

**OPEN RECORDS AND MEETINGS OPINION
2014-O-13**

DATE ISSUED: September 22, 2014

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 Shireen Hoff asking whether the State Board of Higher Education violated open meeting laws by holding a meeting without posting sufficient public notice.

FACTS PRESENTED

On April 28 and 29, 2014, an Advisory Team appointed by the Higher Learning Commission (HLC)¹ conducted a series of interviews regarding institutional practices of the North Dakota University System (NDUS) and the governance of the State Board of Higher Education (SBHE).² The visit was a result of a request for investigation regarding governance allegations raised by Dr. Ellen Chaffee, past president of Valley City State University and Mayville State University and past vice chancellor for academic affairs for NDUS.³ NDUS posted the following notice for the HLC Advisory Team visit:

The Higher Learning Commission will be conducting an advisory visit to the North Dakota University System from April 28-29. The State Board of Higher Education, NDUS presidents, ND legislators and NDUS staff will be in attendance to respond to questions from the Higher Learning Commission Advisory Team. These meetings will be held at the State Capital in the Peace Garden Room, Fort Totten Room, and Roosevelt Room at 600 East Boulevard Avenue, Bismarck, ND 58505.

No board business will be conducted during this time.⁴

¹ The HLC accredits the institutions within the North Dakota Univ. System. See <http://ncahlc.org>.

² See Agenda, HLC Advisory Visit to the N.D. State Univ. System (Apr. 28-29, 2014).

³ See Letter from Dr. Ellen Chaffee to Higher Learning Comm'n (Apr. 3, 2014).

⁴ See Agenda, HLC Advisory Visit to the N.D. State Univ. System (Apr. 28-29, 2014).

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The notice provided an agenda of the date, time, and locations the Advisory Team would meet with the NDUS College University Presidents, the SBHE, and North Dakota Legislators. Specifically, the notice provided that the SBHE was scheduled to meet and be interviewed on April 28, 2014, from 3:45-6:00, in the Fort Totten Room at the State Capitol. The notice was posted on the NDUS website, at the NDUS main office, on the doors of the various meeting rooms on the day of the meetings, and sent to all those subscribing to the NDUS communications listserv.⁵ Members of the public were allowed to attend the interview and no one was denied access.⁶

Shireen Hoff questions whether the interview conducted by the HLC's Advisory Team with the SBHE was a "meeting" subject to open meetings law and, if so, whether the requirements for notice were met.⁷

ISSUE

Whether the interview conducted by HLC's Advisory Team on April 28, 2014, with the SBHE, was a "meeting" subject to the open meetings law, and whether the SBHE provided the notice required by N.D.C.C. § 44-04-20.

ANALYSIS

All meetings of a public entity's governing body must be open to the public⁸ and preceded by sufficient public notice.⁹ The SBHE, as the governing body of NDUS, is a public entity subject to open meetings law.¹⁰

⁵ See Letter from Murray Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att'y Gen. (June 27, 2014); see also Email from Linda Donlin, Director of NDUS Commc'n and Media Relations, to Sandra Voller, Asst. Att'y Gen. (July 16, 2014, 1:41 PM). The NDUS communications listserv sends notices to the media, including the Bismarck Tribune and other members of the media previously requesting notice; SBHE members, campus presidents and their assistants, NDUS office staff, and anyone else requesting to be placed on the listserv.

⁶ See Email from Murray Sagsveen, NDUS Chief of Staff to Sandra Voller, Asst. Att'y Gen. (July 16, 2014, 1:37 PM).

⁷ See Email from Shireen Hoff to Att'y Gen's. office (May 27, 2014, 1:02 PM).

⁸ N.D.C.C. § 44-04-19.

⁹ N.D.C.C. § 44-04-20.

¹⁰ See N.D.C.C. § 44-04-17.1(13) (definition of "public entity"); see also N.D.A.G. 2013-O-12; N.D.A.G. 2013-O-11, and N.D.A.G. 2013-O-06. The SBHE is the only "governing body" the Higher Learning Commission Advisory Team met with Apr. 28 and 29, 2014, and therefore it is only those meetings in which a quorum of the SBHE attended that could be subject to open meetings law.

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.”¹¹ “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.¹² As I have explained in numerous past opinions, when a quorum of members of a governing body attends a 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” for which notice must be provided, even if the members did not call the meeting or set the agenda.¹³

In response to questions from this office NDUS explained that it did not consider the interviews to be a “meeting” of the SBHE subject to open meetings law:

We did not consider this session with the HLC Advisory Team to be a regular or special meeting of the SBHE. The meeting was called by the HLC, the agenda was set by the HLC, and the Advisory Team interviewed the board members as part of its fact-finding visit to the NDUS. The individual board members responded to questions from the Advisory Team, but did not discuss (among themselves) board business.¹⁴

It is of no consequence that the SBHE did not initiate the meeting or set the agenda. Any time a quorum of the SBHE meets regarding the SBHE’s “public business” it is a meeting. The allegations and issues raised in the “Chaffee letter” relate to the SBHE’s performance of its governmental functions and duties and undeniably fit into the definition of “public business.”

Thus, the April 28, 2014, interview was a special meeting¹⁵ of the SBHE, required to be open to the public under N.D.C.C. § 44-04-19, preceded by public notice in compliance with N.D.C.C. § 44-04-20, and followed by minutes in compliance with N.D.C.C. § 44-04-21.

¹¹ N.D.C.C. § 44-04-17.1(9)(a).

¹² N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

¹³ See N.D.A.G. 2013-O-14; N.D.A.G. 2012-O-06; N.D.A.G. 2009-O-06; N.D.A.G. 2008-O-10; N.D.A.G. 2005-O-07; N.D.A.G. 98-O-18; N.D.A.G. 98-O-10; and N.D.A.G. 98-O-08.

¹⁴ See Letter from Murray Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att’y Gen. (June 27, 2014).

¹⁵ This office has explained that a special meeting is one that is held on a day different from a regular meeting. See N.D.A.G. 2013-O-06. Because this was not a regular meeting of the SBHE, it is a “special meeting” subject to the requirements of N.D.C.C. § 44-04-20(6).

Regardless of its failure to recognize the interview as a meeting, NDUS did provide notice. The question becomes whether the notice complied with N.D.C.C. § 44-04-20.

A meeting notice must identify the public entity holding the meeting,¹⁶ must contain the date, time and location of the meeting, and the topics to be considered or agenda.¹⁷ “The purpose of an agenda is to provide sufficient ‘information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.’”¹⁸ The law requires a level of specificity from a special meeting agenda that is not required for regular meetings because a governing body may only discuss topics during the special meeting that are listed on the notice.¹⁹ General terms or phrases that could have numerous meanings are not appropriate for a special meeting notice because they lack the specificity required to give the public meaningful notice of what will be discussed during the special meeting.²⁰

Although the agenda posted by NDUS gives the date, time, and location of the interview, it specifically stated that “Board business would not be discussed.”²¹ The notice contained an extensive list of those to be interviewed along with the interview schedule but failed to sufficiently specify the topics to be considered and discussed during the interviews. At the time the notice was posted the SBHE knew the interviews related to the allegations outlined in a letter by Dr. Chaffee and knew of the general topics that would be discussed with the HLC.²² However, the notice only stated the HLC would be “conducting an advisory visit.” This general and vague phrase could have numerous meanings and was not detailed enough to apprise the public of the

¹⁶ N.D.C.C. § 44-04-20(1); N.D.A.G. 2006-O-09.

¹⁷ N.D.C.C. § 44-04-20(2). A notice must be posted at the public entity’s principal office, centrally filed, in this case, with the Secretary of State’s office or on the public entity’s website, posted at the location of the meeting on the day of the meeting, and given to anyone requesting such information. N.D.C.C. § 44-04-20(4). For special meetings, the public entity’s official newspaper must also be notified. N.D.C.C. § 44-04-20(6). As provided in the facts section, the notice of the visit was posted in all required places and given to the newspaper and anyone requesting on the listserv.

¹⁸ N.D.A.G. 2014-O-01.

¹⁹ N.D.C.C. § 44-04-20(6); N.D.A.G. 2010-O-11; N.D.A.G. 2003-O-20.

²⁰ N.D.A.G. 2013-O-06; N.D.A.G. 2013-O-01; N.D.A.G. 2009-O-03.

²¹ See N.D.A.G. 2006-O-09 (The Grand Forks City Council violated N.D.C.C. § 44-04-20(1) because its notice failed to clearly indicate that the meeting was that of the City Council).

²² See Letter from Murray Sagsveen, NDUS Chief of Staff, to Sandra Voller, Asst. Att’y Gen. (June 27, 2014).

topics that would be considered during the visit.²³ The vague language, coupled with the statement “No board business will be conducted during this time,” is misleading because it suggests the interview is not related to the SBHE’s “public business.” Taken as a whole, I do not find the agenda posted by the NDUS substantially meets the requirements of N.D.C.C. § 44-04-20.

CONCLUSION

The April 28, 2014, interview conducted by the HLC Advisory Team with the SBHE was a “meeting” subject to open meetings law because a quorum of the SBHE was present and the SBHE’s “public business” was discussed. The SBHE violated N.D.C.C. §§ 44-04-20 and 44-04-21 when it failed to properly post notice of the meeting and failed to take minutes of the meeting.

STEPS NEEDED TO REMEDY VIOLATION

The SBHE must prepare detailed minutes of the April 28, 2014, meeting and post those minutes online. All members should prepare statements of their recollection of the conversations during this meeting and the statements should be compiled into minutes. The minutes and statements will be considered open records that should be provided to any requesting member of the public, 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. § 44-04-21.2.²⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁵

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Attorney General

slv/vkk

²³ See N.D.A.G. 2013-O-01 (The use of the phrase “special policy meeting” on a special meeting agenda was not specific enough to comply with N.D.C.C. § 44-04-20 because the phrase could have several meanings and did not adequately appraise the public of the topics to be discussed).

²⁴ N.D.C.C. §44-04-21.1(2).

²⁵ Id.