

**OPEN RECORDS AND MEETINGS OPINION
2013-O-06**

DATE ISSUED: April 18, 2013

ISSUED TO: State Board of Higher Education

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from The Forum (Forum) asking whether the State Board of Higher Education (SBHE) violated the open meeting laws by failing to give proper notice of two alleged dinner meetings held on January 16, 2013, and March 6, 2013, and by failing to prepare proper minutes of the meetings.

FACTS PRESENTED

The SBHE held regularly scheduled meetings on January 17, 2013, and March 7, 2013, on the campus of Bismarck State College in Bismarck, North Dakota.¹ The nights preceding the regularly scheduled meetings, a quorum of members of the SBHE attended “dinner socials” held on January 16, 2013, at North Dakota University System’s Chancellor H.A. Shirvani’s residence, and on March 6, 2013, at the Toasted Frog, a bar and restaurant in downtown Bismarck.² The Forum alleges the dinner socials were “meetings” subject to the open meeting laws, and were not preceded by sufficient notice nor followed by sufficiently detailed minutes.³

ISSUES

1. Whether the January 16, 2013, dinner social at Chancellor Shirvani’s home was a meeting subject to the open meeting laws, and whether the SBHE provided the notice required by N.D.C.C. § 44-04-20.

¹ See March 25, 2013, letter from Claire Holloway, General Counsel to NDUS.

² Id. In a December 13, 2012. memorandum from Noah Brisbin, Special Assistant to the Chancellor to the NDUS Presidents’ Assistants, host campuses are instructed to plan and sponsor a “dinner from 7 p.m. to 9 p.m. at a premier off-campus restaurant for SBHE members and the Chancellor only” on the night preceding the meeting.

³ See March 8, 2013, e-mail from The Forum to Attorney General’s office.

2. Whether minutes of the January 16, 2013, dinner social meeting met the requirements of N.D.C.C. § 44-04-21.
3. Whether the March 6, 2013, dinner social at the Toasted Frog was a meeting subject to the open meeting laws.

ANALYSIS

All meetings of a public entity's governing body must be open to the public⁴ and preceded by sufficient public notice.⁵ The North Dakota University System (NDUS) is a public entity.⁶ The SBHE is a multimember body responsible for making decisions on behalf of the NDUS and is therefore the governing body of the NDUS and a "public entity."⁷

Public notice must be given in advance of all meetings of a public entity.⁸ For state-level bodies, notice must be filed in the Secretary of State's office or posted on the public entity's website, posted at the principal office of the governing body, and posted at the location of the meeting on the day of the meeting.⁹ In the event of a special or emergency meeting, the governing body must also notify the public entity's official newspaper and any representatives of the news media requesting to be notified of special or emergency meetings.¹⁰ Topics that may be considered or discussed at an emergency or special meeting are limited to those included in the notice.¹¹

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."¹² A social gathering is not a meeting as long as public business is not discussed.¹³ However, a "meeting" may occur in a location other than a traditional meeting room if all the

⁴ N.D.C.C. § 44-04-19.

⁵ N.D.C.C. § 44-04-20.

⁶ See N.D.A.G. 2006-O-11; N.D.A.G. 2002-O-12; N.D.A.G. 98-O-05.

⁷ Id., see also N.D. Const. Art. VIII, § 6; N.D.C.C. §§ 15-10-01, 44-04-17.1(12)(a).

⁸ N.D.C.C. § 44-04-20(1).

⁹ N.D.C.C. § 44-04-20(4).

¹⁰ N.D.C.C. § 44-04-20(6).

¹¹ Id.

¹² N.D.C.C. § 44-04-17.1(9)(a).

¹³ N.D.C.C. § 44-04-17.1(9)(b).

elements of a “meeting” are present.¹⁴ “Public business” includes all matters that relate or may foreseeably relate in any way to the performance of the public entity’s governmental functions or use of public funds.¹⁵ Meetings must be summarized in sufficient minutes.¹⁶

Issue One

According to the SBHE, on January 16, 2013, a quorum of the SBHE members gathered at Chancellor Shirvani’s home for dinner with the intention that topics related to the board would be discussed.¹⁷ The SBHE did not independently notice the January 16, 2013, dinner meeting. Instead, information about the “Dinner Social” was listed within the notice of the January 17, 2013, regular meeting, as follows:

Meeting Notice and Agenda

January 17, 2013

Revised January 16, 2013

The State Board of Higher education will meet Thursday, January 17, 2013, at 1:00 p.m. CT, in Bavendick Stateroom of the National Energy Center of Excellence, Bismarck State College, Bismarck, North Dakota.

The exact time each agenda item will be discussed cannot be assured.

¹⁴ See N.D.C.C. § 44-04-17.1(9)(a). See also N.D.A.G. 98-O-05. This office has issued a number of opinions that determined a meeting took place when a quorum met for dinner and discussed public business: attendance of the Fargo City Commissioners at a dinner in a restaurant (N.D.A.G. 2011-O-05); attendance of a committee of a governing body at a dinner in a restaurant (N.D.A.G. 2008-O-21); attendance of members of a water board and its attorney at a local restaurant (N.D.A.G. 98-O-11); attendance of members of the North Dakota Board of Higher Education at a dinner (N.D.A.G. 98-O-05).

¹⁵ N.D.C.C. § 44-04-17.1(12).

¹⁶ N.D.C.C. § 44-04-21.

¹⁷ Although certain governing bodies, such as township boards or city councils of small cities, occasionally meet in private homes, public entities should be aware that these meetings may have a “chilling” effect upon the public’s willingness or desire to attend. Meetings in private homes should be the exception, not the common practice. People who would otherwise attend such a meeting may feel too uncomfortable or unwelcome to attend a meeting in a private home. Fla.A.G. Letter to Galloway (Aug. 21, 2008), 2008 WL 3911097.

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Wednesday, January 16, 2013

6:30 p.m. Dinner Social at 524 Slate Drive, Bismarck, ND
The Board will meet for dinner at Chancellor Shirvani's home to review higher education-related legislative testimony and to discuss other North Dakota higher education issues

Thursday, January 17, 2013

9:00 a.m. Breakfast
National Energy Center of Excellence Room 436 and 443

12:00 p.m. Lunch
National Energy Center of Excellence Room 436 and 443

1:00 - 1:45 p.m. CALL TO ORDER

1. Board President's Remarks
2. Chancellor's Report
3. North Dakota Student Association Report - Mr. William Woodworth
4. Council of College Faculties (CCF) Report - Dr. Douglas Munski
5. Staff Senate Report - Ms. Janice Hoffarth
6. Public Comment¹⁸

The SBHE suggests that the dinner social meeting held the previous night was part of its regular meeting.¹⁹ I disagree.

Unless set by statute, regular meetings are established by filing an annual schedule with the Secretary of State's office or posting the annual schedule on the entity's website in January of each year as required in N.D.C.C. § 44-04-20(3). The SBHE's 2013 schedule filed with the Secretary of State's office listed the regular meeting dates of January 7, January 17, March 7, and May 9.²⁰ Although an annual schedule was not posted on the SBHE website, the SBHE posts notice of upcoming meetings on its website and did so for the January 17, 2013, meeting. Consequently, the dates filed with the Secretary of State's office are the meetings that are considered "regular" for the

¹⁸ See January 17, 2013, meeting notice.

¹⁹ See March 25, 2013, letter from Claire Holloway.

²⁰ Id.

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purposes of the open meetings law. This office has explained that “[a]n emergency or special meeting is . . . one that is held on a day different from the regular meeting day.”²¹ Because January 16, 2013, was not a date listed on the annual schedule of regular meetings it is my opinion that the dinner meeting on January 16, 2013, at Chancellor Shirvani’s home was a special meeting and should have been separately noticed.

This classification as a special meeting is important because the notice requirements for a special meeting are different than for a regular meeting.²² As explained above, special meetings have additional notice requirements. The governing body must notify the public entity’s official newspaper and any representatives of the news media requesting notification. Special meetings also differ from regular meetings because topics discussed during a special meeting are limited to the topics listed in the meeting notice.²³

According to the SBHE, notice of the January 17, 2013, regular meeting, which included information about the January 16, 2013, dinner meeting was sent to the media through the NDUS communications listserv that included its official newspaper.²⁴ The notice was also filed with the Secretary of State’s office and posted on the NDUS/SBHE website. However, the Secretary of State’s office and the SBHE website did not list January 16, 2013, as a separate upcoming meeting. Instead, it was only by accessing the SBHE website link under “January 17, 2013,” that the public would be aware of the January 16, 2013, meeting. Because the January 16, 2013, meeting was only included within the January 17, 2013, meeting notice, it reduced the chance of the public discovering that a separate SBHE dinner meeting was scheduled for the night before the regular meeting. Although arguably filed and posted, it is doubtful that the joint notice provided the public with adequate notice of the January 16, 2013, special meeting. The January 16, 2013, meeting was a separate gathering with a different agenda and should have been noticed separately from the January 17, 2013, meeting.²⁵

In addition, the SBHE did not post notice of the meeting at its main office or at Chancellor Shirvani’s residence at the time of the meeting on January 16, 2013, which are material requirements of N.D.C.C. § 44-04-20. I have explained that posting the notice at the location of the meeting on the day of the meeting is required so the public

²¹ N.D.A.G. Letter to Haner (Nov. 1, 1999).

²² See N.D.C.C. § 44-04-20(6).

²³ N.D.C.C. § 44-04-20(6); N.D.A.G. 2010-O-11.

²⁴ See March 25, 2013, letter from Claire Holloway. The NDUS communications listserv sends out notices to: the media, including the Bismarck Tribune and any other members of the media who have previously requested notice; SBHE members; campus presidents and their assistants; the NDUS office staff; and several other groups.

²⁵ See N.D.A.G. 98-O-09 (The open meetings law applies to each “gathering” of a quorum of the members of a governing body).

can easily identify where the meeting is being held.²⁶ This is especially important in situations where a governing body meets in an unconventional location, such as a private home. It is my opinion that the SBHE failed to provide notice of the January 16, 2013, dinner meeting in substantial compliance with N.D.C.C. § 44-04-20.

The designation as a special meeting is also relevant to the contents of the notice. As detailed above, the topics that may be considered at a special meeting are limited to the topics included in the notice.²⁷ I have explained in past opinions that general terms that could have numerous meanings do not provide the public with meaningful notice of what a governing body intends to discuss at a special meeting.²⁸ This office has repeatedly concluded that general, “catch-all” phrases, such as “other business,” “additional topics,” “any other issues that may need council attention”, or “end-of-the-year recap,” are not appropriate for special meetings because they do not provide the public with advance notice of what the public entity would discuss.²⁹

The notice for the January 16, 2013, meeting states that the Board will “review higher education-related legislative testimony and . . . discuss other North Dakota higher education issues” at the dinner social at Chancellor Shirvani’s home. The phrase “other North Dakota higher education issues” is exactly the type of catch-all phrase this office has deemed inappropriate for special meetings in past opinions.³⁰ This general phrase does not provide the public with sufficient advance notice of the topics to be discussed at the special meeting. It also fails to give the board members any indication that there are restrictions regarding what can be discussed at special meetings.³¹ The public has a right to know what topics the SBHE intended to discuss when it met with the NDUS Chancellor in his private home the night before its regular meeting.

The SBHE failed to list the topics for the special meeting with sufficient specificity. It is my opinion that the notice of the January 16, 2013, special dinner meeting failed to comply with N.D.C.C. § 44-04-20(6).

Issue Two

Minutes of an open meeting must include, at a minimum, the information listed in N.D.C.C. § 44-04-21(2):

²⁶ See N.D.A.G. 2009-O-09 and N.D.A.G. 2009-O-13.

²⁷ N.D.C.C. § 44-04-20(6).

²⁸ N.D.A.G. 2013-O-01; N.D.A.G. 2008-O-23.

²⁹ N.D.C.C. § 44-04-20(6); N.D.A.G. 2013-O-01; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-04; N.D.A.G. 2009-O-03; N.D.A.G. 2005-O-17; N.D.A.G. 2002-O-11.

³⁰ Id.

³¹ N.D.A.G. 2009-O-03; N.D.A.G. 2005-O-17.

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- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.³²

The Attorney General's office does not review any alleged inaccuracies in meeting minutes.³³ Rather, this office will only review the content of meeting minutes to determine whether they meet the minimum requirements specified in N.D.C.C. § 44-04-21(2).³⁴ The NDUS staff provided this office with minutes from the January meetings.³⁵

The minutes of the January 16, 2013, special dinner meeting list board members and staff members present, contain the date and time the meeting began and adjourned. The minutes also include the following brief description of the topics discussed: "The Board reviewed higher education issues arising in the legislative session, including past and forthcoming hearings and opportunities to present testimony. The SBHE also discussed other North Dakota higher education issues."³⁶ No official action was taken, so no motions or votes needed to be recorded in the minutes.

The SBHE acknowledges the minutes are not accurate with regard to those present at the dinner meeting. Board member Mr. Sydney Hull was listed as attending, even though he was not there. Also, even though nine staff members are listed as being in attendance, Chancellor Shirvani was the only staff member who was actually present at the meeting. By inaccurately listing the presence of eight staff members, the minutes are misleading.

The SBHE explained to this office that the conversations at this dinner meeting centered on the upcoming legislative session. These discussions are adequately described in the minutes as "higher education issues arising in the legislative session."

However, the remaining minutes merely echo the meeting notice with a vague reference to discussions of "other North Dakota higher education issues."³⁷ This broad phrase does not give any indication of what was actually discussed so the minutes are not sufficiently detailed. The SBHE admits it engaged in discussions about "other" topics

³² N.D.C.C. § 44-04-21(2).

³³ N.D.A.G. 2004-O-16, N.D.A.G. 98-O-18.

³⁴ Id.

³⁵ The January 17, 2013, minutes were approved by the SBHE on March 7, 2013.

³⁶ See minutes of January 16, 2013.

³⁷ Id.

related to the SBHE's public business, but was not able to recall any specifics of these discussions.³⁸ Although N.D.C.C. § 44-04-21(2) does not require a verbatim record,³⁹ it does require the minutes to separately list all of the topics discussed regarding public business at a special meeting.⁴⁰ Because the minutes incorrectly list the board members who attended the meeting and do not separately list all the topics discussed, it is my opinion that the minutes fail to comply with N.D.C.C. § 44-04-21(2).

Issue Three

The SBHE admits that a quorum of the SBHE members were present at the dinner social on March 6, 2013, at the Toasted Frog.⁴¹ However, the SBHE denies that public business was discussed.⁴² Attorney General's opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity.⁴³ As this section indicates, the opinion process under this statute is designed to address questions of law in a given factual situation rather than to resolve factual disputes. Accordingly, this office cannot question the written assurance from the SBHE that no public business was discussed during the dinner social on March 6, 2013. I, therefore, conclude that the March 6, 2013, dinner social attended by a quorum of the SBHE members at the Toasted Frog was not a "meeting" subject to open meeting laws because no public business was discussed.

CONCLUSIONS

1. It is my opinion that the January 16, 2013, dinner social at Chancellor Shirvani's home was a special meeting subject to the open meeting laws, and the SBHE failed to provide the notice required by N.D.C.C. § 44-04-20.
2. It is my opinion that the minutes of the January 16, 2013, dinner meeting failed to meet the requirements of N.D.C.C. § 44-04-21.

³⁸ This is why minutes should not just generally refer to "other" topics in special meeting minutes, since it can be difficult to remember specific discussions months after a meeting. The purpose of keeping minutes is not only to inform the public of topics discussed, but also to serve as an historical record of the entity and, as is made obvious in this case, to remind the entity of the matters that were considered at a meeting.

³⁹ N.D.A.G. 2010-O-06.

⁴⁰ N.D.A.G. 2005-O-01 (violation when Council discussed the City's policy regarding the fee for copying public records, but did not separately list the discussion as a topic in the minutes of the meeting).

⁴¹ See March 25, 2013, letter from Claire Holloway.

⁴² Id.

⁴³ N.D.C.C. § 44-04-21.1.

3. It is my opinion that the March 6, 2013, dinner social at the Toasted Frog was not a meeting subject to the open meeting laws.

STEPS NEEDED TO REMEDY VIOLATIONS

To remedy the lack of notice and minutes for the January 16, 2013, dinner meeting, the State Board of Higher Education must create separate minutes for the January 16, 2013, special meeting that meet the requirements of N.D.C.C. § 44-04-21. The minutes must include a list of the names of the members who attended, and provide a more detailed description of all discussions of public business at the dinner meeting. To assist in compiling a detailed description of the discussions held at the dinner meeting, every SBHE member who attended must write down his or her recollection of the discussions that related to public business. Those written recollections will be open records. After the detailed minutes of the dinner meeting are prepared, a copy of the minutes and the written recollections of each of the members present must be provided to the requester of this opinion, free of 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 reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.⁴⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁵

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sv/las/vkk

⁴⁴ N.D.C.C. §44-04-21.1(2).

⁴⁵ Id.