

OPEN RECORDS AND MEETINGS OPINION

2013-O-07

DATE ISSUED: May 3, 2013

ISSUED TO: State Board of Higher Education

On April 18, 2013, I issued an opinion to the State Board of Higher Education (SBHE) wherein I determined the Board violated the open meetings law when it failed to properly notice a meeting held at the home of the University System Chancellor, Dr. Shirvani, as a special meeting and take the necessary minutes.¹ In that opinion, I also concluded that the March 6, 2013, dinner, attended by a quorum of SBHE members and held the night before a regularly scheduled meeting, was not a “meeting” subject to open meeting laws based on written assurances that no public business was discussed.²

In any opinion provided pursuant to N.D.C.C. § 44-04-21.1, I am required to base the opinion on the facts given by the public entity. To obtain the facts for the April 18, 2013, opinion, a letter was sent to SBHE president Duaine Espegard, dated March 15, 2013.³ In the letter, I asked whether “SBHE or any other public business” was discussed during the March 6, 2013, dinner.⁴ The SBHE general counsel sent a copy of the letter to each Board member, except staff advisor, Janice Hoffarth, and asked them to answer the questions.⁵ In the e-mail, the SBHE legal counsel explained that it was her

¹ N.D.A.G. 2013-O-06.

² 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.” N.D.C.C. § 44-04-17.1(9)(a).

³ Although the letter was addressed to the Board president, the letter specifically explained that the SBHE was the public entity obligated to prepare a response to this office.

⁴ See Mar. 15, 2013, letter from the Attorney General’s office to Duaine Espegard.

⁵ Some SBHE members stated they either did not recall receiving or paid little attention to this inquiry letter. However, proof was provided to this office that the letter was forwarded on to every SBHE member, except Janice Hoffarth, by NDUS general counsel, along with specific questions regarding the nature of the March 6, 2013, dinner social. See Mar. 21, 2013, e-mail addressed to each SBHE member from NDUS general counsel, Claire Holloway.

OPEN RECORDS AND MEETINGS OPINION 2013-O-07

May 3, 2013

Page 2

understanding from some Board members that the March 6, 2013, dinner was purely social.⁶ No one came forward to contradict this representation.⁷ The Board members also failed to explain that the dinner was held in a separate private room within the restaurant.

The day after the opinion was issued, Janice Hoffarth, the Board's staff advisor⁸, contacted me because she was not aware that the Board's official response stated that the meeting was purely social and said she did not agree with the assessment. Ms. Hoffarth is the only SBHE member who is also employed within the University System at the University of North Dakota, and she said she was worried about potential employment consequences by calling me. Nonetheless, she put her duty as a board member ahead of any concern for her own employment.

Following the telephone conversation with Ms. Hoffarth, I contacted three members of the Board about the nature of the March 6, 2013, dinner social and it became clear that the initial response from the Board was neither accurate nor forthright. Moreover, other than Ms. Hoffarth, no other Board member took any action to correct the inaccuracy.⁹

I informed each Board member I spoke with that I would take action to set the record straight. I sent out letters to the individual SBHE members and to Chancellor Shirvani, because he was also present at the dinner and serves as the chief executive officer of the Board.¹⁰ In these follow-up letters, the SBHE members and Chancellor Shirvani were asked to individually answer a series of questions, keeping in mind N.D.C.C. § 12.1-11-02(2):

A person is guilty of a class A misdemeanor if, in a governmental matter, he:

- a. Makes a false written statement, when the statement is material and he does not believe it to be true.

⁶ See Mar. 21, 2013, e-mail addressed to each SBHE member from NDUS general counsel, Claire Holloway.

⁷ It is the responsibility of the SBHE to provide adequate, truthful, and sufficient responses to this office, regardless of whether legal counsel prepares the response.

⁸ See N.D.C.C. § 15-10-02. The advisor is entitled to attend and participate in all meetings but may not vote.

⁹ Mr. Sidney Hull was not present at the March 6, 2013, dinner social so he would have no way of knowing if the representation was accurate.

¹⁰ See Apr. 23, 2013, letter from Wayne Stenehjem to SBHE members and Chancellor Shirvani.

OPEN RECORDS AND MEETINGS OPINION 2013-O-07

May 3, 2013

Page 3

The responses received by this office about what actually occurred during the March 6, 2013, dinner social varied in particulars but not in substance. Although several members say they believed the conversations were social in nature, the topics of discussion they described were, in fact, substantive board business. Some members of the SBHE appear to believe that by merely labeling the meeting as a “social dinner” in the agenda, they were relieved from any obligation to adhere to the requirements of the open meetings law.

Although each SBHE member has a slightly different recollection of the March 6, 2013, dinner meeting, most SBHE members recall discussing a recent letter to the editor from SBHE president Duaine Espesgard that was published in several newspapers. The letter discussed various SBHE issues and the SBHE’s position on supporting Chancellor Shirvani. Some SBHE members recall the conversation getting quite heated and questions were raised about who represents and speaks to the media on the Board’s behalf. Others recall conversations involving an open records request for SBHE member Sydney Hull’s¹¹ e-mails, text messages, and/or phone records; Mr. Hull’s accusations against Chancellor Shirvani; and, the controversy surrounding construction of the information technology building at the University of North Dakota. One member summed up the conversation saying “no formal agenda but there was a discussion on some of the agenda items of the meeting the next day.”¹²

Some SBHE members ascribe their conduct to their confusion as to what discussions constitute “public business” even though the Board’s former and current legal counsel repeatedly provided information explaining the open meetings law.¹³ “Public business” is specifically defined in law.¹⁴ It encompasses “all matters that relate or may foreseeably relate in any way to: . . . [t]he performance of the public entity’s governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power.”¹⁵ It does not matter if the discussion takes place in an informal setting or that motions were not made because the definition of “meeting” applies to both formal and informal gatherings.¹⁶ I have explained in numerous past opinions that the open meetings law applies to all steps of the decision making process, including information

¹¹ Mr. Sidney Hull was not present at the March 6, 2013, dinner.

¹² See e-mail from Terry Hjelmstad to Claire Holloway, dated and received by the Attorney General’s office Apr. 29, 2013.

¹³ This office has even reviewed guidelines prepared by NDUS general counsel, Claire Holloway, for the SBHE that details their responsibilities under open meeting and records laws and it is debatable whether the SBHE really does not know what constitutes “public business” and what discussions trigger open meeting laws.

¹⁴ N.D.C.C. § 44-04-17.1(12).

¹⁵ Id.

¹⁶ See N.D.C.C. § 44-04-17.1(9)(a).

OPEN RECORDS AND MEETINGS OPINION 2013-O-07

May 3, 2013

Page 4

gathering, deliberating, discussing, formulating, narrowing the options, and final action regarding public business. Therefore, as long as a quorum is present for a discussion involving the public entity's public business, the definition of "meeting" is met.¹⁷

I will not tolerate the circumvention of the open meetings law due to actual or feigned ignorance of the law. In the context of the open records law, I have explained that every state official and the employees of any public entity should know what records are subject to the open records law.¹⁸ Likewise, it is the duty of the members of a governing body to know the requirements of the open meetings law and whether a discussion falls within its scope. Thus, when faced with a situation where a quorum is present in an otherwise social setting, it is the responsibility of each member of the governing body to keep the conversation from turning to public business. This can be especially difficult when, as one SBHE member's response explained, the members would "generally discuss higher education because that is what we all have in common."¹⁹

I do note that during the course of the dinner meeting, Janice Hoffarth and Dr. Kirsten Diederich expressed concern that the conversation was going beyond what was appropriate under the open meetings law. However, such concerns apparently were ignored.

Therefore, I conclude that the March 6, 2013, dinner, attended by a quorum of SBHE members where public business was discussed, was a "special meeting" subject to open meeting laws. The SBHE violated N.D.C.C. §§ 44-04-20 and 44-04-21 when it failed to properly notice and failed to provide sufficient minutes of the dinner meeting.

SBHE E-mails

In addition to being questioned about what actually occurred at the March 6, 2013, dinner meeting, this office asked each SBHE member and Chancellor Shirvani whether they were "aware of any instances since January 1, 2013, where a quorum of the Board

¹⁷ See N.D.A.G. 2012-O-06: "A formal or informal gathering constitutes a meeting when a quorum of the members of the governing body is present at the gathering regarding public business." See also N.D.A.G. 98-O-10: "When a quorum of the members of a governing body of a public entity attend the meeting of another group, and the group's discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a 'meeting.' N.D.A.G. 98-O-08; N.D.A.G. 96-F-09. This conclusion applies even if the commissioners merely listen and do not participate in the meeting."

¹⁸ N.D.A.G. 2006-O-15; N.D.A.G. 82-23.

¹⁹ See e-mail from Don Morton to Claire Holloway, dated Apr. 22, 2013, received by the Attorney General's office Apr. 29, 2013.

has discussed public business by e-mail or sequentially by telephone.”²⁰ In response, Board members and Chancellor Shirvani provided additional documents that reveal that e-mail is commonly used by both Board members and Chancellor Shirvani in a manner that results in widespread open meeting violations. Although not included in The Forum’s initial request, I cannot now turn a blind eye to the numerous e-mails that involved a quorum of the SBHE and discussed public business.

A meeting can occur in person or through electronic means, such as by telephone or e-mail.²¹ The analysis of whether a meeting took place by e-mail is no different than that of other meetings. As long as the exchange occurs among a quorum of members of a governing body of the public entity and public business is discussed; it is a meeting subject to notice requirements.²² A quorum is reached if the e-mails are sent to a quorum of members of the governing body.²³

This office has explained in past opinions that using e-mail to provide information or merely set an agenda topic is appropriate “as long as there are safeguards to protect against communication that may trigger the open meetings law. 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.”²⁴ An e-mail that suggests an agenda item is appropriate, but when a member goes on to express an opinion about the agenda topic to the other members of the governing body, open meeting laws are triggered.²⁵ In addition, “[e]xpressing opinions about how to handle public business is the equivalent to having a discussion because it contributes to the consensus building process.”²⁶ When the e-mail conversations become steps in the decision-making

²⁰ See Apr. 23, 2013 letter from Wayne Stenehjem to SBHE members. A similar question was also posed in the initial inquiry letter, dated March 15, 2013, asking to describe any SBHE meetings held since the beginning of the year, including any telephone conversations.

²¹ See N.D.C.C. § 44-04-17.1(9)(a); N.D.A.G. 2008-O-22.

²² N.D.A.G. 2007-O-14.

²³ The open meeting laws do not require a quorum to actually speak or engage in the exchanged e-mails, as long as a quorum of members are copied in on the e-mails, a quorum is present.

²⁴ N.D.A.G. 2010-O-09; see also, N.D.A.G. 2007-O-14 (“When using e-mail as a means to provide information to a governing body. . . safeguards should be in place to protect against the communication triggering the open meetings law. For example, when in receipt of information by e-mail, it would be a good practice for members of a governing body, if they respond at all, to reply to the sender of the information without copying the response to the other governing body members by using the ‘reply all’ function.”)

²⁵ N.D.A.G. 2010-O-09.

²⁶ Id.

OPEN RECORDS AND MEETINGS OPINION 2013-O-07

May 3, 2013

Page 6

process of information gathering, discussing, formulating or narrowing of options, or action regarding public business, open meeting laws are triggered.²⁷

In 1998, this office found that the series of conversations among members of the SBHE went beyond identifying agenda items and involved the course of action the Board should take in response to an issue involving public concern, including possible options and appropriate timelines.²⁸ Similarly here, e-mails reveal discussions by a quorum of SBHE members that went beyond mere ministerial discussions or setting agenda topics for an upcoming meeting. Instead, the e-mails delved into the substantive merits of the suggested agenda topics. No safeguards were in place, and the members continually used the “reply all” function. The use of the “reply all” function invited more discussions into the substance of these topics.

The e-mails provided to this office illustrate that the members of the SBHE frequently provide opinions, gather information, engage in substantive discussions, and attempt to build support and consensus for certain positions with each other. Oftentimes such e-mail exchanges were prompted by Chancellor Shirvani, who, as the chief executive officer of the Board and a public employee is under the same obligation to adhere to the open meetings law. This practice of using e-mails to circumvent public discussion on public business violates the open meeting laws and must cease immediately. Although the number of violations is difficult to determine, it is my opinion that the series of e-mail exchanges among a quorum of SBHE members were intended to avoid the open meetings law, and were “meetings” required to be open to the public and preceded by public notice.

February 26, 2013, Meeting

Information has also come to this office’s attention that a meeting was held on February 26, 2013, at 5:30, in Fargo, North Dakota, in which a quorum of SBHE members were present. Chancellor Shirvani invited certain SBHE members to meet with senior members of the NDUS office to receive information on “the chancellor’s office, plans, aspirations, operations, particularly in light of the current performance audit.”²⁹ SBHE members Kirsten Diederich and Grant Shaft attended the meeting in person while Duaine Espegard and Kari Reichert joined the meeting via teleconference. Apparently Chancellor Shirvani stepped out of the meeting in order to facilitate a candid conversation among Board members and staff. At the meeting, the SBHE members discussed concerns regarding communication with campus presidents, criticism of the

²⁷ N.D.A.G. 2007-O-08; N.D.A.G. 98-O-05.

²⁸ N.D.A.G. 98-O-05 (at that time the Board was the North Dakota Board of Higher Education).

²⁹ See Feb. 22, 2013, e-mail from Chancellor Shirvani to Kari Reichert.

process used to adopt the Pathways Plan, and the environment at the NDUS office. All of these topics relate to the SBHE's "public business."³⁰ Because a quorum of SBHE members was present,³¹ and public business was discussed, a "meeting" occurred that was subject to open meeting laws. The SBHE violated N.D.C.C. §§ 44-04-20 and 44-04-21 when it failed to notice and provide minutes of the February 26, 2013, meeting.

REMEDY

It is clear that violations of the open meetings law by the Board are pervasive. There is evidence that some Board members have a good faith desire to comply with the open meetings law but are unaware of the breadth of the statutes. There is sufficient reason to conclude that for some members failure to comply may be intentional. In either case, it is obvious there is a need for thorough instruction on the open meeting laws.

The SBHE must contact this office to set up a comprehensive training seminar to be conducted in conjunction with my office which every member must attend. This seminar must be completed within the next two months, unless otherwise agreed to by this office.

Further, to remedy the lack of notice and minutes from the March 6, 2013, dinner meeting, the State Board of Higher Education must create separate minutes for the March 6, 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 detailed description of all discussions of public business at the dinner meeting. 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 requestor of the original opinion, N.D.A.G. 2013-O-06, free of charge.

To remedy the lack of notice and minutes from the February 26, 2013, meeting, the SBHE must create minutes for the February 26, 2013, meeting, that meet the

³⁰ "Public business" means "all matters that relate or may foreseeably relate in any way to: .. [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power." N.D.C.C. § 44-04-17.1(12).

³¹ "Meeting" under open meeting laws includes gathering in which a person appears "through electronic means such as telephone or videoconference." N.D.C.C. § 44-04-17.1(9)(a). "Quorum" is defined as "one-half or more of the members of the governing body." N.D.C.C. § 44-04-17.1(15). The SBHE is made up of eight members, therefore, four members constitute a quorum under open meeting laws. See N.D.A.G. 98-O-05.

OPEN RECORDS AND MEETINGS OPINION 2013-O-07

May 3, 2013

Page 8

requirements of N.D.C.C. § 44-04-21. The minutes must include a detailed description of all discussions of public business. To assist in compiling a detailed description of the discussions held at this meeting, every person who attended the meeting must independently write down his or her recollection of the discussions that related to public business. Those written recollections will be open records.

The purpose of the open meeting and notice laws is to give the public the ability to see how government decisions are made and how public funds are spent. Both interests are implicated by the e-mail exchanges among a quorum of the SBHE members. The failure to hold these discussions in a properly noticed meeting cannot be completely remedied. To remedy the violations described in this opinion as much as possible, the SBHE must individually scour through their e-mails to find any discussions among a quorum of the members. The e-mails that constitute a meeting must be retained pursuant to the record retention schedule for SBHE regular and special meeting minutes.

Failure to take the corrective measures described in this opinion within seven days of the date of this opinion is issued, except for the training seminar's two month timeline, 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. § 44-04-21.2.³² It may also result in personal liability for the person or persons responsible for the noncompliance.³³

Wayne Stenehjem
Attorney General

slv/vkk

³² N.D.C.C. § 44-04-21.1(2).

³³ Id.