law.<sup>15</sup> This may be the case; however, a member of the public reading the notice would have no indication that numerous executive sessions are expected. Anticipated executive sessions, like the location of a meeting, are material requirements of a meeting notice.

Based upon the foregoing, it is my opinion that the Board failed to post the notices of its March, April, and May 2012 meetings in substantial compliance with N.D.C.C. § 44-04-20. It is further my opinion that the March, April, and May 2012 meeting notices failed to include information that is statutorily required and were in violation of N.D.C.C. § 44-04-20.

### Issue two

The requesters allege that the Board failed to take minutes of its meetings.<sup>16</sup> Minutes must be kept of all open meetings.<sup>17</sup> According to the Board it did keep minutes and has provided them in response to a request from this office. It is therefore my opinion that the Board kept minutes as required by law.

### Issue three

The requesters also allege that the Board failed to provide an adequate meeting space because only a limited number of people were allowed to be in the room with the inmate and remaining attendees were allowed to attend only through video access from another location.

All meetings of a public entity must be open to the public unless otherwise specifically provided by law.<sup>18</sup> This section is violated when any person is denied access to a meeting, unless such refusal, implicitly or explicitly communicated, is due to a lack of

---

<sup>15</sup> See 42 C.F.R. § 2a, N.D.C.C. § § 12-47-36(2), 12-59-04, 12.1-34-02(18).

<sup>16</sup> This office can only determine whether minutes were kept for the May, 2012 meeting because “[a] request made under [N.D.C.C. § 44-04-21.1] must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the notice required by section 44-04-20, must be made within ninety days of the alleged violation.” N.D.C.C. § 44-04-21.1.

<sup>17</sup> N.D.C.C. § 44-04-21(2).

<sup>18</sup> N.D.C.C. § 44-04-19.

OPEN RECORDS AND MEETINGS OPINION 2013-O-05

April 16, 2013

Page 5

physical space in the meeting room for the person or persons seeking access.<sup>19</sup> To be open to the public, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.<sup>20</sup>

I explained in a 2008 opinion that subsections (1) and (2) of N.D.C.C. § 44-04-19 must be read together and that a governing body may not deny access based upon space limitations unless it has first attempted to make reasonable accommodations. I explained that the right of the public to attend public meetings cannot be so easily dismissed due to an inconvenience that may arise because of the location of the meeting.<sup>21</sup> “When meetings are held outside the regular meeting room, the possible participation of the public must be considered.”<sup>22</sup>

For its May meeting, the Board could not meet in its usual, more spacious, meeting room at the NDSP because it was under construction so an alternative, but smaller, room at the NDSP was reserved.<sup>23</sup> When the Board was informed that 14 people planned to attend a particular inmate’s appearance before the Board, the Board staff arranged for an additional room, to be connected by live video conference. Although the one meeting room could have arguably accommodated 14 people, the Board explained that the 14 people would have been in much closer proximity to the inmate, which raised a security concern for NDSP staff.<sup>24</sup> To address this security concern, the inmate was allowed to choose five supporters to be in the room with him and the Board while the remaining supporters were located in the additional room that was connected by live video.

Here, the NDSP construction project created a unique set of circumstances for the Board because it raised security issues that would not have existed in the usual, larger, meeting location. The Board had to balance the security concerns of the NDSP staff with the public’s right to attend a public meeting.<sup>25</sup> Given the space limitations at the NDSP presented by the construction and the resulting security concerns, it is my opinion that the Board made reasonable accommodations for the public to attend its meeting and did not violate N.D.C.C. § 44-04-19.

---

<sup>19</sup> N.D.C.C. § 44-04-19(1)(emphasis added).

<sup>20</sup> N.D.C.C. § 44-04-19(2).

<sup>21</sup> See N.D.A.G. 2008-O-28 (meeting held on a bus touring flood project locations).

<sup>22</sup> N.D.A.G. 2008-O-28.

<sup>23</sup> The construction is now complete and the Board has returned to its usual meeting place.

<sup>24</sup> NDSP staff indicated they had very specific security concerns regarding this particular inmate.

<sup>25</sup> See N.D.A.G. 2008-O-28 (the four subsections of N.D.C.C. § 44-14-19 address the balance between the public’s right to attend and the governing body’s ability to hold a productive meeting).

Issue four

The requesters allege that it was a violation of their free speech to limit their participation in the meeting.

The open meetings law does not expressly prohibit or allow public participation during an open meeting.<sup>26</sup> This office has concluded in several opinions that the purpose of the open meetings law is to give members of the public access to the meetings of a governing board of a public entity, but that access does not give members of the public the right to participate in or speak at the public meeting.<sup>27</sup>

It is within the Board's discretion to determine how much testimony, if any, it will hear at its meetings.<sup>28</sup> The Board allowed testimony from certain family members during the Board's May 7, 2012, meeting. It is my opinion that limiting the number of statements was within the discretion of the Board and not a violation of the open meetings law.

Issue five

The requesters allege that the Board failed to announce the executive sessions held during the meeting as required under N.D.C.C. § 44-04-19.2. An executive session may be held to discuss confidential or exempt records.<sup>29</sup> State law requires that prior to holding an executive session, the governing body must announce "during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics."<sup>30</sup> No vote by a governing body is necessary to hold an executive session to hear confidential information.<sup>31</sup>

The Board explains that every meeting commences with a statement read into the record by a Board member explaining the general authority of the Board, the purpose of the meeting, an explanation that the Board must review confidential records during the course of the meeting, and the legal authority for the executive sessions expected to be held throughout the course of the meeting. The announcement provides legal citations to state and federal law that make drug, alcohol, and rehabilitation records confidential.<sup>32</sup> Because the Board may hold so many executive sessions during the

---

<sup>26</sup> N.D.A.G. 2007-O-11.

<sup>27</sup> N.D.A.G. 2007-O-11, N.D.A.G. 99-O-07, N.D.A.G. 98-O-17, N.D.A.G. 98-F-11.

<sup>28</sup> See N.D.A.G. 2007-O-11.

<sup>29</sup> N.D.C.C. § 44-04-19.2(1).

<sup>30</sup> N.D.C.C. § 44-04-19.2(2)(b).

<sup>31</sup> N.D.C.C. § 44-04-19.2(2)(a).

<sup>32</sup> The requesters do not dispute that the records discussed in executive session were confidential by law.

course of the meeting, it believed it was redundant to repeat the same legal authority each time it held an executive session.

A review of the Board minutes from the May meeting reveals that during the May meeting, there were 25 executive sessions.<sup>33</sup> With so many executive sessions, it is understandable why the Board tires of repeating the subject matter and legal authority before each one. However, as I explained in a 2011 opinion, the announcement is a technical requirement with a practical purpose: the public should clearly understand why citizens cannot attend that portion of the meeting.<sup>34</sup> Over the course of a two day meeting, attendees will vary depending on the inmate who is being considered for parole. It is unlikely that the people in attendance at the time the announcement is made are the same people present before each executive session. A person who missed the announcement would have no indication why he or she was being asked to leave the meeting. The fact that the announcement seems redundant to the Board is of no consequence because the purpose of the announcement is for the benefit of the attending public. It is therefore my opinion that the announcement made by the Board at the beginning of each meeting day regarding the upcoming executive session was insufficient and violated N.D.C.C. § 44-04-19.2.

#### Issue six

Finally, the requesters allege it was a violation of the open meetings law to exclude an inmate from parts of the hearing.

As an incarcerated person, an inmate is not free to attend public meetings and must follow the rules and guidelines set forth by the Department of Corrections. The Department of Corrections' rules provide the Board with the discretion to allow or prohibit an inmate's participation in his or her own parole hearing.<sup>35</sup> Finally, the Department of Corrections Inmate Handbook states that inmates who are permitted to appear in person may be excused for the deliberation and readmitted thereafter.<sup>36</sup>

Given the foregoing, the Board did not violate the open meetings law when it excluded an inmate from a portion of his parole hearing.

---

<sup>33</sup> The minutes do not, as required by N.D.C.C. § 44-04-19.2(4), include the legal authority for holding the executive sessions. The requesters did not request a review of the sufficiency of the minutes, however, the Board should insure its minutes are compliant with N.D.C.C. § 44-04-19.2(4).

<sup>34</sup> N.D.A.G. 2011-O-05.

<sup>35</sup> DOCR Policy No. 1A-27; Rule 4(F)(7). Inmates do not have the right to parole in North Dakota. See Patten v. N.D. Parole Bd., 783 F.2d 142 (1986).

<sup>36</sup> DOCR Inmate Handbook, at 67.

### **CONCLUSIONS**

1. The Board did not notice its March, April, and May 2012 meetings in substantial compliance with N.D.C.C. § 44-04-20.
2. The Board kept minutes of its May 2012 meeting in compliance with N.D.C.C. § 44-04-21(2).
3. Given the unique set of circumstances presented by the NDSP construction project, the Board provided reasonable accommodations for the public to attend its May 7, 2012, meeting and did not violate N.D.C.C. § 44-04-19.
4. It was not a violation of N.D.C.C. § 44-04-19 to limit the participation by the public during the Board's May 7, 2012, meeting.
5. The Board failed to announce the executive sessions held during its May 2012 meeting in compliance with N.D.C.C. § 44-04-19.2.
6. It was not a violation of the open meetings law to exclude an inmate from a portion of a meeting conducted for the purpose of the inmate's parole hearing.

### **STEPS NEEDED TO REMEDY VIOLATIONS**

When the Board finalizes its agenda prior to each meeting, it must post the notice, agenda as required in N.D.C.C. § 44-04-20(4) which includes either filing the agenda with the Secretary of State's office or posting it on the Board's website.

The notice and agenda must also include notice of any executive session the Board expects to hold during the meeting.

Prior to holding an executive session, the Board must state the topics to be considered during the executive session and the legal authority that makes the session confidential.

Wayne Stenehjem  
Attorney General