

**OPEN RECORDS AND MEETINGS OPINION
2016-O-05**

DATE ISSUED: March 23, 2016

ISSUED TO: Washburn 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 Duane Bauer asking whether the Washburn City Commission violated N.D.C.C. § 44-04-20 by holding committee meetings without providing notice.

FACTS PRESENTED

At a special meeting of the Washburn City Commission (Commission) on August 31, 2015, a motion was passed to advertise for bids for the 2016 garbage contract for the City of Washburn residential and commercial garbage services.¹ The Commission directed Commissioners Larry Thomas and Kit Baumann to serve on a committee to review the garbage proposals and make recommendations to the Commission.² The Waste Collection Committee met three times, on October 5, 7, and 9, 2015.³ The bids were then shared with the entire Commission during a regular meeting on October 12, 2015, and the Commission voted to approve a contract with Circle Sanitation.⁴ Duane Bauer questions whether the committee meetings were properly noticed.⁵

ISSUE

Whether notice of the meetings of the Waste Collection Committee of the Washburn City Commission was in substantial compliance with N.D.C.C. § 44-04-20.

¹ Minutes, Washburn City Comm'n (Aug. 31, 2015).

² Id.; see also Notice provided to the Bismarck Tribune and Washburn Leader.

³ Letter from Larry Thomas, President, Washburn City Comm'n, to Sandra L. DePountis, Asst. Att'y Gen. (Nov. 3, 2015).

⁴ Minutes, Washburn City Comm'n (Oct. 12, 2015).

⁵ Email from Duane Bauer to Att'y Gen.'s office (Oct. 12, 2015, 6:08pm).

ANALYSIS

All meetings of a public entity must be open to the public unless otherwise specifically provided by law.⁶ 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.”⁷ A “quorum” means “one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.”⁸ A governing body is “the multimember body responsible for making a collective decision on behalf of a public entity.”⁹ The definition of a “governing body” also includes “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.”¹⁰ Under this definition, “any group of persons” delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting or recommending action, as well as taking action, is subject to the state’s open meetings law.¹¹ A governing body does not need to make a formal motion to create a committee.¹² Rather, if the governing body of a public entity consents or otherwise delegates authority to a group of people to perform any function on behalf of the governing body, a committee is formed.¹³

At its August 31, 2015, special meeting, the Commission delegated part of its government function of reviewing and comparing bids on a public works project to Commissioner Thomas and Commissioner Baumann.¹⁴ The Waste Collection Committee was subject to open meetings law.

A committee of a governing body has the same requirements to notice its meetings and prepare minutes as the full governing body. Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity.¹⁵ The notice must provide the date, time, and location of the meeting and an agenda of the topics to be

⁶ N.D.C.C. § 44-04-19.

⁷ N.D.C.C. § 44-04-17.1(9)(a).

⁸ N.D.C.C. § 44-04-17.1(15).

⁹ N.D.C.C. § 44-04-17.1(6).

¹⁰ N.D.C.C. § 44-04-17.1(6).

¹¹ N.D.A.G. 2014-O-05; N.D.A.G. 2013-O-12; N.D.A.G. 2009-O-12; N.D.A.G. 2009-O-05; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03

¹² N.D.A.G. 2014-O-05.

¹³ Id.; see also N.D.A.G. 2013-O-12.

¹⁴ “Meetings” cover all stages of the decision making process, including information gathering. Thus, even if a committee does not have final decision making authority, it is subject to open meetings law as long as it is performing any function on behalf of the governing body. See N.D.A.G. 2015-O-04; N.D.A.G. 2012-O-02.

¹⁵ N.D.C.C. § 44-04-20(1).

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considered and the subject matter of any executive session expected to be held.¹⁶ For regularly scheduled meetings, the notice must be posted at the principal office of the governing body, if one exists, at the location of the meeting on the day of the meeting, and, for city-level bodies, either filed with the city auditor or posted on the public entity's website.¹⁷ For emergency or special meetings, notice must also be given to the public entity's official newspaper,¹⁸ if any, and to any representatives of the news media who requested to be notified of the special meeting.¹⁹ Finally, notice must be given for all regular or special meetings to anyone requesting such information.²⁰

Here, the Waste Collection Committee did not post any notice prior to the October 5, 2015, meeting.²¹ The October 7, 2015, meeting, was only referenced on the City of Washburn's website in the "Community Calendar."²² The October 9, 2015, meeting was also posted on the "Community Calendar" section of the City of Washburn website, emailed to the press, and posted on the door during the meeting.

However, even when some notice was provided for the October 7 and 9, 2015, meetings, the notice lacked an agenda with the topics to be discussed or considered.²³

¹⁶ N.D.C.C. § 44-04-20(2). 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. N.D.C.C. § 44-04-20(6); N.D.A.G. 2014-O-13.

¹⁷ N.D.C.C. § 44-04-20(4).

¹⁸ If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located. N.D.C.C. § 44-04-20(6).

¹⁹ N.D.C.C. § 44-04-20(6). Regular meetings are those meetings which the public entity has filed a schedule in January with either the Secretary of State's office or on the public entity's website. N.D.C.C. § 44-04-20(3). Since no such schedule was filed for the Waste Collection Committee, all of the committee meetings are "special" meetings that must comply with laws governing special meetings. See N.D.A.G. 2005-O-10 (monthly meeting of ambulance board treated as a special meeting because board does not file an annual schedule of regular meetings with the county auditor).

²⁰ N.D.C.C. § 44-04-20(5). A public entity should provide notice in whatever way is agreed upon by the person and the public entity or in a manner that is practical. N.D.A.G. 2009-O-04.

²¹ Letter from Larry Thomas, President, Washburn City Comm'n, to Sandra L. DePountis, Asst. Att'y Gen., (Nov. 3, 2015).

²² Letter from Larry Thomas, President, Washburn City Comm'n, to Sandra L. DePountis, Asst. Att'y Gen. (Nov. 3, 2015); Email from Joan Zimmerman, City Auditor, Washburn, to Sandra DePountis, Asst. Att'y Gen. (Nov. 6, 2015, 11:01am).

²³ Letter from Larry Thomas, President, Washburn City Comm'n, to Sandra L. DePountis, Asst. Att'y Gen. (Nov. 3, 2015); Email from Joan Zimmerman, City Auditor, Washburn, to Sandra DePountis, Asst. Att'y Gen. (Nov. 5, 2015, 3:56pm).

This office has explained that “[t]he 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.”²⁴

The Commission violated the open meetings law because the Waste Collection Committee meetings held on October 5, October 7, and October 9, 2015, were not noticed in substantial compliance with the requirements of N.D.C.C. § 44-04-20.

CONCLUSION

The Washburn City Commission violated open meetings law when it failed to provide notice of its Waste Collection Committee meetings.

STEPS NEEDED TO REMEDY VIOLATION

Detailed meeting minutes should be prepared for the meetings of the Waste Collection Committee that provide a comprehensive recollection of any discussion, along with the requirements of minutes contained in N.D.C.C. § 44-04-21(2). The minutes must be provided to Mr. Bauer, and anyone else requesting, free of charge.

I would also urge the Commission to review the materials available on the Attorney General’s website on open records and meetings law. There the Commission will find manuals, opinions, and summaries that are useful tools in understanding what is required of them under the law.

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. § 44-04-21.2.²⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁶

Wayne Stenehjem
Attorney General

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cc: Duane Bauer (via email only)

²⁴ N.D.A.G. 2014-O-01.

²⁵ N.D.C.C. § 44-04-21.1(2).

²⁶ Id.