

**OPEN RECORDS AND MEETINGS OPINION
2015-O-04**

DATE ISSUED: March 20, 2015

ISSUED TO: Fargo City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matthew Von Pinnon and John Strand asking whether the Fargo City Commission violated N.D.C.C. §§ 44-04-19, 44-04-19.2, and 44-04-20 by holding meetings not preceded by public notice, by failing to properly notice a special meeting, and by holding an unauthorized executive session.

FACTS PRESENTED

The Fargo City Commission (Commission) held a special meeting the morning of November 10, 2014, to discuss the possible resignation and severance package of Fargo's then Chief of Police, Keith Ternes.¹ During the special meeting, the Commission entered into an executive session with its attorney to discuss the severance package, announcing the authority for doing so to be contract negotiations as authorized by N.D.C.C. § 44-04-19.1(9).²

Prior to the special meeting, Commissioner Dr. Timothy Mahoney, who acts as the deputy mayor, and Commissioner David Piepkorn, the Commission's Police Department liaison, held several discussions with city administrators, police department personnel, Mayor Dennis Walaker, Chief Ternes, and Erik Johnson, the Fargo city attorney. Throughout the entire process, Commissioner Mahoney kept the other members of the Commission informed of the preliminary findings and observations made by the Police Review Committee, the proposed resignation of Chief Ternes, and the ongoing discussions and negotiations of a separation agreement.

¹ Letter from Erik Johnson, Fargo City Att'y, to Sandra DePountis, Asst. Att'y Gen. (Dec. 4, 2014). At the time of the special meeting, the Fargo City Commission was made up of 5 commissioners: Mayor Dennis Walaker, and Deputy Mayor Dr. Timothy Mahoney, and Commissioners David Piepkorn, Mike Williams, and Melissa Sobolik. The Commission was set to hold its regular meeting in the afternoon of November 10, 2014, but decided to hold a special meeting that morning to specifically address this issue.

² Id.

ISSUES

1. Whether a series of smaller gatherings collectively involving a quorum of the Commission regarding public business violated open meetings law.
2. Whether the Commission's special meeting, held the morning of November 10, 2014, was noticed in substantial compliance with N.D.C.C. § 44-04-20.
3. Whether the executive session held at the special Commission meeting on November 10, 2014, was authorized by law.

ANALYSIS

Issue One

All "meetings"³ of a "governing body"⁴ of a "public entity"⁵ must be open to the public and preceded by sufficient public notice in accordance with N.D.C.C. § 44-04-20. As explained in numerous opinions, the definition of "meeting" covers all stages of the decision-making process, including information gathering, consensus building, formulating or narrowing of options, and action regarding public business.⁶ There is a threshold in which multiple conversations, that collectively involve a quorum, have the effect of forming consensus or furthering the Commission's decision-making process on that subject.⁷

This office has said that merely providing information, typically through emails, is not a meeting unless the emails include the thoughts, opinions, or suggested course of action of a member of a governing body. The latter then become steps in the decision-making process to which the public should be privy during an open meeting.⁸ The open meeting law is triggered when conversations go beyond ministerial matters and delve into the substantive merits of an issue.⁹

³ N.D.C.C. § 44-04-17.1(9) (definition of "meeting").

⁴ N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

⁵ N.D.C.C. § 44-04-17.1(13) (definition of "public entity").

⁶ N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 98-O-05.

⁷ See N.D.C.C. § 44-04-17.1(9) (definition of "meeting" includes less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19); see also N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 2007-O-08; N.D.A.G. 2004-O-18; N.D.A.G. 98-O-05.

⁸ N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2007-O-14.

⁹ N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2010-O-09; N.D.A.G. 2007-O-14; N.D.A.G. 98-O-05.

When it is alleged that an illegal meeting took place by email, the emails provide a record of what took place. Here, the conversations took place in person or by telephone so there is no written record of the discussions. Therefore, in preparing this opinion, I asked each Commission member to individually submit a signed, written statement of any conversations with any other Commission member prior to the November 10, 2014, special meeting, regarding the resignation and separation agreement of Chief Ternes. The statements do not provide much detail but it is clear that multiple conversations took place between two or more members of the Commission regarding Chief Ternes in the weeks prior to the meeting.¹⁰ The statements provide the following reconstruction of the events leading up to the special meeting.

On October 29, 2014, Commissioner Mahoney received information from the Police Review Committee about an investigation and performance review of Chief Ternes. Commissioner Mahoney sent a text to Commissioner Mike Williams instructing him to contact either him or Attorney Johnson to be filled in on the recent developments.¹¹ Commissioner Williams called Attorney Johnson to receive the information and then sent a text to Mahoney informing him that he had spoken with Attorney Johnson.¹² Commissioner Mahoney also called Commissioner Melissa Sobolik to relay the information about the Police Review Committee.¹³

On October 31, 2014, Commissioner Mahoney called Mayor Walaker informing him that Chief Ternes knew about the Police Review Committee's preliminary observations.¹⁴ Commissioners Mahoney and Piepkorn also made arrangements to meet with a member of the Police Review Committee.¹⁵

¹⁰ One of the problems with having such serial conversations is I cannot now adequately review the substance of the discussion, as I could with an email, to specifically determine at what point a line was crossed between merely providing information versus delving into the substance of the issues. Serial conversations such as these also lack the capacity to have safeguards in place to keep the discussions limited to receiving information versus having a dialogue about the merits of an issue.

¹¹ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014).

¹² Id.; Statement of Michael Williams, Fargo City Comm'r, to Att'y Gen.'s office (Nov.[sic] 4, 2014).

¹³ Statement of Melissa Sobolik, Fargo City Comm'r, to Att'y Gen.'s office (Nov. 26, 2014).

¹⁴ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014).

¹⁵ Id.; Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

On November 3, 2014, Commissioners Mahoney and Piepkorn met with a member of the Police Review Committee to share preliminary observations and conclusions.¹⁶

On the morning of November 4, 2014, Commissioners Mahoney and Piepkorn met with the Fargo City Administrator, the Fargo Human Resource Director, and three deputy chiefs of the Fargo Police Department to discuss the atmosphere in the police department.¹⁷ That afternoon, Commissioners Mahoney and Piepkorn met with Chief Ternes and members of the Police Review Committee about whether to continue with the review process or whether Chief Ternes would consider resigning.¹⁸ Mayor Walaker attended part of this conversation as well. That day, Commissioner Mahoney contacted Commissioner Williams to discuss Chief Ternes' response to proposed resignation.¹⁹ Commissioner Mahoney also called Commissioner Sobolik to inform her that he, along with Commissioner Piepkorn and Chief Ternes, were discussing the chief's resignation.²⁰

On November 5 or 6, Commissioner Williams was walking to a meeting with Commissioner Piepkorn who asked what was going to happen to Chief Ternes, and Commissioner Williams responded he did not know.²¹

On the morning of November 6, Commissioner Piepkorn recalls a telephone conversation with Attorney Johnson and possibly Commissioner Mahoney regarding a potential offer of severance to Chief Ternes.²² Commissioner Mahoney recalls having a meeting with Fargo Administrator and Attorney Johnson to discuss Johnson's upcoming

¹⁶ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

¹⁷ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

¹⁸ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

¹⁹ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

²⁰ Statement of Melissa Sobolik, Fargo City Comm'r, to Att'y Gen.'s office (Nov. 26, 2014).

²¹ Statement of Michael Williams, Fargo City Comm'r, to Att'y Gen.'s office (Nov.[sic] 4, 2014).

²² Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

meeting to negotiate a severance with Chief Ternes.²³ Commissioner Mahoney suggested Johnson offer a three-month severance to Ternes, on the recommendation of Commissioners Mahoney and Piepkorn.²⁴ Commissioner Williams recalls walking by a meeting that day between Commissioner Mahoney and the Fargo City Administrator and Commissioner Mahoney asked Commissioner Williams if he would be open to Chief Ternes receiving a severance package.²⁵ Commissioner Williams affirmed he would be open to such an action.²⁶

On November 7, 2014, Commissioners Mahoney and Piepkorn (appearing by telephone) conferred with City Administrator and Attorney Johnson to receive information from Johnson on his severance negotiation discussions with Chief Ternes.²⁷ The group agreed on an offer of paid administrative leave, subject to full City Commission approval. Commissioner Mahoney thereafter called Commissioner Sobolik and Mayor Walaker to inform them of the terms of the separation agreement, the need for an upcoming meeting and possible executive session to discuss the terms, and the need to make recommendations and appointment of an interim chief.²⁸

Finally, on the morning of November 9, 2014, Commissioner Mahoney met with members of the police department and the City Administrator to discuss continued operations of the police department should Chief Ternes resign.²⁹ Commissioner Piepkorn received a message about the morning meeting but could not attend.³⁰ That afternoon, Commissioners Mahoney and Piepkorn met with Chief Ternes, Attorney Johnson, and the City Administrator and ultimately worked out a proposed separation

²³ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

²⁴ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

²⁵ Statement of Michael Williams, Fargo City Comm'r, to Att'y Gen.'s office (Nov.[sic] 4, 2014).

²⁶ Id.

²⁷ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

²⁸ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014); Statement of Melissa Sobolik, Fargo City Comm'r, to Att'y Gen.'s office (Nov. 26, 2014).

²⁹ Statement of Dr. Timothy Mahoney, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 3, 2014).

³⁰ Statement of David Piepkorn, Fargo City Comm'r, to Att'y Gen.'s office (Dec. 2, 2014).

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agreement.³¹ Later that day, Commissioner Mahoney called Commissioners Williams and Sobolik, and Mayor Walaker, to inform them of a special city commission meeting to be held the following Monday at 7 a.m.³²

Because the open meetings law is triggered when a quorum of a governing body discusses public business, the afternoon meeting on November 4, 2014, in which three of the five commissioners discussed the review of Chief Ternes, was a meeting subject to open meetings law because a quorum was present and public business was discussed. The Commission violated open meetings law when notice was not posted for this meeting.

The Commission argues that the described interactions were not subject to the open meetings law because the conversations only provided information and were not substantive discussions.

However, by this method of “providing information,” the entire Commission learned of the Police Review Committee’s observations, agreed that there was a need for a separation agreement to be negotiated with Chief Ternes, and knew that Commissioners Mahoney and Piepkorn were pursuing such a course of action without ever having a noticed, public meeting. The series of telephone calls and discussions enabled the Commission to negotiate a separation agreement with its police chief through a series of smaller gatherings that collectively involved a quorum of the Commission outside the view of the public. These conversations, even if one-sided, went beyond ministerial matters because the conversations built a consensus that authorized Commissioners Mahoney and Piepkorn to continue their course of action regarding the resignation of Fargo’s chief of police.³³

Even if some of these discussions could have occurred in executive session as negotiation strategy session or attorney consultation under N.D.C.C. § 44-04-19.1, an

³¹ Statement of Dr. Timothy Mahoney, Fargo City Comm’r, to Att’y Gen.’s office (Dec. 3, 2014); Statement of David Piepkorn, Fargo City Comm’r, to Att’y Gen.’s office (Dec. 2, 2014).

³² Statement of Dr. Timothy Mahoney, Fargo City Comm’r, to Att’y Gen.’s office (Dec. 3, 2014); Statement of Melissa Sobolik, Fargo City Comm’r, to Att’y Gen.’s office (Nov. 26, 2014). In Michael Williams’ statement, he stated Dr. Timothy Mahoney only sent a text message stating the date and time of the special meeting. In Dr. Timothy Mahoney’s statement, however, he stated he called Michael Williams.

³³ Arguably, Commissioners Mahoney and Piepkorn acted as a “committee” in meeting with the Police Review Committee, city administrators, and the police department and in negotiating the separation agreement. The Mayor and other Commissioners knew Mahoney and Piepkorn were conducting such public business, and their approval for Mahoney and Piepkorn to continue in their course of action, in essence, formed a committee.

open meeting must first be held to give the public notice of the topics to be discussed and authority for holding an executive session. By the time any notice was given to the public regarding the issues with Chief Ternes, a separation agreement was already negotiated with only final approval being needed by the full Commission.

The Commission violated open meetings law when it held a series of smaller gatherings regarding the police chief's resignation and separation agreement, when such discussions went beyond ministerial matters and merely providing information, but instead built support and consensus, and became steps in the decision-making process. Such meetings were not open to the public nor preceded by public notice in violation of N.D.C.C. §§ 44-04-19 and 44-04-20.

Issue Two

"Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity."³⁴ A meeting notice must include the "date, time, and location of the meeting and, if practicable, the topics to be considered. . . . The notice must also contain the general subject matter of any executive session expected to be held during the meeting."³⁵ Notice of a regular meeting must be posted at the principal office of the governing body, filed at the appropriate central location – for city level bodies with the city auditor or on the city's website, and posted at the location of the meeting on the day of the meeting.³⁶ For special meetings, notice must also be given to the public entity's official newspaper and any representative of the news media requesting notification of such meetings.³⁷ "Topics that may be considered at an emergency or special meeting are limited to those included in the notice."³⁸

Notice of the November 10 special meeting was sent out to members of the press via email on the evening of November 9, 2014.³⁹ The notice provides that the Commission

³⁴ N.D.C.C. § 44-04-20(1).

³⁵ N.D.C.C. § 44-04-20(2). The agenda should include all topics the governing body anticipates it will discuss at the time the notice is prepared.

³⁶ N.D.C.C. § 44-04-20(4). Notice must also be provided to anyone requesting such information. N.D.C.C. § 44-04-20(5).

³⁷ N.D.C.C. § 44-04-20(6).

³⁸ Id. 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. N.D.A.G. 2014-O-01

³⁹ Letter from Erik R. Johnson, Fargo City Att'y, to Sandra L. DePountis, Asst. Att'y Gen. (Dec. 4, 2014); City Comm'n News Release.

will hold a special meeting on November 10 at 7 a.m. at City Hall for the purpose of discussing “the Fargo Police Chief position.”⁴⁰

Although the Commission anticipated an executive session pursuant to N.D.C.C. § 44-04-19.1(9),⁴¹ it was not in the notice. The Commission also failed to post the notice of the special meeting at its principal office, with the city auditor, or at the location of the meeting on the day of the meeting.⁴² I therefore find the Commission violated N.D.C.C. § 44-04-20 when it failed to provide sufficient notice of the November 10, 2014, special meeting.

Issue Three

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”⁴³ A governing body may hold an executive session to discuss negotiation strategy or provide negotiation instructions to its attorney or other negotiators regarding current contract negotiations if discussing the strategy or instruction in an open meeting would adversely affect the bargaining and fiscal position of the entity.⁴⁴

Section 44-04-19.1(9), N.D.C.C., does not authorize an executive session for all contract discussions. Rather, as this office has explained in previous opinions, an executive session held for a negotiation is authorized only if the discussions are in the context of providing negotiation instructions or discussing negotiation strategy and only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity.⁴⁵ Section 44-04-19.1(9), N.D.C.C., does not authorize an executive session for a governing body to receive a history, update, or summary from its negotiator on the status of contract negotiations.⁴⁶

The Commission claims that the executive session held during the special meeting on November 10, 2014, was a proper negotiation strategy session while it discussed the

⁴⁰ City Comm’n News Release. The notice also stated a news conference will be held thereafter at 8:15 a.m. at the Fargo Police Department Headquarters.

⁴¹ Letter from Erik R. Johnson, Fargo City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Dec. 4, 2014); see also Notice of Special Meeting received by Commission members at the Nov. 10, 2014, special meeting.

⁴² Letter from Erik R. Johnson, Fargo City Att’y, to Sandra L. DePountis, Asst. Att’y Gen. (Dec. 4, 2014).

⁴³ N.D.C.C. § 44-04-19.

⁴⁴ N.D.C.C. § 44-04-19.1(9).

⁴⁵ N.D.A.G. 2013-O-02; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-09; N.D.A.G. 2005-O-18.

⁴⁶ N.D.A.G. 2013-O-11; N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05.

separation agreement with its attorney. The executive session recording reveals that the Commission reviewed the prior negotiations that led to the proposed agreement and proceeded to go through various provisions included in the agreement. The Commission also discussed a variety of other issues such as press inquiries, the future of the police department, and the need for a continued task force or committee to review performance and policy of the department.

Prior to the executive session, the terms of the separation agreement had already been negotiated in a meeting with Attorney Johnson, Chief Ternes, Deputy Mahoney, and Commissioner Piepkorn. The separation agreement was already signed by Chief Ternes and only needed approval by the Commission. No negotiation strategies were discussed or instructions for further negotiations given because the other party had already signed the agreement. A recitation of the negotiation history had no negative fiscal impact because Chief Ternes already took part in the negotiations.

The other discussions regarding the future of the police department and the need for a reviewing task force were also not part of any negotiation strategy and should have been made in an open meeting.

The elements necessary to hold an executive session pursuant to N.D.C.C. § 44-04-19.1(9) were absent. It is my opinion that the executive session held the morning of November 10, 2014, was not authorized by law.

CONCLUSIONS

1. The Commission violated open meeting laws when it held a series of meetings to discuss public business not open to the public or preceded by public notice.
2. The Commission failed to post notice of its November 10, 2014, special meeting in substantial compliance with N.D.C.C. § 44-04-20.
3. The executive session held during the November 10, 2014, special meeting was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATIONS

The statements of the Commission provided to this office are open records that should be provided to Mr. Strand, Mr. Von Pinnon, and any member of the public requesting them, free of charge. The executive session was not authorized by law so the recording of the executive session is an open record and must be provided to Mr. Strand, Mr. Von Pinnon, and any other member of the public upon request, 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. § 44-04-21.2.⁴⁷ It may also result in personal liability for the person or persons responsible for the noncompliance.⁴⁸

Wayne Stenehjem
Attorney General

sld

cc: Eric Johnson Fargo City Attorney (via email)
John Strand (via email)
Matthew Von Pinnon (via email)

⁴⁷ N.D.C.C. § 44-04-21.1(2).

⁴⁸ Id.